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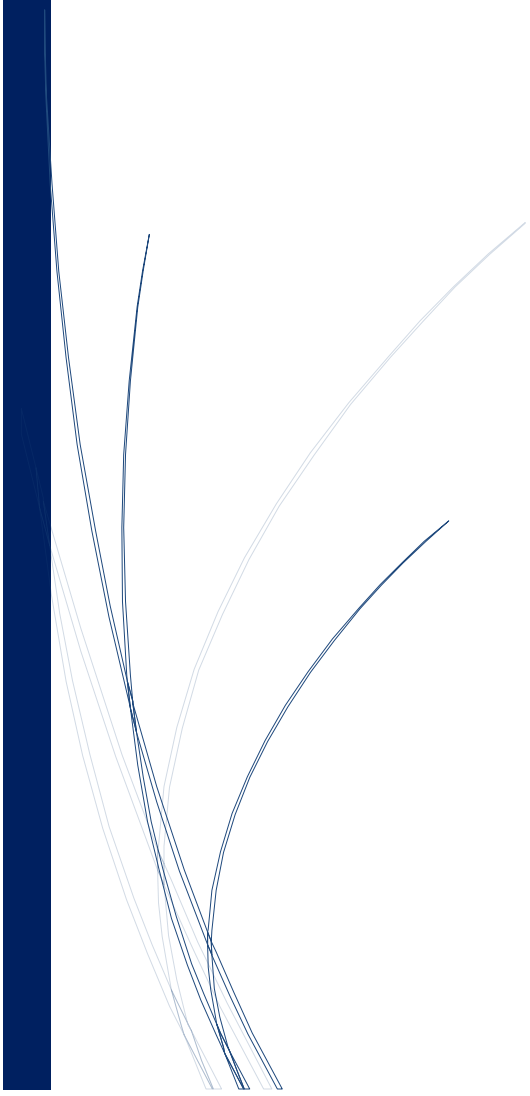
Vishnu Daya Tax News

An update of tax laws



Vishnu Daya & Co

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CENTRAL EXCISE:

- **Physician samples given at free of cost has to be valued on the basis of cost of production**

Centaur Pharmaceuticals Pvt. Ltd. Vs Commissioner of Central Excise, Goa
2016-TIOL-299-CESTAT-MUM

Issue: Issue involved is regarding the valuation of the physician samples cleared free of cost**.**

Decision: The honourable Mumbai CESTAT has held that the issue is no more *res integra* as the Supreme Court has given its judgment in the similar issues in case of Biochem Pharmaceuticals India Limited. The valuation of physician samples given free of cost needs to be valued on the basis of cost of production or manufacture of goods i.e. cost of production + 15% as profit margin and not on the basis of pro rata value of the sale pack of the said physician samples of medicines as alleged by department.

- **Activities carried out by the sub-contractor at his site will not attract excise duty liability to the contractor**

Jayant K Furnishers Vs Commissioner of Central Excise, Mumbai-I
2016-TIOL-448-CESTAT-MUM

Facts: The appellants are engaged in manufacture of different types of furniture at their factory. They had undertaken turnkey contracts at the sites of their clients which included civil works as well as electrical work and furnishing work. Further the appellant had sub-contracted the entire activity to contractor for completion of the work. The department contended that the activity amounts to manufacturing activity and demanded the central excise duty from the appellant.

Decision: The honorable Mumbai CESTAT has held that the activity does not amounts to manufacturing activity based on the following grounds:

→ The central excise duty is payable on manufacturing activity by the manufacturer. The manufacturing activity of the furniture at the site is by the job worker and not the appellant. The written contract between the appellant and subcontractor is not disputed by the revenue. The subcontractor is required to purchase material, procure his own labour to execute the contract given to him. If that be so, the manufacturing of furniture comes in to existence at the site, in the hands of the job worker.

→ The appellant has given back-to-back contract to the subcontractor by a written agreement, a fact which was not on records in the appellant's own case in an earlier issue wherein the same allegations were levelled against the appellant. This factual difference in the case in hand was not considered by the adjudicating authority while deciding the issue.

- **Eligibility of CENVAT credit on various input services**

M/s S K D Lakshmanan Fireworks Industries Vs CCE & ST, Tirunelveli
2016-TIOL-275-CESTAT-MAD

Issue: The issue relates to the admissibility of credit of service tax paid on various service for the period April, 2011 to February, 2012.

Decision: The honorable Madras CESTAT has found the following observations on the CENVAT Credit:

→ The group insurance taken by the assessee is only in favour of their employees, even though the claim is filed by them and the claim is settled on them, the final beneficiaries are the workers only. Hence, they cannot take the credit of service tax paid on insurance in respect of their employees.
→ The manufacturer cannot take the credit of service tax paid on General Insurance Services, renting of a cab, motor vehicle related service (repair, reconditioning or restoration of motor vehicles, in any manner) and supply of tangible goods.

- **In the case of Inter-unit transfer of goods for captive consumption, the actual cost of production of the raw material is the cost of raw material**

M/s ITC LTD Vs Commissioner of Central Excise, Chennai
2016-TIOL-45-CESTAT-MAD-LB

Issue: Whether, in the case of inter-unit transfer of goods for captive consumption, the entire value (i.e. 115% / 110% of the cost of production) OR the actual cost of production (i.e. 100% of cost) excluding notional loading (i.e. 15°/o / 10%) of the goods manufactured by the one unit, would be the cost of raw material of the another unit (who used the goods in the manufacture of another article) for the purpose of determining value under Rule 8 of Valuation Rules and CAS-4 issued by ICWAI, for transferring the goods to their other unit for further use.

Decision: The honorable Madras CESTAT has held that in the case of Inter-unit transfer of goods for captive consumption, the actual cost of production (100% of the cost of production), of the raw material (excluding the notional loading under Rule 8 - 15%/10%) is the cost of raw material in the hands of the second unit, for determining the cost of production of packaging material manufactured by it. The percentage of loading on such cost of production, mandated by provisions of Rule 8 for remittance of excise duty by the first unit cannot however be considered as comprised in the cost of the raw material consumed for manufacture of packaging material and thus constituting the cost of production at the Chennai unit.

SERVICE TAX

- **Service Tax and Sales Tax are Mutually Exclusive**

M/s Tirupati Cylinders Ltd Vs Commissioner of Central Excise, Meerut-I
2016-TIOL-316-CESTAT-ALL

Facts: The appellant is registered under the provisions of Central Excise and service tax. The appellant has regularly discharged the service tax liability on the service tax component involved in the repair and maintenance of the cylinders. The appellants had also regularly discharged the VAT on material component involved in repair and maintenance job. The contention of the department is that the appellant is liable to pay service tax on the material component used or consumed in the repair and maintenance of cylinders.

Decision: The honorable Allahabad CESTAT has held that while going into this exercise of divisibility, dominant intention behind contract, namely, where it was for sale of goods or for services is rendered otiose or immaterial. The issue is no longer *res integra*. It has been explained in decision by Apex Court that service tax and sales tax are mutually exclusive – Following the ruling of Apex Court in Pro Lab and

others 2015-TIOL-08-SC-CT-LB and Balaji Tirupati Enterprises, it is held that Commissioner is in error in levying tax on material component involved in repair and maintenance of cylinders carried out by assessee. Accordingly, the impugned order was set aside.

- **Infringement of procedure is not serious enough to impose equivalent penalty**

M/s L and T Sargent and Lundy Ltd Vs Commissioner of Central Excise and Service Tax, Vadodara
2016-TIOL-441-CESTAT-AHM

Facts: The appellants had made excess payment of service tax for the month of May 2010 and subsequently adjusted the said excess amount paid towards payment of service tax during the months of June, July and August, 2010. However, the appellants had not intimated the said adjustment to the department and have *suo-moto* adjusted the same. The contention of the department is that the appellants are not eligible to do so in terms of Rules 6(4A) and 6(4B) of the Service Tax Rules, 1994.

Decision: The honorable Ahmedabad CESTAT held that the dispute revolves around the procedure which appellant have followed in adjusting the said excess amount against the future service tax liabilities in June, July and August 2010 suo-moto. Since in reality there is no short payment of service tax in the instant case, and it is a question about adjustment of excess service tax paid which has been adjusted suo-moto against the subsequent service tax liability, the demand of Service Tax, interest and penalty thereupon cannot be sustained.

- **The date of export invoice shall be the relevant date for time-limit for filing refund claim in respect of services exported**

M/s Paul Mason Consulting India Pvt. Ltd Vs Commissioner of Central Excise and Service Tax, Vadodara
2016-TIOL-271-CESTAT-AHM

Issue: What is the relevant date for time-limit for filing refund claim in respect of CENVAT credit accumulated as a result of services exported?

Decision: The honorable Ahmedabad CESTAT has held that the date of export invoice should be treated as the relevant date. The time limit of one year prescribed under Section 11B of the Central Excise Act would be computed from this date and refund claims submitted within the said time limit of one year from the said date would be eligible for refund.

- **Condition of filing the declaration Rule 6(3A)(a) of the Cenvat Credit Rules, 2004 is only directory and not mandatory**

M/s TATA Technologies Ltd Vs Commissioner of Central Excise, Pune-I
2016-TIOL-272-CESTAT-MUM

Issue: The assessee was providing taxable as well as exempted services and was availing input service credit under Rule 3 of the Cenvat Credit Rules on common input services used in providing output services. They were maintaining a separate account for input services used for taxable services and for exempted services. The appellants exercised the option provided in Rule 6(3)(ii) of the Cenvat Credit Rules, 2004 for the disputed period. The appellants also filed the declaration as required under Rule 6(3A)(a) of the Cenvat Credit Rules, 2004 and reversed the Cenvat credit attributable to input services used in providing exempted services along with the interest. Though the appellants did not reverse the

proportionate credit on monthly basis, but, such credit was not utilized during the said period. The contention of the department is that assessee has to pay 8% of the value of exempted services since had not filed a declaration under Rule 6(3A) of the Cenvat Credit Rules, 2004 before exercising the option.

Decision: The honorable Mumbai CESTAT has held as under:

→ The condition of filing the declaration is only directory and not mandatory. Most of the requirements under Rule 6(3A) like, name, address and registration no. of the assessee, description of taxable services and exempted services, CENVAT Credit of inputs and input services lying in balance as on the date of exercising option, are already available in the records of the Revenue.

→ In the garb of Rule 6 of CCR, 2004 the provisions of section 93 of the Finance Act, 1994 cannot be overridden and/or the exemption provided under the section 93 of the Finance Act, 1994 cannot be negated by the CCR, which is a delegated legislation and subservient to the main Act.

→ Rule 6 of CCR, 2004 cannot be used as tool of oppression to extract the amount which is much beyond the remedial measure and what cannot be collected directly, cannot be collected indirectly, as well.

- **Eligibility of CENVAT Credit**

M/s Carrier Air conditioning and Refrigeration Ltd Vs Commissioner of Central Excise, Delhi-IV
2016-TIOL-450-CESTAT-CHD

Issue: CENVAT Credit on various services like Renting of branch office, Insurance service, Construction service, Travel Agent Service, Interior decorator Service and Architect Service denied in adjudication during the period prior to and after 01.04.2011.

Decision: The honorable Chandigarh CESTAT has held as under relating to various services:

→ Insurance Service: The insurance policies except to the extent they cover journey of goods from the place of removal onwards would be covered within the scope of input service.

→ Rent of branch office: credit is admissible in case of rent paid for branch offices which are used for procurement of orders and provision of services.

→ Construction service: The construction service was used for dismantling of building and construction of storage shed. As per Rule 2(l) of Cenvat Credit Rules, 2004 input service also includes service in relation to setting up, modernization, renovation or repairs of a factory. In the light of judicial precedents, denial of CENVAT credit on construction service is unsustainable.

VAT

- **The clarifications issued by the Commissioner of Commercial Taxes are not binding on the appellate authority**

Sri Sri Saimukh Vijaya and Company, Bangalore Vs State of Karnataka
2016 (84) Kar. L.J.83 (Tri.) (DB)

Issues: Whether the clarification issued by the Commissioner of Commercial Taxes clarifying the rate of tax is binding on the Appellate Authority?

Decision: The honorable Karnataka Appellate Tribunal has held that the instructions or clarifications or circulars issued by the Commissioner of commercial taxes are not binding on the appellate authority's functions. Therefore, any clarification issued by the commissioner of commercial taxes are executive in nature and cannot alter the provisions of the Act.

- **The assessee cannot be granted benefit over and above what has been claimed in the returns filed**

Nandi Constructions, Mysuru Vs State of Karnataka
2016 (84) Kar. L.J.1 (HC) (DB)

Issue: Whether unless a claim is made by the assessee in its return, any benefit beyond the benefit claimed in the return can be considered by authorities?

Decision: The honorable High Court of Karnataka has held that nothing more than what is claimed by the assessee in its return can be given by the authorities, and if permitted, then the assessing authority or the appellate authorities would be given unfettered powers to grant any such relief which may not even have been claimed by the assessee in its returns. The Act provides for filing a revised return under the section 35(4) of the Karnataka Value Added Tax Act, 2003. If the assessee fails to avail the benefit of filing revised return, then it is only the return which is filed, which has to be considered by the assessing officer or other authorities and nothing more than what is claimed in the return that can be granted by the authorities in favour of the assessee.

CIRCULARS AND NOTIFICATIONS

- **SEZ Units can claim refund of Swachh Bharat Cess paid**

Notification No. 02/2016 dated 03.02.2016

The Government of India has given the addition benefit to the SEZ units by way of refund of Swachh Bharat Cess by making the below mentioned insertions to notification No. 12/2013 dated 01.07.2013. The insertion has been made to paragraph 3, in subparagraph (III) after clause (b).

- **Input service credit available on sales commission and CENVAT Credit cannot be utilised for payment of Swachh Bharat Cess**

Notification No. 02/2016 –CE (NT) dated 03.02.2016

Following amendments have been made to the CENVAT Credit Rules:

→ The definition of input service has been amended by way of insertion of explanation which provides that the sales promotion will include the services which are provided by way of sale of dutiable goods on commission basis. By virtue of this, Service Tax paid on the sales commission relating to the sale of dutiable goods would be available as input services.

→ Further amendment has been made to Rule 3 (4) by way of insertion of sixth proviso. The proviso states that the duty amounts specified under Rule 3(1) of the CCR shall not be utilized for the payment of the Swachh Bharat Cess. The amendment reads as under:
"Provided also that the CENVAT credit of any duty specified in sub-rule (1) shall not be utilised for payment of the Swachh Bharat Cess leviable under sub-section (2) of section 119 of the Finance Act, 2015 (20 of 2015):"

- **Rebate of Swachh Bharat Cess Paid on input Services used in providing export of service**
  Notification No. 03/2016 ST dated 03-02-2016

  The Government of India has made an amendment to the notification No. 39/2012 ST dated 20.06.2012 by way of insertion to explanation 1, after clause (c). Henceforth, the term Service Tax and Cess in the notification no. 38/2012 ST will also include Swachh Bharat Cess.

  Due to the above amendment rebate can be claimed in respect of the service tax and Swachh Bharat Cess paid on the input services used for providing export the service in terms of Rule 6A of the Service Tax Rules, 1994

- **Amendment to the definition of Specified services**
  Notification No. 01/2016-ST dated 03.02.2016

  The Government of India has made amendment to the notification No. 41/2012 dated 29.06.2012 which provides for rebate in respect of service tax paid on taxable services which are used for export of goods.

  The amendments made are as under:
  → In the explanation given under the notification which defines the term specified services, sub – clause (i) has been substituted as
  in the case of excisable goods, taxable services that have been used beyond factory, or any other place or premises of production or manufacture of the said goods, for their export
  → The clause B of the explanation which defines the term place of removal has been omitted
  → The rate of rebate has been changed for certain products.

  The detailed notification is available in the below link:
  http://www.cbec.gov.in/htdocs-servicetax/st-notifications/st-notifications-2016/st01-2016

- **Exemption on payment of customs duty on specified goods**
  Notification No. 08/2016 dated 05.02.2016
  The Central Government has issued the above notification by virtue of which the goods specified under schedule I to the notification are exempted from payment of customs duty when they are imported into India subject to re-export and other conditions specified in the notification.
  The detailed notification is available in the below link:
  http://www.cbec.gov.in/htdocs-cbec/customs/cs-act/notifications/notfns-2016/cs-tarr2016/cs08-2016

TAMIL NADU VAT AMENDMENT HIGHLIGHTS

- **TNVAT Second Amendment Act 2015, TNVAT Third Amendment Act 2015 and TNVAT Rules 2007, (amendment) effective from 29.01.2016 vide G.O. (Ms) No 15 and G.O. (Ms) No 18 published in extraordinary issue of Tamil Nadu Government Gazette.**

  Above amendments were notified in the Tamil Nadu Government Gazette on 29.01.2016 and therefore effective from that date.

→ Requirement of Tax Deductor identification number like TAN in income tax act (new section 13A) notified; new definition for tax deductor identification number provided.

→ Applicability of Information Technology Act (New Section 79A):
- Requirement of digital signature notified; If DSC not available, hard copy of electronic submissions shall be submitted to the authority within the due dates as specified. For companies, the submissions shall be done in electronic form along with the DSC;
- Online registration & online payments mandatory – no cash or cheque payments; no need to file manual returns in assessment circle; online filing of returns will suffice;
- Online filing of appeal and revision petitions; Feb 2016 month returns (to be filed in Mar 2016) shall be filed in the new website - (https://ctd.tn.gov.in/home);
- Rolling out of e-C Tax Project (Guidelines attached for your reference); generation of online TDS certificates;
- CAs to signup & register in the new website like income tax; submission of TNVAT audit report online w.e.f. FY 2016-17;
- All the registered dealers including new and existing should sign up in the website. The existing registered dealers shall register in the new website within 30 days from 29.01.2016;
- The existing registered dealers liable to deduct TDS shall apply and obtain TDIN (Form XX) within 30 days from 29.01.2016.
- The existing registered dealers shall submit Form G-1 for intimating the books of accounts maintained in electronic form within 30 days from 29.01.2016.
- Present website can be used for filing TNVAT returns and C forms only up to the Jan 2016 returns;
- Notices to be served by the authority through registered electronic account of the dealer in the website or through registered email of the dealer;
- Changes in existing forms to e-forms and introduction of new e-forms.

→ Amendment to definition of the word Input tax which now means only tax paid on purchases; earlier it was tax paid or payable. New proviso to section 19(1), registered dealer claiming input tax credit shall establish that tax due on purchases has been paid by the registered dealer who sold such goods and goods have been actually delivered. The responsibility is on the buying dealer now. Input tax credit shall be available to him only after paying the same to the seller as well as the selling dealer has paid the tax to the Government.

→ Amendment in section 3 – Presently, under the said section, instead of the expression "sales of goods purchased within the State" the expression "sales of goods purchased from the registered dealers within the State" is substituted. Thus composition scheme is not available to dealers if the purchases are made from unregistered dealers within the State.

→ Amendments in section 6 covering not only CST purchases but also interstate transfers. The effect of the amendment is that works contractors who get goods into the State on inward stock transfer are not eligible for composition scheme.

→ Amendment in Section 18 (relating to Zero rated sales) i.e. sale to units in SEZ has been modified as sale to units in SEZ for the purpose of manufacturing, trading, production, processing, assembling etc.,

→ Amendment in section 18(2), refund of input tax paid or payable on purchases has been replaced with refund of input tax paid on purchases. Therefore, input tax that has been paid only can be claimed refund vide Form W.

- → Amendment in Section 19 (input tax credit - eligibility and reversal) - now includes only tax paid on purchases; earlier tax paid or payable.
- → New subsection 3A to Section 22 on deemed assessment for first time assessee and the last assessment; their assessment shall be based on the scrutiny.
- → Amendment to section 27 on wrong availment of input tax credit; penalty has been increased to 300% of tax due; (presently it is 50% of tax due on first time and subsequent wrong availment, 100%);
- → Amendment to Section 39 – Registration fees has been increased from Rs. 500/- to Rs. 1,000/-; for incorporation of additional place of business, fees increased from Rs. 50/- to Rs. 1,000/-; Sub section 11 on requirement of issue of duplicate registration certificate to section 39 omitted due to introduction of online registration and e-certificate;
- → Amendment to Section 64 on maintenance of books; now books are to be kept for 6 years; earlier it was 5 years.
- → Introduction of new section 67A on production of advance inward airway bill on notified goods on interstate movement to Tamil Nadu; goods notified are included in appendix. (notification III)
- → Amendment to Section 84 on power to rectify error apparent on the face of the record by AO or appellate authority etc., time limit has been increased from 5 to 6 years.
- → TNVAT Rules amendment –

  Changes in existing forms to electronic forms for following:

  (i) Form A – application for registration within 30 days of commencement of business.
  (ii) Form D – Certificate of Registration (COR); (Concept of deemed registration, if COR not issued by the Authority within 2 working days from the date of receipt of the application.
  (iii) Form B – application for amendment to COR. (Form C relating to changes in constitution of partnership firm and Form E relating to death of the registered dealer are now not required)
  (iv) Form I – Monthly e-return for normal dealers and Form K - monthly e-return for (a) dealers opting for composition scheme (WC dealers, brick manufacturers, hotels, restaurants, sweet stalls, bakeries), (b) second and subsequent dealers. The said returns are to be filed within 20th of succeeding month along with proof electronic payment of tax. (Monthly return Forms L, L-1 for dealers opted for composition scheme are not required now; Manual submission of e-filed returns not required now).
  (v) Form I-1 – Annual return for dealers dealing in exempted goods as specified in the fourth schedule of TNVAT Act, or as exempted vide notifications under section 30 to be filed on or before 20th of May of the succeeding year showing the total turnover for the year.
  (vi) Form S – Electronic Form S to be issued by the Authority for non-deduction of TDS.
  (vii) Form R – Electronic Form R to be submitted by the dealer to the Authority for deduction of TDS on payment to other dealers.
  (viii) Form T – Electronic Form T to be submitted by the dealer to the other dealer for deduction of TDS on payment to him.
  (ix) Form P-1 – Old Form P for notice of refund replaced with new Form P-1.
  (x) Form W – electronic Form W for claiming refund of input tax paid on Zero rated sales u/s 18.
  (xi) Form VV – electronic Form VV for application for clarification and advance ruling. (Such form to be accompanied by proof of electronic payment of fee of Rs. 1,000/-).
  (xii) Form X – Option of e-filing appeal to Appellate Deputy Commissioner and Appellate Joint Commissioner. Manual filing of appeal is also available. Payment of appeal fees is through electronic mode only.

(xiii) Form Y – Option of e-filing revision petition to Joint Commissioner and Additional Commissioner (RP). Manual filing of RP is also available. Payment of fees for RP is through electronic mode only.
(xiv) Form Z – Option of e-filing appeals to Appellate Tribunal. Manual filing of appeal is also available. Payment of appeal fees is through electronic mode only.
(xv) Form BB – Option of e-filing application for review of the order passed by Appellate Tribunal. Manual filing of application is also available. Payment of fees for such application is through electronic mode only.
(xvi) Form CC – Option of e-filing of enhancement petition or restoration petition. Manual filing of application is also available. Payment of fees for such application is through electronic mode only.
(xvii) Form JJ – Delivery note generated from website. Manual Form JJ is dispensed with now.
(xviii) Form KK – When the goods are moved for export or cleared after import, the Clearing and Forwarding agent shall carry e-Form KK generated from website.
(xix) Form MM – Transporter airway bill shall be generated from website. Copy of Form MM along with Form JJ, invoice etc., shall be accompanied with the goods that are being transported. Instead of carrying Form MM, Unique number generated by entering the details in the website should be carried by the transporter.
(xx) Form LL – Revised E transit pass. (from 01.03.2016).
(xxi) Form WW – Revised and exhaustive TNVAT Audit report.
(xxii) Form UU – Electronic Application for enrollment of VAT Practitioner.
(xxiii) New e-Forms as follows:

a) Form G-1 – for furnishing details relating to books of accounts maintained in electronic form, within 30 days (a) from date of commencement of business or (b) from date of installation of software or (c) from 29.01.2016 (For existing dealers); any change in the features of the software to be intimated within 30 days.
b) Form XX – application for Tax Deductor Identification Number (TDIN). Any person deducting TDS should obtain TDIN within 30 days. (All existing dealers deducting TDS should obtain TDIN within 30 days from 29.01.2016).
c) Form K-1 – for exercising the option of composition scheme. (Earlier intimation through letter was sufficient)

→ IEC Code –

- All the existing dealers having IEC, shall furnish IEC to the registering authority along with the proof, within 2 months from 29.01.2016.
- Existing dealers who have subsequently been assigned IEC shall furnish IEC to the registering authority along with the proof, within 15 days from the date of assignment of IEC.
- Every dealer who is liable to be registered having IEC shall submit IEC along with the proof, at the time of applying for registration

→ Amendments to other acts:

- TN Entertainment tax
- TN tax on entry of motor vehicles like - New form for filing of return - New Forms for appeal and revision petitions (Form XI and XIA).

INCOME TAX

- **Delhi ITAT Allows STPI Unit Loss Set-Off against Non-STPI Profits, Follows CBDT Circular over Jurisdictional HC**
  NEC HCL System Technologies Ltd [TS-28-ITAT-2016(DEL)]

  → Delhi ITAT allows set-off of losses incurred by assessee's STPI unit (eligible for Sec 10A deduction) against income from non-STPI unit for AY 2008-09 in view of CBDT circular no. 7 dated July 16, 2013;
  → Rejects Revenue's reliance on jurisdictional HC in Kei Industries Ltd. denying such set-off, acknowledges that in view of different High Courts interpreting differently on the issue, CBDT had issued circular no. 7/2013 which provides that if after aggregation of income in accordance with Sections 70 and 71 of the Act, the resultant amount is a loss from eligible unit it shall be eligible for carry forward and set off in accordance with the provisions of Sec 72;
  → As CBDT circulars are binding on Revenue authorities, ITAT opines that "according to us assessee's claim deserves to be considered favourably in view of the beneficial circular issued by CBDT.";
  → With respect to outsourcing fees paid to a Japanese JV company by assessee's Japan Branch Office (i.e., assessee's foreign PE) for earning income outside India, ITAT clarifies that Sec 195 TDS is not applicable;
  → Remarks that merely because financial statements of Japan branch were required to be incorporated in assessee's financial statements, it cannot suggest that "expense of Fees for technical services are borne out by assessee and not by Japan BO of the assessee", relies on jurisdictional HC ruling in Lufthansa cargo

- **Mumbai ITAT Departs from precedent; Interest on partners' capital not an 'allowance', Sec 14A applicable**
  Pahilajrai Jaikishin [TS-33-ITAT-2016(Mum)]

  → Mumbai ITAT departs from earlier ruling in assessee's own case, holds that interest paid by the assessee-firm to partners on capital contribution is liable for disallowance u/s 14A for AY 2010-11;
  → Rejects assessee's stand that interest on capital borrowed from partners was part of firm's profits and thus, a statutory 'allowance' u/s 40(b) and not an expenditure; ITAT holds that SC ruling in Munjal Sales Corporation and Ahmadabad ITAT ruling in Shankar Chemicals Works were not brought before earlier ITAT decision in assessee's favour for AY 2009-10;
  → ITAT traces the history of partnership taxation and specific amendments brought out in 1992 and holds that 'interest' paid by the firm to partners on capital contribution is covered as an 'expenditure' as envisaged u/s 36(1)(iii) and firm has to first establish its interest deduction claim on capital by satisfying provisions of Sec. 36(1)(iii);
  → Sec. 40(b) puts limitation on allowability of interest once Sec. 36(1)(iii) threshold is met and hence, interest deduction u/s 40(b) is not a statutory 'allowance'; Since interest on partners' capital contribution is an expenditure u/s 36(1)(iii), provisions of Sec. 14A would be applicable if the expenditure is incurred in earning exempt income;
  → ITAT in assessee's facts upholds that Sec. 14A disallowance shall apply on interest paid by the firm on capital borrowed from partners and invested in mutual funds for earning exempt income;
  → Lastly, ITAT also holds that Sec. 14A disallowance in firm's hands will not entitle partner to claim any relief in their individual return of income against interest income.

- **Supreme Court dismisses SLP; Consultancy services 'consumed' in India, Singapore co. payments taxable FTS**
  Andaman Sea Food Private Ltd [TS-30-SC-2016]

→ SC dismisses assessee's (an Indian company) SLP against Calcutta HC judgment, HC had held that payment of consultancy fees to Singaporean company for forex derivative transaction services was taxable as 'Fees for technical services '('FTS') for AY 2008-09;
→ Observing that Singaporean company provided expert guidance and consultancy services, HC had rejected assessee's contention that amount paid to non-resident was business profits, which was not taxable absent PE in India;
→ HC had also held that services were rendered & consumed in India and had observed that "process may have originated from out of the country but the process culminated into service in this country [India] only";
→ Further, with respect to assessee's contention that it could not have foreseen Finance Act, 2010 amendment while making payment during AY 2008-09, HC had clarified that even in absence of said amendment, transaction was taxable u/s 9(1)(vii) in terms of Explanation inserted by Finance Act, 2007;
→ Further, HC had held that Finance Act, 2010 amendment even otherwise was applicable and had held that "law has been amended with retrospective effect Court has to proceed on the basis that the amendment was always there with effect from 1st June, 1976."
→ Explanation to Sec 9(2) was first inserted by Finance Act, 2007, w.r.e.f. 1-6-1976 which clarified that where FTS is deemed to accrue or arise in India u/s 9(1)(vii), it shall be taxable in India irrespective of whether the non-resident has a residence or place of business or business connection in India. Subsequently, the said explanation was substituted by Finance Act 2010, w.r.e.f. 1-6-1976 to incorporate an additional clarification that even where the non-resident has not rendered services in India, FTS shall be deemed to accrue or arise in India.

- **Bombay High Court Overrules Orient ruling, TDS u/s 195 inapplicable for shipping-company assessed u/s 172**
  V.S. Dempo & Co. Pvt. Ltd. [TS-45-HC-2016(BOM)]

→ Bombay HC's Full Bench overrules division bench decision in case of Orient (Goa) Private Limited;
→ Full Bench rules on the question "Whether, while dealing with the allowability of expenditure under section 40(a)(i) of the Income Tax Act, 1961, the status of a person making the expenditure has to be a non-resident before the provision of section 172 of the Act can be invoked?";
→ HC's Full Bench examines, in detail, the taxation scheme for non-resident shipping companies, levy of tax on gross basis u/s 44B, specific provisions for levy and recovery of tax u/s 172;
→ HC Full Bench observes that "The sub-sections of section 172 read together and harmoniously would reveal as to how the tax should be levied, computed, assessed and recovered. Therefore, there is no warrant in applying the provisions in chapter XVII for collection and recovery of the tax and its deduction at source vide section 195";
→ HC Full Bench notes that a ship cannot leave the port without paying or making arrangement for payment of taxes in India and hence holds that "...we do not see how there is an obligation to deduct tax at source on the resident assessee/Indian company before us";
→ HC Full Bench observes that "the apprehension of avoidance or evasion both are taken care of by the legislature";
→ HC Full Bench relies on SC rulings in Union of India vs. Gosalia Shipping (PVT.) Ltd and A. S. Clittres D/5 I/S Garonne & others on the interpretation of Sec 172 and SC ruling in case of GE India Technology Center on the scope of Sec 195.

- **Karnataka HC holds that interest provision reversed subsequently, not income; TDS inapplicable**
  Karnataka Power Transmission Corporation Limited [TS-51-HC-2016(KAR)]

  → Karnataka HC reverses ITAT order, holds assessee (a State Government undertaking engaged in power transmission) not in default u/s 201(1)/(1A) for non-deducting TDS u/s 194A on provision for interest reversed subsequently for AYs 2005-06, 2006-07 and 2007-08;
  → Since provision entries were reversed subsequently, HC holds no income 'finally' accrued to suppliers ('payee');
  → Referring to Sec 194A, HC opines that "the phrase 'any income' and 'income tax thereon' if read harmoniously would indicate that the interest which finally partakes the character of income, alone is liable for deduction…";
  → Cites Delhi HC ruling in Ericsson Communication Limited wherein it was held that obligation of a person to deduct TDS u/s 195 would be applicable to 'income chargeable under the Act', remarks that "Absence of such words 'chargeable to tax' under the provisions of Sec 194A … would not empower the authorities to invoke the provisions of Sections 201 and 201(1A) of the Act ignoring the words 'any income by way of interest'";
  → Also applies principles enunciated by SC ruling in Kedarnath Jute Manufacturing Co. Ltd. wherein it was held that existence or absence of entries in books of account not decisive of assessee's right to claim deduction;
  → With respect to TDS officer's jurisdiction to invoke Sec 201, HC notes that Sec 201 was amended vide Finance Act 2008 with retrospective effect to substitute expression 'any such person' referred to in Sec 200 with 'any person' who is required to deduct any sum in accordance with the provisions of the Act;
  → Further notes that Sec 200 did not speak about person who has not deducted TDS, and consequently assessee's case was not hit by un-amended Sec 201;
  → As amended provision was not in force at the time of passing orders u/s 201, accepts assessee's stand that TDS Officer proceeded to pass orders based on non-est provision.
  → Bangalore ITAT in case of IBM India Private Ltd [TS-305-ITAT-2015(Bang)] had held assessee liable to deduct tax at source ('TDS') on quarterly expense provision entries, rejecting assessee's stand that there was no charge in the hands of payee u/s. 4(1) of the Act.

- **Delhi ITAT rejects assessee's "unique" PLI-computation; Denies loss conversion into profit through capacity-adjustment**
  Saxo India Pvt. Ltd [TS-41-ITAT-2016(DEL)-TP]

  → ITAT rejects assessee's claim for capacity utilization adjustment in respect of its provision of software development services to AE for AY 2011-12 absent any reliable data to support the difference between capacity utilization levels of assessee and comparables, states onus was on assessee to prove that comparables were operating at 100% capacity;
  → Notes that assessee had devised a "unique method" for converting loss from AE segment (-15.43%) into profit (22.63%) by artificially excluding huge operating costs actually incurred, thereby projecting a "rosy picture" of profit from its international transactions to demonstrate ALP and opines "This course of action adopted by the assessee is legally unacceptable";
  → Rejects assessee's contention that adjustment due to difference between comparables and assessee should be carried out in assessee's profit margin, holds "On going through all the sub-clauses of Rule 10B(1)(e), the natural corollary which follows is that the net profit margin realized by the assessee from its international transaction is taken as such and the adjustments, if any, due to differences between the

international transaction and comparable uncontrolled transactions, are given effect to in the profit margin of comparables", relies on Claas India ruling;

→ Also rejects assessee's reliance on Rule 10B(3) for allowing capacity utilization adjustment claim, states that this rule is only meant for deciding the inclusion / exclusion of a probable company in the list of comparables and "If we accept the contention…that rule 10B(3)(ii) is to be construed as a provision for allowing adjustment on account of differences between uncontrolled transaction and international transactions from the profit margin of the assessee, then we will have to read sub-rule (3) as a part of machinery for calculating ALP under Rule 10B(1)(e), which has no statutory sanction";

→ Further, rules on selection of 10 comparables included by TPO on various parameters like functional dissimilarity, absence of segmental results and existence of significant related party transactions.

- **Non-resident to non-resident payment for providing engineering specification taxable, "make available" criterion met**
  Foster Wheeler France S.A. [TS-62-ITAT-2016(CHNY)]

→ Chennai ITAT holds payment by assessee (a French company engaged in engineering and construction works) to its associate company in USA ('AE') for providing job specifications and reviewing assessee's work with respect to its contract in India with Reliance, amounts to Fees for Technical Services ('FTS') under India-US DTAA and consequently liable for Sec 195 TDS;

→ Rejects assessee's stand that sharing of best practices in engineering services in form of written procedure, forms, specifications and details would not mean that technical knowledge was "made available" to assessee by its AE;

→ ITAT notes that assessee is not a layman, but an expert in providing technical and engineering service, accordingly holds that "These specifications and procedures made available to the assessee …can very well be used by the assessee-company for execution of other projects also.";

→ Follows Cochin ITAT ruling in US Technology Resources Pvt. Ltd., distinguishes assessee's reliance on Karnataka HC ruling in De Beers India Minerals Pvt. Ltd, Delhi HC ruling in Guy Carpenter & Co. Limited, Pune ITAT ruling in Sandvik Australia Pty. Ltd and AAR rulings in Intertek Testing Services India (P.) Ltd and Ernst & Young (P) Ltd. on facts;

→ Moreover, since AE's services were utilized in India for the purpose of carrying out assessee's business in India, holds payment taxable in India in view of Explanation 2 to Sec 9(1)(vii).

- **Mumbai ITAT holds that Israel Company's 'Project Office' constitutes Indian-PE; Rejects contract-split & sub-contracting plea**
  Orpak Systems Ltd [TS-94-ITAT-2016(Mum)]

→ Mumbai ITAT rules that revenue earned by assessee (an Israel company) from contract with HPCL (an Indian petroleum company) for implementing automated systems, taxable in India, holds assessee's project office ('PO') in India to oversee implementation of project constitutes assessee's PE in India;

→ Rejects assessee's stand that contract can be split into (1) supply of equipment which took place outside India and (2) installation of systems at HPCL sites which was sub-contracted to another Indian company;

→ ITAT notes that assessee supplied equipment to subcontractor, which in turn installed the same at the HPCL petrol pumps, further assessee received the entire contract revenues from HPCL and compensated sub-contractor for the works carried out by it;

→ Thus, holds that contract was composite, accepts Revenue's stand that sub-contracting is only one of the methods of executing contract and it was assessee which had taken up full responsibility for executing contract, relies on Madras HC ruling in Ansaldo Energia SPA and distinguishes SC ruling in Ishikawajima Harima Heavy Industries ltd.;
→ Further rejects assessee's stand that neither PO constitutes assessee's PE in India as it was merely coordinating the activities carried by sub-contractor nor the subcontractor constitutes PE as it was an agent of independent status, however, ITAT remands matter back to AO with respect to attribution of profits to India operations

- **Mumbai ITAT accepts "scrip-wise" long-term capital gain computation applying beneficial provision u/s 112**
  Parle Pet Pvt. Ltd. (Now merged with Parle Agro Pvt. Ltd.) [TS-92-ITAT-2016(Mum)]

→ Mumbai ITAT quashes CIT's revisionary order u/s 263 directing computation of long term capital gains ('LTCG') on sale of various shares/mutual funds @ 10% without indexation benefit for AY 2005-06;
→ Accepts assessee's stand that in view of beneficial provision u/s 112, LTCG should be worked out scrip-wise and tax should be charged at 10% (without indexation) or 20% (with indexation) whichever is beneficial to assessee;
→ Relies on coordinate bench ruling in Savla Motor Agencies and Mohanlal N. Shah wherein it was held that "sec 112 is not only a beneficial provision but is also mandatory and if several transaction have taken place by way of sale of share, the assessee can avail the benefit of indexation, in a few transaction and avail 10% tax rate in the remaining transaction";
→ As AO in its order had computed LTCG through mixed method depending upon the situation suitable to assessee, ITAT holds there is no infirmity in the assessment order
→ Zyme Solutions P Ltd [TS-65-ITAT-2016(Bang)-TP]
→ Bangalore ITAT Holds data analytical services as high-end; Declines risk-adjustment absent quantification in TP-study
→ Bangalore ITAT upholds DRP's application of turnover filter of Rs. 200 crores for exclusion of 2 comparables for benchmarking data analytical services (ITES) rendered by assessee during AY 2010-11, accepts reliance on Bombay HC decision in CIT vs. Pentair Water India Pvt. Ltd and ITAT Genisys Integrating ruling over Capgemini India ruling (relied on by Revenue);
→ Upholds treatment of foreign exchange gain/loss as operating in nature, holding that, "Unless rebutted a safe presumption can be made that foreign exchange gain/loss arose out of the business activity of the assessee which was entirely providing ITES services to its principal abroad";
→ Further rejects 1% risk adjustment granted by DRP as assessee had not quantified the risk the its TP study, holds that "Perceived single party risk is purely hypothetical… even if any has been voluntarily taken by the assessee, an adjustment for such a perceived or hypothetical risk can never be factored while working out the Profit Level Indicator";
→ Rejects assessee's plea for exclusion of Acropetal Technologies Ltd (earning substantial revenue from high-end EDS services) considering that segmental results along with allocation of expenses are available, also holds that assessee's data analytical services cannot be classified as low-end service observing that "analysis of voluminous data and deciphing meaningful information therefrom which helps build core business strategy is a highly skilled function, requires advanced programming skills and knowledge of data mining. It is in no way comparable to low end business process outsource function";
→ Accepting assessee's contention that when rental income is excluded for PLI calculation, corresponding rental expenditure is also required to be excluded, directs TPO/AO to re-work PLI by excluding both

rental income as well as expense, also directs AO to allow working capital adjustment of 0.23% as recommended by TPO.

- **Deeming fiction u/s 50 cannot restrict short-term capital gain set-off against long-term loss**
  Parrys(Eastern) Pvt. Ltd. [TS-90-HC-2016(BOM)]

→ Bombay HC dismisses Revenue's appeal, holds that assessee was entitled to set-off deemed short term capital gains ('STCG') arising from transfer of depreciable assets u/s 50 against brought forward long term capital loss ('LTCL') for AY 2005-06;
→ Revenue had disallowed the set-off of brought forward LTCL and unabsorbed depreciation against deemed STCG in view of Sec 74 (which restricts set-off of LTCL against STCG);
→ Opines that "The deeming fiction under Section 50 is restricted only to the mode of computation of capital gains contained in Sections 48 and 49 of the Act. It does not change the character of the capital gain from that of being a long term capital gain into a short term capital gain for purpose other than Section 50 of the Act";
→ Thus holds that deemed STCG (as computed u/s 50) continues to be long term capital gain for the purpose of Sec 74;
→ Follows Coordinate Bench ruling in ACE Builders (P) Ltd., also relies on Mumbai ITAT ruling in Komac Investments and Finance Pvt. Ltd.

- **Mumbai ITAT holds that TP provisions inapplicable to outbound share investment; Rejects potential income plea**
  Topsgrup Electronic Systems Ltd [TS-61-ITAT-2016(Mum)-TP]

→ Mumbai ITAT deletes TP addition of Rs. 142 crores on account of alleged excess consideration paid on investment in share capital of wholly owned subsidiary and notional interest on re-characterization of transaction as loan;
→ Reiterates the principle that Chapter X inapplicable to an international transaction on capital account which does not result in income chargeable to tax, draws support from Bombay HC decisions in Vodafone India Services ("Vodafone IV"), Shell India Markets (P) Ltd. & Equinox Business Parks (P) Ltd., and Hyderabad ITAT decisions in Vijay Electrical Ltd. and Hill Country Properties Ltd.;
→ Rejects Revenue's contention that there is scope for potential income arising from subsequent sale of shares, relying on Bombay HC decision in Vodafone IV, holds that, "the impugned transaction cannot be brought within the ambit of Indian Transfer Pricing provisions merely on the presumption that it may impact profits arising out of a subsequent transaction which may or may not be an international transaction";
→ Observes that "a plain reading of section 92(1) of the Act which specifies that 'any income arising from an international transaction shall be computed having regard to the Arm's Length Price' implies that the potential income, if any, should arise from the impugned international transaction which is before the Transfer Pricing Officer for consideration and not out of a hypothetical international transaction which may or may not take place in future";
→ Rejects Revenue's contention that Vodafone IV decision was not applicable to the assessee's case as it dealt with an inbound transaction in shares and not an outbound transaction, stating that such distinction is not mandated or prescribed by Chapter X of the Act and Rules, holds, "whether the transaction under comparability is inbound share investment or outbound share investment, the comparison has to be with comparables and not with what options or choices were available to the

assessee for earning income or maximizing returns...what is made applicable for inbound share investment would be equally applicable to outbound share investments also. The parameters to be applied cannot be different for outbound investment and inbound investments";

→ Regarding recharacterization of investment in share as loan by TPO, observes that assessee had placed material evidence on record to establish bona-fide nature of transaction and therefore re-characterization as loan was not permissible under TP provisions, relies on Bombay HC decisions in Besix Kier Dabhol and Aegis Ltd.;

→ Also states that even if re-characterization would have been permissible, the loan cannot, by any stretch of imagination, be considered income of the assessee, thus, addition of Rs. 124 crores representing recharacterized loan not tenable along with addition of Rs. 18 crores towards notional interest on recharacterized loan amount;

→ With respect to Revenue's contention that value of investment was far in excess of book value determined under Wealth Tax Act, ITAT refuses to apply Wealth Tax Valuation Rules to determine ALP on the ground that equity shares not covered under definition of term 'assets'

- **Dismisses Cairn India's writ challenging Rs 250+ cr addition; Cites alternate remedy availability**
  Cairn India Limited [TS-58-HC-2016(P & H)-TP]

→ Punjab & Haryana HC dismisses writ petition filed by Cairn India (assessee) challenging the increase to book profit by Rs. 253 crores as a result of re-computation of depreciation and consequential book profit for MAT purposes u/s 115JB, relegates assessee to avail alternate remedy under the Act;

→ Notes that AO in Feb 2015 had issued draft assessment order proposing addition to book profits and TP-addition of over Rs 189 cr and DRP upheld draft assessment order passed by AO and assessee challenged adjustment to book profits u/s 115JB through a writ petition;

→ Referring to the mandate of Sec 144C, HC holds that, "It is well recognized that when a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of";

→ Relies on SC decisions in Titaghur Paper Mills Co Ltd & Dunlop India, and also jurisdictional HC decision in Larsen & Toubro wherein writ petition was rejected where alternate statutory remedy was available;

→ With reference to assessee's reliance on various rulings such as Appollo Tyres (SC) and Maruti Suzuki Limited, holds that, "However, as we have refrained from entertaining the writ petition on the ground of availability of efficacious alternative remedy to the petitioner, it is not considered appropriate to express any opinion regarding the applicability or otherwise of these judgments to the present case".

STATUTORY DUE DATES FOR MONTH OF MARCH	
Payment of Excise Duty through Cheque/ Electronically	31st March 2016
Payment of Service Tax (Monthly) through cheque/Electronically	31st March 2016
TDS /TCS Payments	30th April 2016
Central Excise return (ER-1, ER-2, ER-3)	10th April 2016
KVAT Return under COT Scheme	15th April 2016
PF Payment	15th April 2016
KVAT Returns under regular scheme	20th April 2016
Profession Tax Payment	20th April 2016
ESIC Payment & Return	21st April 2016
Service Tax Return for the half year ending March 206	25th April 2016
TDS/TCS return	15th May 2016

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