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SNK Newsletter

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DIRECT TAXES

Judicial pronouncements

Section 2 – Definition

Pr. Commissioner Vs. Gulmohar Green Golf And Country Club Ltd. [Tax Appeal No. 608/609/741/744 of 2016, Gujarat High Court, dtd. 16.11.2016, in favour of assessee]

Refundable security deposit upon members' admission not club's income absent absolute dominion

Gujarat HC dismisses Revenue's appeal for AY 2008-09, receipt of non-interest bearing refundable security deposit by assessee-club constitutes a capital receipt and thus not taxable; On noting that the security deposit recovered by the assessee-club from its members at the time of their enrolment was refundable after a period of 25 years or on occurrence of certain contingencies (as outlined in the bye-laws), holds that 'it cannot be said that the assessee club had absolute dominion over the impugned deposits"; Rejects Revenue's contention that security deposits ought to be taxed as assessee's income as it was appropriated towards construction and other amenities provided in the club; Rules that "merely because the security deposit is not kept apart and/or subsequently the amount of security deposit is utilized by the club for other purposes such as construction and providing other amenities at the club, the same shall not loose the "character of deposit".

Section 10B – Special provisions in respect of newly established hundred per cent export oriented undertaking

Krupa Trading Company Vs. Addl. Com. Of IT [(2017) 77 taxmann.com 177, ITAT Mumbai bench, dtd. 09.11.2016, in favour of assessee]

Interest earned by EOU on its surplus income would be eligible for deduction under sec. 10B

Where income by way of reimbursement of CST, interest on term deposits and interest on deposits with Electricity Board

were earned from surplus business income of 100 per cent EOU under definition of profits derived from export contained in section 10B(4), said income was eligible for deduction.

Section 14A – Expenditure incurred in relation to income not includible in total income

Delhi Towers Ltd. Vs. DCIT [ITA No. 6007/Del/20136, ITAT Delhi bench, dtd. 06.01.2017, partly in favour of revenue]

Delhi ITAT upholds Sec 14A disallowance; Substantial Rule 8D compliance sufficient, AO's non-recording of satisfaction irrelevant

Delhi ITAT upholds Sec 14A disallowance despite requisite satisfaction not recorded by AO before making the disallowance; During relevant AY 2009-10, assessee did not make any 'suo-motu' disallowance u/s 14A, however, in view of clear mandate u/s 14A read with Rule 8D, AO calculated the disallowance; ITAT observes that "Section 14A (1) & (2) read with Rule 8D(i), leave AO with no choice, and mandates a particular methodology enacted, should be followed.", remarks that the methodology of calculation adopted by AO in the order evidences that "all these elements were present in his mind"; Therefore, ITAT holds that in these circumstances, it was not mandatory for AO to expressly record his satisfaction, remarks that "To insist that the AO should pay such lip

service regardless of the substantial compliance with the provisions would, destroy the mandate of Section 14A."; However, ITAT restricts the interest disallowance u/s 14A made by AO based on the calculations submitted by assessee in appeal.

Shreno Ltd. Vs. ACIT [ITA No. 1452/Ahd/2012, ITAT Ahmedabad bench, dtd. 27.12.2016, in favour of assessee]

ITAT Deleted interest disallowance u/s 14A considering free funds availability, end-use trail not necessary

Ahmedabad ITAT deletes disallowance u/s 14A read with Rule 8D, holds that the approach of lower authorities to attribute part of interest to investment yielding tax exempt income was incorrect considering that the investments were from common pool of funds but were less than available interest free fund; Noting that assessee's interest free funds were "far in excess" of investments yielding exempt income, ITAT holds that it can be presumed that investment were made from interest free funds even though assessee has raised a loan at the same time, relies upon jurisdictional HC ruling in UTI Bank Ltd and Bombay HC ruling in Reliance Utilities; Further, notes that assessee has given evidence of the purposes for which loans were obtained and one to one linkage of advance and also the end use to the extent possible, but it could not show one to one linkage where there were numerous transactions; Noting that the lenders would take reasonable precautions to ensure that the end use of funds is in line with the stated purpose, ITAT holds that "a reasonable presumption, even de hors the principle laid down by Reliance Utilities decision, is required to be taken"; Also opines that merely because disallowance towards administrative expenses was on an adhoc basis, it does not imply that it is incorrect or inadequate, further observes that there is no finding by AO to the effect that such disallowance was inadequate to meet administrative expenses

Section 35D – Amortisation of certain preliminary expenses

M/s. Nitta Gelatine India Ltd. Vs. ACIT [ITA No. 88 of 2009, Kerala High Court, dtd. 26.08.2016, in favour of assessee]

Existing shareholders not a mere section of 'public'; Kerala HC allowed Sec.35D deduction on rights-issue

Kerala HC reverses ITAT order for AYs 1999-00 and 2003-04, allows assessee's (a public limited company) claim of amortisation of expenditure incurred in connection with rights issue of shares u/s 35D(2)(c)(iv); HC notes that assessee had offered shares to its existing shareholders in terms of rights issue u/s 81 of Companies Act, further notes that shares not accepted by the existing shareholders were subscribed by the promoters; Rejects Revenue's contention that assessee's claim ought to be rejected as rights issue was confined only to a section of the public (i.e. existing shareholders) and to qualify for deduction, the shares must be issued for 'public' subscription; With a view to understand the scope of the term 'public' employed in Sec. 35D (given that it's not defined under the IT Act), HC refers to Sec. 67 of the Companies Act which provides that a section of the public holding shares in a company would also be treated as public; HC opines that any contrary interpretation "would lead to a situation where the benefit of amortization would be available to public issue of shares and the same benefit would be denied when shares are issued by Companies on rights basis".

Section 37 – General

Dy. CIT Vs. PHL Pharma P. Ltd. [ITA No. 4605/Mum/2014, ITAT Mumbai bench, dtd. 12.01.2017, in favour of assessee]

Pharma co. 'freebies' to doctors allowable deduction, not violative of MCI guidelines

Mumbai ITAT allows deduction u/s 37 to a Pharma co. ('assessee') in respect of freebies given to doctors during AY 2010-11, rejects Revenue's stand that since payments were made in violation of MCI regulations, they were illegal and hence do not qualify for deduction in view of Explanation to Sec 37(1); ITAT observes that the MCI Regulation 2002 provides limitation/curb/prohibition only for medical practitioners and not for pharmaceutical companies, "Nowhere the regulation or the notification mentions that such a regulation or code of conduct will cover pharmaceutical companies or health care sector in any manner."; Takes note of Delhi HC ruling in Max Hospital wherein the MCI admitted that the MCI Regulations, 2002 has jurisdiction to take action only against the medical practitioners and not to health sector industry, accordingly ITAT rules that MCI regulations" cannot have any prohibitory effect on the pharmaceutical company like the assessee."; Further rejects Revenue's reliance on CBDT Circular 5/2012, holds that CBDT in its clarification has enlarged the scope and applicability of 'MCI Regulation 2002' by making it applicable to the pharmaceutical companies or allied health care sector industries, remarks that "The CBDT cannot provide casus omissus to a statute or notification or any regulation which has not been expressly provided therein."; Moreover, ITAT holds that CBDT circular which creates a burden or liability or imposes a new kind of impairity, cannot be reckoned retrospectively; Referring to the nature of expenses incurred,

ITAT holds that the expenses were incurred to make aware of the products and medicines manufactured and launched by assessee, opines that "This kind of expenditure is definitely in the nature of sales and business promotion, which has to be allowed."

Pr. Commissioner of IT Vs. Seagram Manufacturing Pvt Ltd. [ITA No. 885/2016, Delhi High Court, dtd. 09.12.2016, in favour of assessee]

Brand promotion expenditure deductible despite parent company ownership, cites Trademark law provisions

Delhi HC upholds assessee's claim for deduction of advertisement and promotion expenses incurred towards enhancement of brands owned by its foreign parent-company as business expenditure; AO had disallowed part of the expenditure holding that they were incurred for popularizing parent company's brand and thus were not incurred wholly and exclusively for assessee's business; HC notes that even though all the brands owned by parent company were not made available in Indian market, the overseas brand owner did not set-up any other licensee (as a rival) at least in the area where the assessee operated; Regarding Revenue's contention that even if the arrangement was terminated, overseas owner's brand presence would have subsisted, HC observes that "but that would nevertheless subsist in any event on the theory of trans-national reputation of the IPR owner"; Referring to Sec. 48 of the Trademarks Act holds that "as long as the arrangement existed, the assessee, who was a licensee of the products, was entitled to claim them as business expenditure though in the ultimate analysis they might have enhanced the brand of the overseas owner" and thus concludes that disallowing a certain proportion on an entirely artificial and notional basis from the expense otherwise deductible, was unjustified.

Section 40 – Amount not deductible

Sanjay Kumar Agarwal Vs. ITO [(2017) 77 taxmann.com 117, Kolkata ITAT bench, dtd. 02.09.2016, in favour of assessee]

Sec. 40(a)(ia) doesn't specify any time-limit for furnishing of form 15G

Section 40(a)(ia) does not specify as to point of time at which declaration in Form 15G for non-deduction of tax at source is to be filed; if payee furnishes Form 15G after closure of accounting year, to extent recipients included sum in their returns disallowance under section 40(a)(ia) would not be sustained in hands of payee.

Section 48 – Mode of Computation

CIT Vs. Sriram Investments [(2017) 77 taxmann.com 113, Madras High Court, dtd. 15.11.2016, in favour of assessee]

AO couldn't reject sale of shares at lower price without producing supporting doc to rebut such claim

AO couldn't reject sale of shares at lower price without producing supporting documents to rebut such claim.

Pr. Com. Of IT Vs. Quark Media House India (P.) Ltd. [(2017) 77 taxmann.com 301, Punjab & Haryana high Court, dtd. 24.01.2017, in favour of assessee]f

No reference to DVO to determine FMV if AO fails to prove that higher consideration was received by assessee

Where it was not case of Assessing Officer that assessee received a consideration more than what was mentioned in sale deed, there was no necessity for computing fair market value and accordingly Assessing Officer could not have referred matter to D.V.O. under section 55A. The Assessing Officer was only concerned with amounts actually received by the assessee. The amount received was admittedly the amount mentioned in the sale agreement.

Section 50C – Special provision for full value of consideration in certain cases

Shri Devendra J. Mehta Vs. ACIT [ITA No. 55/Rjt/2016, dtd. 08.12.2016, in favour of revenue]

'Agreement to sell' date irrelevant for stamp-duty valuation u/s 50C absent consideration payment

Rajkot ITAT upholds Revenue's action of invoking Sec 50C (relating to substitution of sale consideration with stamp duty valuation) for AY 2011-12 on sale of land by assessee-individual; Assessee had entered into 'agreement to sell' for land in March 2008 for Rs. 50.45 lakhs, but sale deed was registered in January 2011, accordingly, AO adopted the stamp duty valuation of Rs. 4.35 cr as on 'registration date' (Jan 2011) and made addition u/s 50C; ITAT rejects assessee's reliance on Ahmedabad ITAT ruling in Dharamshibhai Sonani to contend that stamp duty valuation for AY 2008-09 (i.e. agreement date) should be adopted for the purposes of Sec 50C, observes that assessee before Ahmedabad ITAT had received partial sale consideration on agreement date whereas in present case, assessee did not receive any consideration at the time of agreement; ITAT rejects taxpayer's contention that capital gains was assessable in 2008 and not 2011, ITAT observes that assessee himself recognized sale in subject AY 2011-12, thereafter ITAT takes note of Sec 53A of Transfer of Property Act, 1882 ('TOPA') which provides protection to transferee to retain his possession taken in part performance of

the contract, also takes note of Registration and Other Related laws (Amendment) Act, 2001 which introduced significant changes in the rights flowing on the basis of the agreement executed in 'part performance' of the contract u/s 53A; ITAT rules that by virtue of the 2001 amendment, if the transferee fails to register the contract, then he would not be able to protect his possession or any benefit conferred by Sec 53A of the TOPA, remarks that the 'transfer' u/s 2(47)(v) would only be complete if possession is protected, however, ITAT remits matter back to AO to refer the matter to DVO in terms of Sec 50C(2)

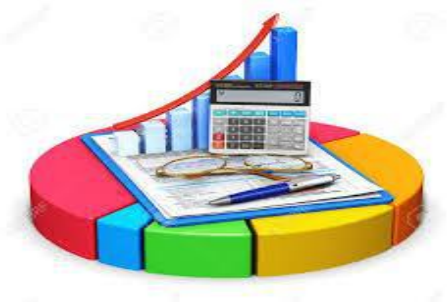
Section 54EC – Capital gain not to be charged on investment in certain bonds

Niamat Mahroof Virji Vs. ITO [(2017) 77 taxmann.com 174, ITAT Mumbai bench, dtd. 19.12.2016, in favour of assessee]

6 months investment period given under sec. 54EC should be treated as six British Calendar Months

The assessee sold his ancestral property on 13-10-2008 and received the consideration of Rs. 1,05,00,000/-. The long term capital gains were computed by the revenue authorities at Rs. 17,69,104/-. The assessee invested amount of Rs. 17,50,000/- in REC bonds on 24-4-2009 whereas bonds were allotted on 30-4-2009. Accordingly, the assessee claimed deduction under section 54EC.

Section 54EC clearly stipulates that investment should be made in specified assets at any time within a period of six months after the date of transfer of the asset. In the instant case, the assessee complied with this condition as the word "month" has to be reckoned as per the British Calendar. The REC bonds were subscribed by the assessee on 24-4-2009 and were allotted to the assessee by REC on 30-4-2009 which is within six months after the date of transfer of asset as per British Calendar month, hence, the assessee fulfilled the conditions laid down under section 54EC and as such assessee is eligible for deduction under section 54EC.



CIT Vs. Subhash Vinayak Supnekar [(2017) 77 taxmann.com 226, Bombay high Court, dtd. 14.12.2016, in favour of assesse

Investment can be made out of advance received under sale agreement for sec. 54EC relief

When amount received as advance under an agreement to sell a capital asset is invested in specified bonds, benefit of section 54EC is available to assessee.

Section 68 – Cash Credits

Pr. CIT Vs. Goodview Trading (P.) Ltd. [(2017) 77 taxmann.com 204, Delhi High Court, dtd. 21.11.2016, in favour of assessee]

No addition under sec. 68 where share applicant had sufficient capacity to invest in assessee-company

Where Commissioner (Appeals), analysing net worth of share applicant-companies, noticed that they possessed substantial means to invest in assessee investment company, no addition could be made under section 68.

Pr. Commissioner of Income tax Vs. Jatin Investment Pvt. Ltd. [ITA No. 43/2016 & 44/2016, Delhi High Court, dtd. 18.01.2017, in favour of assessee]

AO has to exercise his powers u/s 131 & 133(6) to verify the genuineness

A transaction cannot be treated as fraudulent if the assessee has furnished documentary proof and proved the identity of the purchasers and no discrepancy is found. The AO has to exercise his powers u/s 131 & 133(6) to verify the genuineness of the claim and cannot proceed on surmises.

Section 80IB – Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings

Pr. Com. Of IT Vs. Omaxe Buildhome (P.) Ltd. [(2017) 77 taxmann.com 122, The Supreme Court of India, dtd. 14.12.2016, in favour of assessee]

Sec. 80-IB relief to be allowed on all housing projects which are independent from other projects; SLP dismissed

SLP dismissed against High Court's ruling that where each real estate project developed by assessee was completed on a stand-alone basis and each was independent of other housing schemes developed by assessee on adjoining lands, assessee would be entitled to deduction under section 80-IB on each project, being separate housing projects.

Section 148 – Issue of notice where income has escaped assessment

Jeans Knit (P.) Ltd. Vs. DCIT [(2017) 77 taxmann.com 176, The Supreme Court of India, dtd. 08.12.2016,

HC couldn't uphold validity of reassessment notice when it was contrary to decision of Apex Court

Where High Court dismissed writ petitions preferred by assessee challenging issuance of notice under section 148, since said order was contrary to law laid down by Court in Calcutta Discount Ltd. Co. v. ITO [1961] 41 ITR 191 (SC), it was to be set aside.

Section 234E – Fee for default in furnishing statements

Sree Narayana Guru Smaraka Sangam Upper Primary School Vs. UOI [WP(C) No. 30229 of 2013, Kerala High Court, dtd. 14.12.2016, in favour of revenue]

Kerala HC upholds constitutional validity of Sec. 234E; Provision not onerous as Sec.200A intimation appealable

Kerala HC dismisses assessee-deductor's writ challenging the constitutional validity of Sec. 234E [levying mandatory fee for delay in filing TDS returns]; Rejects assessee's stand that there is no element of 'quid pro quo' for collecting the fee, relies on Bombay HC ruling in Rashmikant Kundalia wherein it was observed that delay in filing TDS return has cascading effect and it results in additional burden upon department with respect to processing deductee's tax status; Accordingly, Bombay HC had held that the levy has a quid pro quo as far as it is a fixed charge for the extra service which the Department has to provide due to the late filing of the TDS statements; Further rejects assessee's stand that the provision is unreasonable as no appellate remedy is available, holds that the appellate remedy is now available by virtue of Finance Act, 2015 amendment whereby a provision for appeal has been inserted u/s 246A against an order passed u/s 200A(1) (relating to processing of TDS statements); Moreover, HC clarifies that "the provision is not onerous even in the absence of a right of appeal as it is always open for the aggrieved person to approach the High Court under Artide 226 of the Constitution of India".

Section 245H – Power of Settlement Commission to grant immunity from prosecution and penalty

Sandeep Singh Vs. UOI & Ors [Civil Appeal No. 418 of 2017, The Supreme Court of India, dtd. 13.01.2017, in favour of assessee]

SC grants immunity from prosecution despite belated tax payments contravening Settlement Commission directions

SC allows assessee's appeal, grants immunity from prosecution u/s 245H despite tax & interest payments made beyond the time specified by Settlement Commission vide its final order u/s 245D(4); SC notes that though assessee did not make the tax payments within the time originally granted by the Settlement Commission, but all payments were made by assessee before he approached Supreme Court and filed an SLP; Also notes that "the Settlement Commissioner is free to grant further time for payment, u/s 245H (1A).."; However, considering the facts and circumstances of present case, SC opines that "is not necessary to relegate the appellant to the Settlement Commission for enlargement of time, since the payments have already been made."; SC rules that "for all intents and purposes it shall be taken that the appellant has made the payments within the time granted under Section 245H(1A) of the said Act."

Section 263 – Revision of orders prejudicial to revenue

Easy Transcription & Software Pvt Ltd. Vs. CIT [ITA No. 327/759/Ahd/2015, ITAT Ahmedabad bench, dtd. 10.01.2017, in favour of assessee]

CIT cannot invoke revisionary powers u/s 263 to initiate penalty after AO completed assessment

Ahmedabad ITAT quashes CIT's revision order u/s 263 directing AO to initiate penalty proceedings u/s 271(1)(c) in respect of assessee's erroneous deduction claim u/s 10B for AY 2010-11; ITAT rules that "the CIT cannot, after the conclusion of the assessment proceedings, make up mind or arrive at the required affirmative conclusion towards initiation of penalty proceedings in substitution of the lapse committed by the AO"; Noting that an AO has to record 'satisfaction' for penalty levy, ITAT remarks that "the impugned 'satisfaction' towards default enumerated in 271(1)(c) is required to be formed not later than the conclusion of proceeding"; Also, rejects Revenue's reliance on amended Sec. 271(1)(c) which empowers CIT to impose penalty w.e.f June 1, 2002, holds that the amendment "by itself would not be sufficient to hold that the CIT is entitled to exercise revisional powers by treating the assessment order as erroneous and prejudicial to the interest of revenue" , holds that the designated authorities would become 'functus officio' once the proceedings are concluded.

Section 34 of the Evidence Act

Common Cause (A registered Society) Vs. UOI [Interlocutory Application No. 3 & 4 of 2017, The Supreme Court of India, dtd. 11.01.2017]

Loose paper-sheets "irrelevant, inadmissible" evidence; Rejects investigation plea in Sahara/Birla case

SC dismisses petition filed by Shanti Bhushan & Prashant Bhushan, seeking constitution of Special Investigation Team, directing investigation of the allegedly incriminating material seized in CBI/tax department raids conducted on Birla & Sahara group of companies; Mr. Bhushan argued that during the raids,

e-mails and excel sheets were found that showed payment of cash to several important 'public' figures; Apex Court cites ratio in V.C. Shukla/Jain Hawala diaries case, wherein the court held that entires in loose papers/sheets are irrelevant and not admissible under Sec. 34 of Evidence Act and only where entries are in books of accounts/ regularly kept, those are admissible; Further cites V.C. Shukla ratio to drive home the point that entires in books of account alone shall not constitute sufficient evidence to implicate a person since the same is only "corroborative" evidence; SC observes that the judiciary ought to be cautious while ordering investigation against any important constitutional functionary/officers in the absence of "prima facie reliable/legally cognizable material" which are not supported by 'other circumstances'; Holds that "….. In case we do so, the investigation can be ordered as against any person whosoever high in integrity on the basis of irrelevant or inadmissible entry falsely made, by any unscrupulous person or business house that too not kept in regular books of accounts but on random papers at any given point of time."; As for Sahara raids, SC refers to Settlement Commission order dated November 11, 2016 wherein the Commission recorded a finding that transactions noted in the documents were not genuine and did not attach any evidentiary value to the pen drive, hard disk, computer loose papers, computer printouts; SC concludes " ... it would not be legally justified, safe, just and proper to direct investigation, keeping in view principles laid down in the cases of Bhajan Lal and V.C. Shukla."

INTERNATIONAL TAXATION

Section 9 – Income deemed to accrue or arise in India

Sical Logistics Ltd. Vs. ACIT [ITA No. 1074-1079/Mds/2015, ITAT Chennai bench, dtd. 14.12.2016, in favour of assessee]

Time-charter hire charges, not royalty u/s 9

Chennai ITAT reverses CIT(A) order for AY 2002-03, payment of hire charges by assessee-charterer (an Indian Company) to Foreign Shipping Companies ('FSC') for transportation on a time charter basis not royalty u/s 9(1)(vi), TDS u/s 195 inapplicable; On perusal of time charter agreement notes that captain/master of the vessel, crew and other staff of the ship were controlled by the FSC and not the assessee, further notes that repairs, maintenance and insurance related expenses of the ship were born by the FSC; Also notes that assessee simply informed the FSC regarding cargo's description and the port from which the cargo had to be transported, thus opines that "the assessee neither has control nor the possession over the vessel in question"; Thus Rejects Revenue's contention that charges paid by assessee on account of the use and hire of the ship amounted to royalty within the meaning of Sec.9(1)(vi) and Article 12 of the respective tax treaties since ship is an equipment.

DCIT Vs. Welspun Corporation Limited [ITA No. 48/Rjt/2015, ITAT Ahmedabad bench, dtd. 03.01.2017, in favour of assessee]

Export commission to non-resident agents not taxable; Differs from AAR's SKF Boilers ruling

Ahmedabad ITAT holds that commission paid to non-resident export commission agents by assessee (an Indian company engaged in manufacturing steel pipes), not taxable in India for AY 2010-11 & Sec 195 TDS not applicable, rejects Revenue's stand that commission payments constitute 'fees for technical service' ('FTS'). ITAT rejects Revenue's reliance on AAR ruling in SKF Boilers & Driers Pvt. Ltd. wherein commission paid to non-residents was held as taxable u/s 9(1)(i) read with Sec 5(2)(b) on the grounds that the right to receive the commission arose in India; ITAT opines that when no operations of commission agent's business were carried on in India, Explanation 1 to Sec 9 (1)(i) takes the entire commission income outside the ambit of deeming fiction u/s 9(1)(i) r.w. 5(2)(b). ITAT clarifies that "Just because a product is highly technical does not change the character of activity of the sale agent… The object of the salesman is to sell and familiarity with the technical details, whatever be the worth of those technical details, is only towards the end of selling."; ITAT analyses the scope of managerial, consultancy and technical services to lead to taxability as FTS u/s 9(1)(vii), rules that "unless there is a specific and identifiable consideration for the rendition of technical services, taxability u/s 9(1)(vii) does not get triggered"; Moreover, observes that payment to commission agents was for obtaining orders and not rendering any services per se.

Chapter IX – Double Taxation Relief

Elitecore Technologies Private Limited Vs. Dy. Com. Of IT [ITA No. 623/ Ahd/2015, ITAT Ahmedabad bench, dtd. 03.01.2017, partly in favour of revenue]

Foreign Tax Credit eligible on 'income', not 'gross-receipts'; Allows taxpayer's claim considering 'unique' facts

Ahmedabad ITAT allows foreign tax credit ('FTC') Ahmedabad ITAT allows foreign tax credit ('FTC') claimed by assessee (an Indian company engaged in software development) in respect of taxes withheld in Singapore and Indonesia on receipt from software license sale and annual maintenance contract (AMC); During AY 2009-10, assessee

claimed FTC by taking into consideration gross receipts & adjusted against MAT liability, however, Revenue restricted FTC claim only to the extent of corresponding 'income' that has suffered tax in India; AO computed income that suffered tax in India by reference to the actual MAT liability being divided in the same ratio as the ratio of corresponding foreign receipts to the overall turnover of the assessee; ITAT notes the treaty language on FTC eligibility being amount which shall not exceed part of the income tax as computed before the deduction is given, "which is attributable as the case may be, to the income which may be taxed in that other State" ; Citing UN and OECD Conventions, ITAT holds that "expression used is 'income', which essentially implied 'income' embedded in the gross receipt, and not the 'gross receipt' itself"; On broad principles, ITAT rejects taxpayer's argument that 'gross receipts' to be considered for computing FTC; However, ITAT notes assesssee's unique facts as "main business is carried on in India and only some isolated transactions have taken place in Singapore and Indonesia"; On specific revenue receipt of margin money release and additional user license during relevant year, ITAT observes that the income doesn't require any activity on the part of the assessee and are akin to 'passive earnings' and observes that "no part of the costs incurred in India can be allocated to earnings from Singapore and Indonesia"; As regards income from AMC, ITAT holds that "assessee has allocated the costs on a proportionate basis and no defects are pointed out in the allocation so made by the assessee"; ITAT rejects AO's approach of allocating costs in proportion of turnover especially since assessee itself has prepared the required workings and no defects were pointed out in these workings; However, ITAT cautions "this decision cannot be the authority for the general proposition that only marginal or incremental costs incurred in respect of foreign income should be taken into account and the overheads cannot be allocated thereto."; ITAT opines that "the allocation of proportional deductions can be justified in some situations, such as when business operations are somewhat evenly or even in a significant manner, spread over the residence and source jurisdiction, but that's not the case here."; After ruling on doubly-taxed income eligible for FTC, ITAT rules that actual tax attributable to income to be determined by apportioning the actual tax paid under MAT provisions in the same ratio as double taxed profit to the overall profits.

Reliance Infrastructure Ltd. Vs. CIT [ITA No. 75 of 1998, Bombay High Court, dtd. 20.12.2016, partly in favour of assessee]

HC denies foreign tax credit u/s 91, but allows expense-deduction; Distinguishes reliance on Wipro ruling

Bombay HC upholds foreign tax credit denial u/s 91 to Reliance Infrastructure Ltd. ('assessee') with respect to taxes paid in Saudi Arabia during AY 1983-84, however, allows expense-deduction for foreign taxes paid applying the 'real income theory'; During the relevant AY, assessee claimed double taxation relief u/s 91 on profits against which export incentives were claimed [viz. deduction u/s 80HHB (available on execution of foreign projects) and u/s 35B (which provides for export markets development allowance)]; HC rejects assessee's stand that once the amount is included in the total income (despite deduction claimed u/s 80HHB/35B), relief u/s 91 cannot be denied; HC accepts Revenue's stand that for claiming relief u/s 91, the same income must be taxed in both the countries, holds that as the income subject to deduction u/s 80HHB and Sec.35B did not suffer any tax in India, no relief can be granted u/s 91; However, HC holds that taxes paid abroad are not hit by the bar contained in Sec 40(a)(ii) (which denies deduction of 'taxes' paid) as foreign taxes do not fall under the ambit of 'tax' u/s 2(43) (which defines 'tax' as income-tax chargeable under the provisions of this Act); Also takes note of Explanation to Sec 40(a)(ii) inserted vide Finance Act, 2006, remarks that "on the Explanation being inserted in Section 40(a)(ii) of the Act, the tax paid in Saudi Arabia on income which has accrued and / or arisen in India is not eligible to deduction u/s 91…Therefore, not hit by Sec 40(a)(ii) of the Act."; As the Explanation uses the words the use of the words "for removal of doubts" , HC holds the same as declaratory and hence retrospective in application; Rules that " the benefit of the Explanation would now be available and on application of real income theory, the quantum of tax paid in Saudi Arabia, attributable to income arising or accruing in India would be reduced for the purposes of computing the income on which tax is payable in India.".

Chapter X – Special provisions relating to avoidance of tax

Bose Corporation India (P.) Ltd. Vs. Asst. Com. Of IT [(2017) 77 taxmann.com 194, Delhi ITAT Bench, dtd. 30.10.2016, partly in favour of assessee]

RPM is best method to determine ALP in case of resale of goods purchased from AE

RPM is best suited for determining ALP of an international transaction in nature of purchase of goods from an AE, which are resold as such to unrelated parties. In case goods so purchased are used either as raw material for

manufacturing finished products or are further subjected to processing before resale, then RPM cannot be characterized as a proper method for benchmarking international transaction of purchase of goods by Indian enterprise from foreign AE. Incurring of high advertisement and marketing expenses by assessee, does not in any manner affect determination of ALP under RPM as amount of advertisement and marketing expenses finds its place in profit and loss account, higher or lower spend on it cannot affect amount of gross profit and resultant ALP under RPM. In view of aforesaid, where assessee-company engaged in business of distribution of sound and audio assistance for individual customers and public places, simply purchased various products from its AE and resold same as such without any further value addition, TPO was to be directed to determine ALP of said transactions by using RPM.

Volvo India (P.) Ltd. Vs. CIT(A) [(2017) 77 tsxmann.com 207, Bangalore ITAT bench, dtd. 16.012.2016, in favour of revenue]

ALP of services would be Nil when assessee failed to prove that services were actually received from AE

Even though ALP of services of AE cannot be determined at Nil by questioning necessity of benefits of expenditure incurred, yet onus lies on assessee to prove that services are actually rendered by AE.

While determining ALP under TNMM, bundling of transactions is permissible only when transactions are closely related to each other.

Circulars/Notifications / Instructions

Notification No. 3/2017, dtd. 10.01.2017

Vide the above notification, CBDT has notified that all the provisions of the Agreement and Protocol between India and Cyprus for the avoidance of double taxation and the Prevention of Fiscal evasion with respect to taxes on income, shall be given effect to in the Union of India with effect from the 1st day of April, 2017 being the First day of Fiscal year next following the year in which the said Agreement and Protocol entered into force.

Circular No. 4 of 2017, dtd. 20.01.2017

Vide the above circular, CBDT has kept circular no. 41/2016 dated 21.12.2016 issued relating to Indirect transfer provision under abeyance for the time being.

Circular No. 6 of 2017, dtd. 24.01.2017

Vide the above circular, CBDT has given guiding principle for determination of Place of Effective Management (POEM) of the Company. For detail please visit -

http://www.incometaxindia.gov.in/communications/circular/circular06_2017.pdf

Circular No. 7 of 2017, dtd. 27.01.2017

Vide the above circular, CBDT has given clarification in respect of GAAR (General Anti-Avoidance Rule) which will be effective from 01.04.2017. For detail please visit –

http://www.incometaxindia.gov.in/communications/circular/circular7_2017.pdf

INDIRECT TAXES

Judicial pronouncements

CENTAL EXCISE

Tej Shoe Factory Vs. Comm. Of Central Excise [(2017) 77 taxmann.com 79, CESTAT Allahabad bench, dtd. 08.08.2016, in Favour of assessee]

Fire incidence at factory is an unavoidable accident; damaged goods entitled for remission

Where due to short circuit assessee's factory caught fire and burnt in uncontrolled fire and thereupon assessee claimed for remission of duty involved on destroyed goods during firing accident, accident due to short circuit was an unavoidable accident for which assessee was entitled to remission of duty

SERVICE TAX

Shreenath Mhaskoba Sakhar Karkhana Ltd. Vs. Com. Of Central Excise [(2017) 77 taxmann.com, CESTAT Mumbai bench, dtd. 18.11.2016, in favour of assessee]

No service tax under reverse charge when service recipient reduces transportation charges from invoice value

Where assessee, a sugar factory, paid charges for transportation of sugarcane from fields to its factory and deducted same from sale bills of farmers, it was not liable to pay service tax on amount of transportation charges.

Safety Retreading Company (P.) Ltd. Vs. Com. Of Central Excise [(2017) 77 taxmann.com 280, The Supreme Court of India, dtd. 18.01.2017, in favour of assessee]

Service tax liability on retreading of tyre is to be restricted on 30% portion of gross amount

In a contract for retreading of tyres, assessee is liable to pay service tax only on service component which under State Act has been quantified at 30 per cent and not on entire gross value of service rendered.

Bombay Well Print Inks (P.) Ltd. Vs. Com. Of Central Excise & Service Tax [(2017) 77 taxmann.com 59, CESTAT Mumbai bench, dtd. 04.07.2016, in favour of revenue]

Past service-tax demand can be recovered by adjusting current cenvat credit

Where assessee was engaged in service of renting of immovable property and during period 2007-08 to 2009-10 it paid service tax under section 73 from cenvat credit available on 31-1-2011 along with interest and Adjudicating Authority held that as per rule 3(4) of Cenvat Credit Rules, cenvat credit available on 31-1-2011 could not have been utilised by assessee for payment of tax pertaining to period 2007-08 to 2009-10, in view of Board Circular dated 28-3-2012, there was no restriction to utilise cenvat credit even at later date at time of payment of service tax.

CENVAT CREDIT

Sampre Nutritions Ltd. Vs. Commissioner [(2017) 77 taxmann.com 91, CESTAT Hyderabad bench, dtd. 19.10.2016, in favour of revenue]

Input credit shall be reversed when sum payable to creditor is written off

Where assessee, a manufacturer, was availing cenvat credit facility on inputs and it as a result of decision taken in Board meeting had accounted in account books a certain amount as extra ordinary income by writing off of dues to suppliers, since assessee had neither paid value of goods to suppliers nor duty on goods, it was bound to reverse credit availed on inputs.

Pepsico India Holding (P.) Ltd. Vs. Comm. Of Central Excise [(2017) 77 taxmann.com 229, CESTAT Mumbai bench, dtd. 25.10.2016, in favour of assessee]

Cenvat Credit can't be denied just because serial number isn't printed on invoices

Denial of benefit of cenvat credit on allegations that (i) assessee availed cenvat credit on invoices, wherein serial number was not printed but was written by hand, and (ii) in one invoice credit was taken on Xerox copy of invoice, not justified.

Circulars/Notifications / Instructions

Notification No. 04/2017-ST, dtd. 12.01.2017

The above notification seeks to amend notification No. 26/2012-ST dated 20.06.2012 so as to rationalize the abatement for tour operator services. W.e.f. 22.01.2017, the abatement rate on services provided by a tour operator has been reduced to 40% where the bill issued for this purpose indicates that it is inclusive of charges of accommodation and transportation required for such a tour and the amount charged in the bill is the gross amount charged for such a tour including the charges of accommodation and transportation required for such a tour.

Notification No.03/2017-ST, dtd. 12.01.2017

The above notification seeks to amend notification No. 30/2012-ST dated 20.06.2012 so as to specify the person complying with the sections 29, 30 or 38 read with section 148 of the Customs Act, 1962 (52 of 1962) as the person liable for paying 100% service tax in case of services provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India w.e.f. 22.01.2017. Corresponding change has been made in notification no. 25/2012 vide notification No. 01/2017-ST, dtd. 12.01.2017.

Notification No. 02/2017-ST, dtd. 12.01.2017

The above notification seeks to amend Service Tax Rules, 1994 so as to,

- exclude such persons from the definition of aggregator who enable a potential customer to connect with persons providing services by way of renting of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes subject to fulfillment of certain conditions;
- specify the person complying with the sections 29, 30 or 38 read with section 148 of the Customs Act, 1962 (52 of 1962) as the person liable for paying service tax in case of services provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India.

Due Dates of key compliances pertaining to the month of February 2017:

5th Feb.	*Payment of Excise duty for the month of January*
6th Feb.	*Payment of Service Tax & Excise duty paid electronically through internet banking for the month of January*
7th Feb.	*TDS/TCS Payment for the month of January*
10th Feb.	*Excise Return*
15th Feb.	*PF Contribution for the month of January*
21st Feb.	*ESIC payment of for the month of January*