Issue 03 | March, 2017



Website : www.snkca.in Email: newsletter@snkca.com

# SNK Newsletter

## DIRECT TAXES

### *Judicial pronouncements*

**Section 10B – Special provision in respect of newly established hundred percent export oriented undertaking**

**ITO Vs. Anthelio Business Technologies (P.) Ltd. [(2017) 78 taxmann.com 203, ITAT Mumbai bench, dtd. 21.12.2016, in favour of assessee]**

**Profit enhanced due to disallowance u/s 40(a)(i) eligible for sec. 10B deduction**

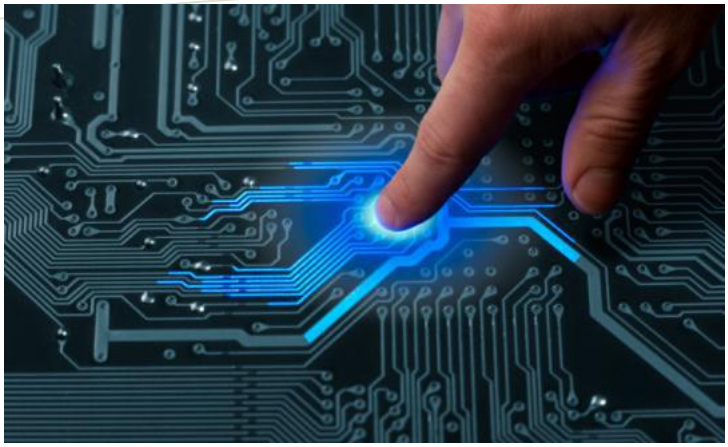
Disallowance under section 40(a)(i) being a statutory disallowance, enhanced profit due to such disallowance would be considered for deduction under section 10B.

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

**Pr. CIT Vs. State Bank of Patiala [ITA No. 244 of 2016, Punjab & Haryana High Court, dtd. 30.01.2017, in favour of assessee]**

**Bank holding shares as stock-in-trade not hit by Sec 14A disallowance**

Punjab and Haryana HC rules that Sec 14A disallowance not applicable to an assessee-bank for AY 2008-09, holds that Sec. 14A applies only to shares held as 'investments' and not as 'stock-in-trade'; HC notes that assessee was dealing in shares and bonds as a trader (as permitted u/s 6 of the Banking Regulation Act, 1949), further in view of CBDT circular no. 18/2015 (which states that shares/stock held by bank are stock-in-trade and not investments), assessee's income from purchase and sale of securities was in the nature of business income; Noting that "what is disallowed u/s 14A is expenditure incurred to "earn" exempt income", HC remarks that "..it is axiomatic, therefore, that the entire expenditure including administrative costs was incurred for the purchase and sale of the stock-in-trade and, therefore, towards earning the business income from the trading activity of purchasing and selling the securities.."; Holds that the assessee did not



retain shares with the intention of earning dividend income and that the dividend income was incidental to the business of sale of shares, clarifies that the expenditure incurred in acquiring the shares cannot be apportioned to the extent of dividend income and disallowed u/s 14A.

**Voltech Engineers P. Ltd. Vs. DCIT [ITA No. 1801 & 1765/Mds/2016, ITAT Chennai Bench, dtd. 20.02.2017, in favour of revenue]**

**Investment vs. stock-in-trade distinction irrelevant for Sec 14A application; Disallows expenditure on strategic investments**

Chennai ITAT upholds Sec 14A disallowance for AYs 2011-12 & 2012-13 in respect of strategic investments made by assessee-company in subsidiary / associate companies for business purposes; ITAT clarifies that the holding of asset/property under reference either as an investment or as stock-in-trade becomes inconsequential or irrelevant for Sec 14A application, what is relevant is not the object for which the investment was made, but the nature of income – tax-exempt or otherwise, that arises from the investment; Remarks that "Now, it stands to reason that if 'investments' forming part of the assessee's stock-in-trade does not preclude application of sec. 14A, investments made for business, i.e., assuming

so, would surely not."; Further rejects assessee's stand that no expenditure was incurred for making strategic investments, remarks that "the very fact that the assessee claims it as having business implications, makes such a review imperative, entailing cost.", upholds disallowance of indirect expenditure as per Rule 8D(iii).

**Punjab Tractors Ltd. Vs. CIT [ITA No. 458 of 2015, Punjab & Haryana High Court, dtd. 03.02.2017, in favour of revenue]**

### Invoking Rule 8D based on AO's reasonable presumption permissible, actual quantification not required

Punjab and Haryana HC upholds AO's resort to Rule 8D for ascertaining Sec 14A disallowance for AY 2008-09, inference drawn by AO that assessee would have incurred certain administrative expenses to handle its huge investment portfolio worth Rs. 150 cr., valid and sufficient 'satisfaction' to invoke Rule 8D; During relevant AY, assessee claimed that it did not incur any expenditure in relation to the exempt income, however AO presumed that such huge investment portfolio would require deployment of assesses's intellectual, physical and financial resources and accordingly invoked Rule 8D; Rejects assessee's emphasis on the word 'determine' contained u/s 14A(2), HC also rejects assessee's argument that AO has to first determine the amount expended by assessee towards earning the exempt income in order to express his dissatisfaction on assessee's Sec 14A daim; HC darifies that it is sufficient if the AO demonstrates that assessee's claim was not correct, it is not necessary for him to decide the extent or the quantum of the incorrect claim, remarks that "There would be several instances where an AO can come to the condusion that the daim is incorrect but would be unable to assess the extent of the inaccuracy."; HC further darifies that the word 'determine' u/s 14A(2) is with respect to the exercise for computing expenditure in relation to exempt income in accordance with method prescribed and thus the AO is not required to quantify the amount prior to invocation to Rule 8D.

**Delhi Towers Ltd. Vs. DCIT [(2017) 78 taxmann.com 56, ITAT delhi Bench, dtd. 06.01.2017, in favour of revenue]**

### Mere failure of AO to record satisfaction while making sec. 14A disallowance won't destroy mandate of sec. 14A

Where Assessing Officer proceeded to make disallowance under section 14A, read with Rule 8D in respect of exempt dividend income earned by assessee, mere fact that Assessing Officer did not expressly record his satisfaction while making said disallowance, would not per se destroy mandate of section 14A

Where there was no fresh investment made by assessee during year under consideration and tax free dividend income had been earned from old investments, impugned disallowance made by Assessing Officer by invoking provisions of section 14A, was to be deleted

## Section 32 – Depreciation

**Sony India Pvt. Ltd. Vs. CIT [ITA No. 13&14/2012, Delhi high Court, dtd. 24.01.2017, in favour of assessee]**

### Reverses ITAT; Discontinued unit's assets forming part of 'block' eligible for depreciation

Delhi HC allows Sony India's appeal and reverses ITAT order for AY 2005-06, allows depreciation on assets forming part of 'block of assets' in respect of assessee's unit which was sold and ceased to exist during relevant AY; Rejects Revenue's stand that since the assets pertained to discontinued unit, depreciation u/s 32 cannot be allowed as assessee was neither the owner of assets nor assets were put to use in assessee's business; HC observes that despite the unit hived-off, 'block of assets' did not come to an end and assessee claimed depreciation thereon; Accepts assessee's reliance on Oswal Agro Mills Ltd. ruling and Ansal Properties and Infrastructure Ltd. rulings wherein the co-ordinate bench took note of legislative changes brought in Sec 50 (special provision for capital-gains computation on depreciable assets dealing inter-alia with a situation where any 'block of assets' ceases to exist on account of block being transferred) and allowed depreciation on assets of closed unit on the basis that they form part of 'block of assets'; Distinguishes Revenue's reliance on co-ordinate bench ruing in Allied Electronics and Magnetics Ltd. as it did not take into account the legislative changes and relied on Bombay HC ruling in Maharashtra Minerals Corporation Ltd rendered prior to introduction of 'block of assets' concept.

**M/s Giriraj Enterprises Vs. DCIT [ITA No. 1384 & 1385/Pun/2015, ITAT Pune bench, dtd. 23.02.2017, in favour of assessee]**

### Third Member allows 'additional depreciation' on windmill; Sec 32(1)(iia) amendment of 2012 applicable retrospectively

Pune ITAT third member rules that process of generation of electricity through windmill amounts to 'manufacture or production of article or thing' as contemplated u/s 32(1)(iia), allows assessee's 'additional depreciation ' daim on windmills for AYs 2011-12 & 2012-13; During relevant AYs, apart from daiming accelerated depreciation @ 80% u/s. 32(1)(i) (available to power generation companies),

assessee also claimed additional depreciation @ 20% u/s. 32(1)(iia), accepts assessee's stand that conversion of wind energy into electric energy by windmill amounts to 'manufacture ' as contemplated u/s 32 (1)(iia), relies on Madras HC ruling in Atlas Export Enterprises; Third member dissents with Accountant member view that in light of 'substantive' amendment made by Finance Act 2012 to extend & include activity of 'generation of power' under the ambit of Sec 32(1)(iia) with effect from April 1, 2013, benefit of initial depreciation/ additional depreciation could not be extended to windmills acquired prior to AY 2013-14; Third member agrees with Judicial member view that amendment brought to Sec. 32(1)(iia) was clarificatory and not 'substantive' in nature, accordingly was retrospective in application

**Principal Commissioner of Income-tax, Vadodara-2 Vs. IDMC Ltd. [(2017) 78 taxmann.com 285, Gujarat high Court, dtd. 25.01.2017, in favour of assessee]**

**Additional depreciation should be allowed on machinery which installed subsequent to year of acquisition**

Assessee purchased plant and machinery on 12-2-2004. However, certain damaged parts of machinery were replaced by supplier at Germany on 13-12-2004 and, therefore, said machinery could be installed on 15-4-2005. Assessee claimed additional depreciation on said plant and machinery in F.Y. 2005-06 which was denied by Assessing Officer on ground that as plant and machinery on which additional depreciation was claimed was not installed during year under consideration, twin conditions of acquisition and installation had not been satisfied. Additional depreciation to be allowed to assessee on plant and machinery acquired during assessment year but installed after end of year.

**Section 37 – General**

**CIT & Anr Vs. IBM Global Service Indian Pvt. Ltd. [Special leave to Appeal No. 19012/2014, The Supreme Court of India, dtd. 11.02.2017, in favour of assessee]**

**Dismisses Revenue's SLP in IBM; Human skill transfer, database payments - revenue expenditure**

SC dismisses Revenue's SLP against Karnataka HC ruling in the case of IBM Global Services India Private Ltd. ('assessee') for AY 1998-99; HC had held that payments for domestic customer database and transfer of human skills (with respect to employees originally recruited by erstwhile TATA IBM) amounted to revenue expenditure, despite benefit of enduring nature; With respect to customer database, HC had observed that payment was made for 'use' and not 'acquisition' of database, therefore, it was not capital expenditure; With regard to transfer of human skills, HC had noted that TATA IBM spent a lot of money to give training to those employees who were transferred to assessee-company and "therefore the payments have been made to save such revenue expenses.... Such expenditure cannot be termed as expenditure laid for carrying on the business."

**Section 43B – Certain deductions to be only on actual payments**

**Sagun Foundry (P.) Ltd. Vs. CIT [(2017) 78 taxmann.com 47, Allahabad High Court, dtd. 21.12.2016, in favour of assessee]**

**Sec. 43B applies to both employee and employer's contribution to PF and ESI**

Assessee deposited contributions towards provident fund and ESI before due date of filing of return, deductions allowable

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

**CIT Vs. Greenfield Hotels & Estates (P.) Ltd. [(2017) 77 taxmann.com 308, Bombay High Court, dtd. 24.10.2016, in favour of assessee]**

**Section 50C doesn't apply to transfer of leasehold rights in land**

Section 50C will not be applicable while computing capital gains on transfer of leasehold rights in land and buildings

**Section 54F – Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house**

**Shri Puranchand & Family (HUF) Vs. ITO [ITA No. 2974/Mds/2016, ITAT Chennai bench, dtd. 31.01.2017, in favour of assessee]**

**ITAT allowed Sec. 54F capital-gains relief to HUF though property purchased in co-parcener's name**

Chennai ITAT allows Sec. 54F benefit to assessee-HUF despite property purchased in the individual name of coparcener of HUF for AY 2012-13; Observes that though HUF is an independent assessable unit under IT Act, but under the common law, HUF cannot be considered to be a legal entity, states that HUF has to be represented through any one of the coparceners; Accordingly, ITAT rules that "When the nucleus of the HUF fund was used for purchase of a property in the name of any one of the coparcener, the property belongs to the HUF.."; Further rejects Revenue's stand that since assessee used borrowed funds and did not utilize the sale proceeds on transfer of a capital asset to invest in new property, deduction should be denied;

Holds that "when the assessee borrowed the funds and utilized in purchasing the capital asset and thereafter uses the sale proceeds or capital gain for repaying the loan borrowed, that would amount to sufficient compliance of the requirement of Section 54F of the Act."

**Section 57 – Deductions**

**Serendipity Apparels (P.) Ltd. Vs. ITO [(2017) 78 taxmann.com 154, ITAT Ahmedabad bench, dtd. 19.12.2016, in favour of assessee]**

**Depreciation to be allowed even if leasing income from machinery is taxable as residuary income**

n view of provisions of clause (ii) of section 57, in respect of cases falling under clauses (ii) and (iii) of sub-section (2) of section 56, deduction under section 32 has to be allowed

**Section 115JB – Special provision for payment of tax by certain companies**

**DCIT Vs. McNally Bharat Engineering Co. Ltd. [ITA No. 100/Kol/2011, ITAT Kolkata bench, dtd. 01.03.2017, in favour of assessee]**

**Retention money not part of "book profit" despite credit to P&L account**

Kolkata ITAT excludes retention money from book profits for the purposes of MAT calculation u/s 115JB in case of assessee (engaged in executing turn-key contracts) for AY 2006-07; Rejects Revenue's stand that AO cannot tinker with the book profit except for adjustments provided under Explanation 1 to Sec 115JB and hence retention money, once credited to P&L account, cannot be exduded; Notes that assessee's title over the retention money remains in suspense till assessee performs all the contractual obligations to the satisfaction of customer, accordingly, ITAT holds that retention money does not have character of income; ITAT rules that retention money cannot be regarded as income either under normal provisions of the Act or under MAT provisions u/s.115JB though credited to P&L account.

**JSW Steel Limited Vs. ACIT [ITA No. 930/Bang/2009, ITAT Mumbai bench, dtd. 13.01.2017, in favour of assessee]**

**Loan waiver credited to P&L as 'exceptional item' not 'book-profit' under MAT**

Mumbai ITAT rules that loan waiver of Rs. 314 cr., being on capital account, be reduced while computing book profits for the purposes of MAT calculation u/s 115JB for AY 2004-05; Notes that assessee credited the waiver of loan borrowed for capital asset acquisition in the P&L account as an exceptional item, however, by way of a note to MAT computation, assessee specifically gave a caveat that loan waiver was not includable in the 'book profit' and same was included only out of abundant precaution; ITAT notes that loan waiver is neither taxable under the normal provisions of the IT Act, nor can be recorded as operational profit in the P&L account as per Companies Act and relevant Accounting Standards, ITAT remarks that "a mere disclosure of an extraordinary item in the P&L account statement does not mean that the said item represents the 'working result' of the company"; Further, ITAT holds that even if company credited the amount to its P&L account, such P&L account needs to be adjusted with the amount of remission so as to arrive at the net profit in accordance with Schedule VI of the Companies Act; Taking note of the legislative intent, ITAT holds that "It was never the intention of the legislature that any receipts which is not taxable per se within the income tax provision or not reckoned as part of net profit as per the profit & loss account as per Companies Act can be brought to tax as a book profit.".

**Stryker Global Technology Center (P.) Ltd. Vs. ACIT [(2017) 78 taxmann.com 299, ITAT Delhi bench. Dtd. 24.01.2017, in favour of assessee]**

**Rent equalization reserve debited to P/L account to be added back while computing book profit**

Rent equalization reserve debited to profit and loss account was to be added back while computing book profit

**Section 147 – Income escaping assessment**

**Ingram Micro (India) Exports (P.) Ltd. Vs. DCIT [(2017) 78 taxmann.com 140, Bombay high Court, dtd. 04.01.2017, in favour of assessee]**

**No deemed escapement of income due to non-filing of return when AO didn't record satisfaction about escaped income**

For Explanation 2(a) to section 147 to apply, there must be (i) non-filing of return of income and (ii) satisfaction of Assessing Officer that income chargeable to tax had escaped assessment

**Section 153C – Assessment of income of any other person**

**Pr. CIT Vs. Smt. Lakshmi Singh [(2017) 78 taxmann.com 207, Karnataka High Court, dtd. 13.01.2017, in favour of assessee]**

**Sec. 153C powers can't be invoked if no incriminating evidence discovered during search**

Power under section 153C could not be invoked when no incriminating evidence was discovered during search.

**Section 179 – Liability of directors of private company in liquidation**

**Ajay Surendra Patel Vs. DCIT [(2017) 78 taxmann.com 339, Gujarat High Court, dtd. 23.02.2017, in favour of revenue]**

**Director also liable for tax default of Public Company practically acting like a private company**

The Company though named as Hirak Biotech Limited has acted practically as a Private Limited Company altogether and the Directors appeared to have acted in such a detrimental way which falls within the purview of section 179 of the Income Tax Act. There were huge financial transactions, serious default, total non-cooperation in the Company and the Company appears to have been spearheaded by one of the Directors only. There were serious defaults in financial transactions with Jammu and Kashmir Bank as also with Ahmedabad People's Co-Op. Bank of huge amounts and therefore, all these combination of circumstances makes this is a fit case to resort to a principle of lifting of corporate veil enshrined in section 179 of the Act.

**Section 192 – TDS on salary**

**EIH Ltd. Vs. ITO [(2017) 78 taxmann.com 242, ITAT Delhi bench, dtd. 14.02.2017, in favour of assessee]**

**Tips collected by hotel and paid to waiters can't be treated as salary of waiters**

No TDS is deductible under section 192 by hotel-employer from TIPS collected from clients and disbursed to staff. Since the contract of employment is not the proximate cause for the receipts of TIPS by the employee from a customer. Therefore, even if it is collected in the fiduciary capacity by the employer, it would be outside the dragnet of sections 15 & 17 of the Act and not liable for TDS u/s 192

**Section 194C – TDS on payments to contractors**

**Apollo Tyres Ltd. Vs. Deputy Comm. Of IT [(2017) 78 taxmann.com 195,**

**No TDS liability if payee not identifiable at time of making provision for expenditure at year end**

Where assessee-company could not ascertain identity of payees while making provision for expenditure under several heads of income at year end, assessee was not required to deduct tax at source on such provision

**Section 201 – Consequences of failure to deduct or pay**

**M/s. Twenty First Century Securities Ltd. Vs. ITO [ITA No. 464 & 465/Kol/2014, Kolkata ITAT bench, dtd. 03.02.2017, in favour of assessee]**

**AO's lower TDS certificate u/s 197, 'person specific', not 'transaction specific'; Deletes interest- levy u/s 201(1A)**

Kolkata ITAT deletes interest u/s 201 (1A) levied for alleged short deduction of TDS u/s 194A on interest payments made by assessee-company during AYs 2008-09 and 2009-10; Notes that the parties to whom assessee paid interest had obtained lower tax deduction certificates u/s 197 from their respective AOs, but the interest amount mentioned in such certificates was lesser than the actual interest payments made by assessee; Rejects Revenue's view that the lower TDS rate specified in the certificate u/s.197 was valid only in respect of the amount specified in the certificate and assessee ought to have deducted TDS at the normal applicable rate in respect of the remaining sum; ITAT refers to Sec. 197(2) alongwith relevant Rule 28AA(2), clarifies that once the certificate u/s 197(2) is issued for lesser/no TDS deduction, the person making the payment is at liberty to deduct tax at rates specified in the certificate and that "it does not make any reference to any income specified in such certificate"; ITAT rules that "It is therefore clear in the statutory provision that deduction of tax at source at lower rate is "person specific" and cannot be extended to the amounts specified by the recipient of the payment while making an application for grant of certificate u/s 197 of the Act...."

**State Bank of Mysore Vs. ITO(TDS) [ITA No. 207 to 210/PAN/2016, ITAT Panaji Bench, dtd. 13.02.2017, in favour of assessee]**

**No TDS-default proceedings on deductor if CBDT retrospectively restores deductee-VTU's Sec 12AA registration**

Panaji ITAT rules on assessee-bank's (State Bank of Mysore branches) challenge against initiation of proceedings u/s 201(1)/(1A) for non-deduction of TDS u/s 194A on interest payments to Vishveshvaraya Technological University ('VTU') during AYs 2011-12 to 2015-16, directs AO to await CBDT's decision in respect of petition filed by VTU u/s 119; Consequent to denial of exemption u/s 10(23C) to VTU by the SC, assessee branches were held liable u/s 201(1)/(1A) for not deducting TDS u/s 194A in respect of interest on deposits to VTU; Taking note of the fact that, VTU is granted Sec 12AA registration for AY 2016-17 and that it has applied to CBDT u/s 119(2)(b) praying for retrospective recognition of registration u/s 12AA, ITAT rules that in case CBDT accepts VTU's application, then assesses' liability to deduct TDS would efface; In the event CBDT doesn't consider VTU's application favourably, ITAT directs AO to re-adjudicate the issue in line with SC decision in Hindustan Coca Cola Beverage P. Ltd., after

considering the impact of Form 26A furnished by VTU; Directs that interest u/s 201(1A) shall be computed from the date from which tax was deductible to the date of filing of return by deductee-VTU, accordingly, ITAT restores the matter back to the file of AO.

**Section 264 – Revision of other orders**

**Agarwal Yuva Mandal (Kerala) Vs. UOI [WP(C) No. 26779 of 2016 (V), Kerala High Court, dtd. 10.01.2017, in favour of assessee]**

**Sec 143(1) intimation, despite not order, subject to CIT's revision u/s 264 to consider taxpayer's claim**

Kerala HC allows assessee's (a charitable society) writ, directs CIT to consider assessee's revision petition u/s 264 for AY 2013-14; Notes that assessee received intimation u/s 143(1) wherein certain deduction was not allowed, consequently a revised return was filed by assessee which was not considered by AO and also CIT declined to entertain assessee's revision petition u/s 264; HC observes that "a mere intimation does not amount to an order which could be revised u/s 264" in view of statutory provision u/s 143(1) which uses the word intimation and not order; However, considering that CIT's revisionary powers are very wide, HC opines that if there is failure on part of taxpayer in making a claim for deduction, the CIT may grant one more opportunity in the matter; Holds that "independent of the notice issued u/s 143(1)(a), …when the petitioner has filed a revised return and has sought for interference by the Commissioner, necessarily the claim has to be considered in accordance with law."

**Rajesh Kumar Aggarwal Vs. CIT [(2017) 78 taxmann.com 265, Delhi High Court, dtd. 03.01.2017, in favour of assessee]**

**Sec. 54F relief can be claimed under sec. 264 when time to file revised return has elapsed and assessment is completed**

Where assessee set off capital gain against capital loss and, thus, did not claim relief under section 54F in original return and time for filing revised return lapsed, if set off as claimed was not permitted, exemption under section 54F was to be granted in revision under section 264

## INTERNATIONAL TAXATION

**Section 9 – Income deemed to accrue or arise in India**

**Sical Logisticts Ltd. Vs. Asst. Director of Income tax [(2017) 78 taxmann.com 158, ITAT Chennai bench, dtd. 14.12.2016, in favour of assessee]**

**Vessel hire charges under time charter agreement couldn't be treated as royalty**

Hire charges paid by assessee for right to utilize space in vessels to foreign shipping companies, for moving coal from various ports in India, would not amount to royalty.

**Director of Income Tax (IT) Vs. A. P. Moller Maersk A S [(2017) 78 taxmann.com 287, The Supreme Court of India, dtd. 17.02.2017, in favour of assessee]**

**No FTS when global telecom facility provided to shipping agents helped them to discharge their functions**

Amounts received by assessee from its Indian agents for Global Telecommunication Facility 'Maersk Net' not taxable in India as fees for technical services. Global telecommunication facility was a common facility provided by assessee to all its agents across countries to enable them to discharge their role more effectively, which was an integral part of shipping business and hence payments towards same were not towards reimbursement of any technical services

**Chapter X – Special provisions relating to avoidance of tax**

**Global Payments Asia Pacific (India) (P.) Ltd. Vs. DCIT [(2017) 78 taxmann.com 262, ITAT Mumbai bench, dtd. 25.01.2017, in favour of assessee]**

**No ALP adjustments on payment made to AE when tax deduction of such exp. wasn't claimed**

Where consideration paid to AE for acquisition of goodwill and customer lists had not been considered by assessee while computing taxable income, same could not be subject to application of ALP contained in Chapter X of Act.

**Thomas Cook (India) Ltd. Vs. DCIT [(2017) 78 taxmann.com 198, ITAT Mumbai bench, dtd. 30.01.2017, in favour of assessee]**

**AMP exp. couldn't be held as international transaction without any evidence that it was incurred for benefit of AE**

Where all four comparables selected by assessee were in same business as that of assessee and there existed functional similarities between assessee and those comparables, they were to be accepted for benchmarking assessee's margin.

In absence of any direct or indirect evidence of incurring of AMP expenses by assessee for benefit of AE or on behalf of AE, AMP expenditure could not be considered as an international transaction.

**Nagarjuna Fertilizers & Chemicals Ltd. Vs. ACIT [(2017) 78 taxmann.com 264, ITAT Hyderabad Special bench, dtd. 13.02.2017, in favour of assessee]**

### Provisions of DTAA would override Sec. 206AA: ITAT Special Bench

If the rate of tax applicable under DTAA is lower than the 20% tax rate prescribed under section 206AA, TDS would have to be deducted at such lower rate even if the non-resident deductee fails to furnish his PAN

**Pr. CIT Vs. R.A.K. Ceramics India (P.) Ltd. [(2017) 78 taxmann.com 230, Andhra Pradesh High Court, dtd. 23.12.2016, in favour of assessee]**

### TPO couldn't apply 'benefit test' while determining ALP of royalty payments

Once it is admitted by revenue that assessee entered into a royalty agreement with AE and assessee claimed benefit from such agreement, in form of quantum increase in sales with no apparent increase in production, minimal product recalls and low after sales maintenance cost, and, consequently, paid royalty in terms thereof, it is not for TPO to make T.P. adjustment in respect of royalty payment by reducing rate of payment.

**Net App B.V. Vs. Deputy Director of Income tax [(2017) 78 taxmann.com 97, ITAT Delhi bench, dtd. 16.01.2017, in favour of assessee]**

### Group subsidiary can't be held as PE when it fails to satisfy requirement of Article 5 of treaty

In terms of article 5(7) of India-Netherlands DTAA, a holding of subsidiary by themselves would not become permanent establishment of each other, rather - A group subsidiary can be permanent establishment of holding company if it satisfies requirement of other paragraphs of article 5 of DTAA

### Circulars/Notifications / Instructions

**Notification No. 10/2017, dtd. 14.02.2017**

Vide the above notification, Central Government has notified all the provisions of Protocol between the Republic of India and the State of Israel for the avoidance of double taxation and for the prevention of fiscal evasion with respect to taxes of income and on capital. For detail please visit –

http://www.incometaxindia.gov.in/communications/notification/notification10_2017.pdf

**Circular No. 8/2017, dtd. 23.02.2017**

Vide the above circular, it has been clarified that the provision of clause (ii) od Sub section (3) of Section 6 (i.e. Place of Effective Management of the Company) shall not apply to a company having turnover or gross receipts of Rs. 50 Crores or less in a financial year.

## INDIRECT TAXES

### *Judicial pronouncements*

### SERVICE TAX

**JSW Ispat Steel Ltd. Vs. Com. Of Central Excise [(2017) 78 taxmann.com 176, CESTAT Mumbai bench, dtd. 04.11.2016, in favour of assessee]**

### No penalty when assessee had paid service tax and interest on pointing out by department

Where assessee collected service tax from a party, but deposited same along with interest only on being pointed out by AA under section 73A, penalty imposed upon assessee under section 78 unsustainable.

**Ballarpur Industries Ltd. Vs. Comm. Of Customs & Central Excise [(2017) 78 taxmann.com 35, CESTAT Mumbai bench, dtd. 26.10.2016, in favour of assessee]**

### Input Service Distributor can distribute credit even before obtaining registration

Input service distributor can distribute credit before obtaining registration; credit can validly be availed on basis of allocation chart if it contains all relevant information; valid invoice is not a must.

For Rent-a-cab service received by assessee for to and fro transportation of assessee's employees to job worker's place for purpose of assessee's manufacturing activity there, cenvat credit would be available.

For security service received at job worker's place in relation to activity carried out for assessee's manufacturing, cenvat credit would be available.

**Shree Pandurang SSK Ltd. Vs. Com. Of Central Excise [(2017) 78 taxmann.com 102, CESTAT Mumbai bench, dtd. 07.12.2016, in favour of assessee]**

### Credit available on input services even when depreciation is also claimed on it

There is no explicit provision in rule 4 (4) to restrict cenvat credit on input services if assessee has claimed depreciation

**Gimmco Ltd. Vs. Commissioner of Central Excise & Service Tax, Nagpur [TS-552-CESTAT-2016-ST, dtd.**

### Equipment renting constitutes 'deemed sale', not "tangible goods supply for use service"

CESTAT holds that activity of renting of earthmoving equipment involves 'transfer of right to use' and hence, taxable as "deemed sale" under MVAT Act r/w Article 366(29A) of Constitution, and no service tax would be liable under "Supply of Tangible Goods for Use" category from May 16, 2008; Perusing

the agreement, CESTAT notes that responsibilities casted upon hirer clearly show that right of possession and effective control of equipment vested with hirer, since it was liable for any misuse / abuse, safe custody / security and to settle disputes with third parties in relation to use; Agreement also provided for charging of VAT at 12.5% on monthly invoice value to be paid by hirer, notes CESTAT while referring to CBEC Circular No. MF (DR) 334/1/2008- TRU dated February 29, 2008 wherein it was clarified that "supply of tangible goods for use" leviable to VAT / sales tax as 'deemed sales' will not be covered under the scope of "Supply of Tangible Goods for Use" service; Relies on AP HC ruling in case of G. S. Lamba which laid down essential requirements for transaction to constitute "transfer of right to use goods", to hold that merely because restrictions were placed on lessee, it cannot be said that there was no right to use the equipment; As regards dropping of demand under "Business Auxiliary Service" category prior to May 16, 2008, CESTAT remands matter to Adjudicating Authority for fresh consideration absent detailed findings as such and non-existence of main ground, i.e. classification as "Supply of Tangible Goods for Use" service.

**Amyway India Enterprises Pvt Ltd Vs. Commissioner of Service Tax, New Delhi [TS-511-SC-2016-ST, dtd. 07.12.2016, in favour of revenue]**

### SC affirms taxation of distributors subscription towards representational & selling rights as 'franchise service'

SC finds no merit in assessee's appeal against confirmation of service tax on subscription received towards representational rights granted to various distributors to sell company products, under 'Franchise Service' category; Examining assessee-company's Business Starter Guide and Terms & Conditions, as also Rules of Conduct, CESTAT had noted that a distributor must inter alia be truthful and accurate in offering business opportunity or selling products, and must strictly adhere to guidelines, systems, procedures and policies mentioned therein; Refusing to consider the meaning of word "franchise" in other countries in light of definition u/s 65(47) of Finance Act, CESTAT observed that said sources were useful for interpretational purposes only in case of ambiguity in statute; Accordingly, CESTAT had held that distributor was not merely granted right to sell assessee-company's products, but also had representational rights, falling under 'Franchise Service' category; CESTAT had however, set aside demand i.r.o. Intellectual Property Services received from associate enterprises situated abroad for lack of speaking order, and accordingly remanded matter for de novo consideration by Adjudicating Authority.


## CENVAT CREDIT

**Montage Enterprises Pvt. Ltd. Vs. Commissioner of Central Excise, Noida [TS-592-CESTAT-2016-EXC, dtd. 04.07.2016, in favour of assessee]**

### Capital goods removed after use not clearance 'as such', directs refund of duty-paid

CESTAT allows assessee's appeal, removal of capital goods after a period of 'use' not 'removal as such', therefore, CENVAT credit taken at time of acquisition not to be reversed, in terms of CENVAT Credit Rules, 2004 (CCR); Assessee relied upon HC rulings in Cummins India Ltd., Raghav Alloys Ltd., Harsh International Pvt. Ltd., to contend that since capital goods have been removed / cleared after period of use, no duty / CENVAT credit reversible and amount deposited by way of reversal of duty, pursuant to audit-objection is illegal; CESTAT pursues relevant provisions of CCR containing provision for payment of duty on transaction value on removal of capital assets as waste and scrap introduced w.e.f. May 16, 2005 and provisions relating to proportionate depreciation introduced vide Notification dated November 13, 2007; Further, relies upon Madras HC ruling in Lakshmi Machine Works Ltd.; Accordingly, stating that, issue squarely covered by various HC rulings, directs for refund of amount deposited by assessee, i.e. duty paid on transaction value.

**Man Industries India Ltd. Vs. Commissioner of Central Excise Large Taxpayer Unit, Mumbai [TS-538-HC-2016(MAD)-ST, dtd. 08.12.2016, in favour of revenue]**

### Disallows credit of 'outward freight' not included in assessable value; HC ratios inapplicable

CESTAT disallows CENVAT credit of tax paid on outward freight not forming part of 'assessable value' of manufactured goods; According to CESTAT, accepting assessee's contention that value of service claimed as "input service" is not includible in assessable value, would result in availment of undue privilege of credit balance by paying lower tax and retention of tax recovered from customer, which is clearly not intent of CENVAT Credit Rules (CCR); CCR do not purport to be an exemption mechanism, but rather govern the manner in which a fund of 'non-money' is

acknowledged as means of discharging tax/duty obligation and regulates its operation: Stating that, "foundation of Cenvat Credit Rules, 2004 is inherent relationship with tax liability for without a tax liability on output goods or services, the Rules are merely academic", CESTAT holds that quantum of credit is linked to ingredients that constitute value for tax liability; Rejects assessee's reliance on various HC rulings such as ABB Ltd. and Parth Poly Woven Pvt Ltd, stating that they do not pertain to determination of dispute whether credit availed was in confirmity with CENVAT Credit scheme, and on other hand, relies on decision of Maharashtra Scooters Ltd. to conclude that tax paid on outward freight is unavailable to offset duty liability on output goods.

**Atlas Automotive Components Private Limited and Anr. Vs. Union of India and Ors [TS-576-HC-2016(BOM)-EXC, dtd. 20.12.2016, in favour of revenue]**

### MODVAT credit reversible when final product cleared under purchaser's duty remission claim

HC directs reversal of input credit against clearance of aluminium castings under claim of duty remission by buyer for use in specific industrial process, in terms of Chapter X r/w Rule 57C of Central Excise Rules 1944; Notes Adjudicating Authority's finding that assessee was reversing credit initially but resorted to jugglery subsequently, and since goods cleared under Chapter X procedure had not suffered any duty payment, MODVAT credit was reversible; Rejects assessee's contention that choice of buyer to either claim MODVAT credit of duty paid or claim remission doesn't make the goods exempt or chargeable to nil rate of duty; Relies on Kirloskar Oil Engines decision wherein it was held that MODVAT Credit in respect of inputs, which have been used in manufacture of final product that is fully exempted from whole of excise duty, is not available; States that since assessee had cleared goods without payment of duty, the case was covered by aforesaid decision, thus credit taken on aluminium ingots (inputs) was incorrect.


**Tata Toyo Radiators Ltd. vs. Commissioner of Central Excise, Pune-I [TS-548-CESTAT-2016-EXC, dtd. 04.11.2016, in favour of revenue]**

### Interest on wrongly 'availed' CENVAT credit recoverable under Rule 14; Applies Ind-Swift ratio

CESTAT upholds interest liability on wrong availment of CENVAT credit, under Rule 14 of CENVAT Credit Rules r/w Sections 11A & 11AB of Central Excise Act; Refuses to accept assessee's contention that such wrong availment merely entailed an entry in CENVAT Credit Account, not causing any loss to Revenue and since the same was reversed voluntarily, interest liability would not accrue; Also rejecting assessee's reliance on Karnataka HC decision in Bill Forge Pvt Ltd, CESTAT notes that as per Rule 14, where CENVAT credit is taken or utilized or refunded erroneously, same alongwith interest is recoverable from manufacturer / service provider and such recovery shall be effected in terms of Sections 11A & 11AB of Central Excise Act; Noting that Bill Forge Pvt Ltd decision was held per incuriam by coordinate bench in case of Dr. Reddy's Laboratories Ltd, CESTAT follows Apex Court ratio in Ind-Swift Laboratories Ltd; SC in said case had held that even if credit had been wrongly availed, liability to interest would arise inasmuch as Rule 14 covers both situations – availment or utilization and the word 'or' is disjunctive in nature.

**Sai Construction Pvt. Ltd. Vs. Commissioner of Central Excise, Pune-III [TS-495-CESTAT-2016-ST, dtd. 16.05.2016, in favour of assessee]**

### Grants credit of services used towards property renting; Denial basis occupancy rate, incorrect

CESTAT allows CENVAT credit of tax paid on services like 'repair and maintenance', 'consultancy', 'courier', 'telephone' & 'office rent' used towards rendition of "renting of immovable property service" during the period October 2008 to September 2013; Sets aside denial of credit based on occupancy rate of every month during this period, stating that entire property (building) was on offer for rent and to the extent that it was occupied at different times, services utilized thereat are attributable to the area available for rent; CENVAT Credit Rules do not envisage proportional allocation, they govern the accumulation of fund of credit for payment of duties / taxes and so, acknowledgment of disallowance of credit is to be perceived in its appropriate context and not as a privilege of exemption conferred by tax administration at its discretion; Observes that CENVAT credit had been availed by virtue of Rule 3, and as taxes were paid on common services used for property which was not in use by assessee as a 'recipient', CENVAT credit claim was within the scope of the Rules; Distinguishes coordinate bench decisions in Treat Convenience Foods, Daiichi Karkaria Ltd, Godrej & Boyce Manufacturing Co. Ltd cited by Revenue on facts.

## Circulars/Notifications / Instructions

**Notification No. 8/2017-ST dtd. 20.02.2017**

Vide above notification, CBEC has directed that the service tax payable on the services by operators of Common Effluent Treatment Plant under Section 66B of the Finance Act, 1994 for the period commencing on and from the 1st day of July, 2012 and ending with the 31st day of March, 2015, shall not be required to be paid.

**Notification No. 9/2017-ST, dtd. 28.02.2017**

Vide above notification , CBEC has directed that the service tax payable on the services by way of admission to a museum under Section 66B of the Finance Act, 1994 for the period commencing on and from the 1st day of July, 2012 and ending with the 31st day of March, 2015, shall not be required to be paid.

**Circular No.204/2/2017-Service Tax dtd 16.02.2017**

Vide above circular, it has been clarified that goods imported into a customs station in India intended for transhipment to any country outside India, the destination of goods is not a place in taxable territory in India but a country other than India if the same is mentioned in the import manifest or the import report as the case may be and the goods are transhipped in accordance with the provisions of the Customs Act, 1962 and rules made there under. Hence, with respect to such goods, services by way of transportation of goods by a vessel from a place outside India to the customs station in India are not taxable in India as the destination of such goods is a country other than India.

**Instruction F. NO. 206/01/2017-CX 6**

Vide the above instruction, it is directed that assessees should be requested that CAS-4 certificate of the financial year ending on 31st March shall be issued by 31st December of the next financial year. For example, for the Financial Year 2016-17, CAS-4 certificate should be issued by 31.12.2017. The assessing officer shall thereafter finalize the provisional assessment expeditiously.

## Due Dates of key compliances pertaining to the month of March 2017:

| | |
|---|---|
| *5th March* | *Payment of Excise duty for the month of February* |
| *6th March* | *Payment of Service Tax & Excise duty paid electronically through internet banking for the month of February* |
| *7th March* | *TDS/TCS Payment for the month of February* |
| *10th March* | *Excise Return* |
| *15th March* | *PF Contribution for the month of February* |
| *15th March* | *Final installement of Advance tax* |
| *21st March* | *ESIC payment of for the month of February* |
| *31st March* | *Payment of Service Tax & Excise duty for the month of March* |
| *31st March* | *Filing of belated pending income tax returns of A.Y. 2015-16* |

**OUR OFFICES:**

- **MUMBAI**
  303, Konark Shram, 3rd Floor, 156 Tardeo Road, Tardeo, Mumbai-400 034.
  Tel. : 91- 7303221942 / 7603321942
- **PUNE**
  E-2-B, 4th Floor, The Fifth Avenue, Dhole Patil Road Pune.
  Tel. : 91-20-26166044/55, 9579345401 Fax : 91-20-30529401
- **SURAT**
  'SNK House' 31-A, Adarsh Soc, Opp. Seventh Day Adventist High School, Athwalines, Surat-395 001.
  Tel. : 91-261-2656271/3/4 & 9510299547 Fax : 91-261-2656868
- **AHMEDABAD**
  304, Super Plaza, Sandesh Press Road, Vastrapur, Ahmedabad-380054
  Tel : 91-079-40032950