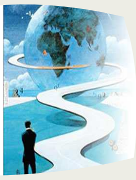

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SNK Newsletter

DIRECT TAXES

Judicial pronouncements

CIT v. Standing Conference of Public Enterprises (ITA No. 1409 of 2008)(Delhi HC)

Allowability of exemption claimed by a society on principle of mutuality notwithstanding its revenue generating activities

Simply because some incidental activity of the assessee is revenue generating, does not provide any justification to hold that it is tainted with "commerciality" and reaches a point where relationship of mutuality ends and that of trading begins.

Om Shanti Co-op Society v. ITO (ITA No. 2550/ Mum/2008)

Consideration for permission to use TDR / FSI not chargeable to tax

The assessee co-op housing society gave permission to a developer to construct 2 floors and 8 flats on the building belonging to the society by using the TDR / FSI available to the developer. In consideration, the developer paid Rs. 26 lakhs to the assessee and Rs. 66 lakhs to its members aggregating Rs. 92 lakhs. The AO took the view that the assessee had relinquished its right "to load TDR and construct additional floors" and as there was no cost of acquisition, the entire consideration of Rs. 26 L was assessable as long-term capital gains. On appeal, the CIT (A) took the view that even the amounts received by the Members were assessable in the assessee's hands. He accordingly enhanced the assessment and directed that the consideration be taken at Rs. 92 L. On appeal by the assessee, HELD reversing the CIT (A):

The assessee – society and its members had no right to construct additional floors on the existing building as they had exhausted the right available while constructing the flats in the building. The TDR was not obtained by the assessee and sold to the developer. Accordingly, the assessee had not transferred any existing right to the developer nor any cost was incurred / suffered prior to permitting the developer to construct the additional floors. In the absence of a cost of acquisition, the judgement in B. C. Srinivasa Setty 128 ITR 294 (SC) applied and the consideration was not assessable as capital gains.

CIT v. Hybrid Rice International (P) Ltd. (2009) 30 (I) ITCL 424 (Del-HC)

Computation of Actual cost when depreciation was not claimed in earlier years

Where no depreciation was claimed in earlier years, because the assessee's income was exempt from tax during those years, the actual cost for computation of depreciation in the first year when income was first offered for taxation would not be reduced by notional depreciation for the period during which income was exempt from tax.

M/s ONGC Videsh Ltd. (Taxpayer) (2009-TIOL-758-ITAT-DEL)

Allowability of depreciation on participatory right in the nature of license

The issue before the Tribunal was allowability of depreciation on participatory right to carry out the hydrocarbon operations, acquired by the Taxpayer, pursuant to a Production Sharing Arrangement (PSA). The ITAT held that the participatory right acquired by the Taxpayer was in the nature of asset, in the form of 'license' i.e. license to have an access and to carry out exploration, development and production of hydrocarbon operations. Considering this, it was held that the participatory right is eligible for depreciation under the provisions of the Indian Tax Law (ITL).

CIT v M/s Hi Tech Arai Limited (Madras HC) [Tax Case (Appeal) Nos. 670 and 671 of 2009]

Additional depreciation on new asset not subject to setting up or operational connectivity with main business

The issue for consideration before the HC was, whether the setting up of new machinery or plant, which is not used in the main business of the Taxpayer, is eligible for additional depreciation under the ITL?

Background and facts

- The Taxpayer is engaged in the business of manufacture of oil seeds, moulded rubber parts etc., apart from power generation.
- The Taxpayer had set up 2 windmills in addition to the existing 4 windmills, thereby increasing the power generation capacity more than 50%.
- The power generated from the wind energy was used for self-consumption and the surplus was sold to the State Electricity Board.
- The ITL provides for the allowability of additional depreciation, when a new undertaking is set up or there is a substantial expansion of an existing undertaking by a taxpayer which is engaged in the business of manufacture or production of any article or thing.
- For the relevant assessment years, the Taxpayer claimed additional depreciation on setting up of windmills which was disallowed by the Tax Authority, on the ground that the main business of the Taxpayer was not power generation.
- The first and second appellate authorities allowed the claim of additional depreciation made by the Taxpayer. Aggrieved by this, the Tax Authority preferred an appeal before the HC.

Contentions of the Tax Authority :- The setting up of the windmill has absolutely no connection with the Taxpayer's main business of manufacture of oil seeds etc.

Ruling of the HC

- For the purpose of claiming additional depreciation under the ITL, the condition to be satisfied by a taxpayer already engaged in the business of manufacture or production of any article or thing, is to set up a new machinery or plant.
- The setting up of a windmill will fall within the expression 'setting up of new machinery or plant'.
- The new machinery or plant need not have any operational connectivity to the article or thing that was being manufactured by the Taxpayer.
- It was held that the Taxpayer was entitled to the claim of additional depreciation on setting up of the windmill.

CIT v. Bharat Alumunium Co. Ltd.

(Delhi HC) (ITA Nos. 532,1484, 1486,1 487,1592,1593,1670 and 1671 of 2006)(ITA Nos. 657 and 659 of 2007)(ITA No. 1489 of 2008 and 323 of 2009)

Depreciation is allowable on non-operating plant and machinery when they are part of block of assets

The assessee purchased machinery which was **not put to use during the year** though it formed a part of the "block of assets". On the question whether depreciation on the said machinery was allowable, the Tribunal held that once a particular asset falls within the block, it is added to the WDV and depreciation is to be allowed on the block. The individual asset loses its identity and the question whether an individual asset is put to use in a particular year or not is irrelevant inasmuch as the requirement of law is to establish the use of the block of assets and not the use of particular equipment. On appeal by the Revenue, HELD affirming the Tribunal's order:

Judicial pronouncements

(i) The rationale and purpose for which the concept of block asset was introduced, as reflected in the CBDT's Circular dated 23.09.1988 is that once the various assets are clubbed together and become 'block asset' within the meaning of s. 2(11), it becomes one asset. Every time, a new asset is acquired, it is to be thrown into the common hotch-potch, i.e., block asset on meeting the requirement of depreciation being allowable at the same rate. Individual assets lose their identity and become an inseparable part of block asset insofar as calculation of depreciation is concerned;

(ii) The fusion of various assets into the block asset gets disturbed only when the eventuality contained in clause (iii) of s. 32 takes place, viz., when a particular asset is sold, discarded or destroyed in the previous year (other than the previous year in which first brought in use). Even in that event, the amount by which the moneys payable in respect of that particular building, machinery, etc. together with the amount of scrap value is to be deducted from total written down value of the 'block asset';

(iii) Though as per s. 32(1) the asset is to be owned and "used" for the purpose of business or profession, the expression "used for the purpose of business" when applied to block asset would mean use of block asset and not any specific items in the said block as individual assets have lost their identity after becoming inseparable part of the block asset;

(iv) The fact that under the second proviso to s. 32 assets acquired after 30th Sept shall be entitled to 50% depreciation of amount admissible does not mean requirement of user of individual asset remains intact. In the first year when the particular asset is acquired, user of the asset is required. In subsequent years, the user of individual assets is not required.

Swati Synthetics v. ITO (ITAT Mumbai) (ITA No. 1165/Mum/2006)

Under "block of assets" even a closed unit is eligible for depreciation

The assessee had two divisions, one at Dombivili and the other at Surat. The division at Surat was closed since two/three years. The assessee claimed depreciation on the assets of the said Surat division which was rejected by the AO and the CIT (A) on the ground that the assets were not "used" and depreciation could not be allowed. On appeal by the assessee, HELD allowing the appeal:

(i) In Gulati Saree Centre 71 ITD 73 (Chd.) (SB), it was held that even after introduction of the concept of block of assets, the identity of individual assets was not lost & the AO could restrict depreciation u/s 38(2) having regard to the user of the assets. However, s. 38 (2) applies only to a case when the asset is not exclusively used for business purposes but is used for non business purposes as well. S. 38 (2) does not apply to an asset which is neither used for business purposes nor for non business purposes but remains in the block of assets;

(ii) The concept of allowing depreciation on block of assets was introduced w.e.f. 01.04.1988 with the object of avoiding separate book keeping. A harmonious reading of the expression 'used for the purposes of the business', would show that it only means that the assessee has used the machinery for the purposes of the business in earlier years;

(iii) The doubt as to how deprecation can be allowed on assets which are not used for the purpose of business is answered by the legislative scheme that though the profit of that year is reduced, the WDV is reduced and the gain is taxed u/s 50 when the asset is sold and block ceases to exist;

(iv) The "use" of an individual asset can be examined only in the first year when the asset is purchased. In subsequent years the use of block of assets is to be examined. The existence of an individual asset in block of asset itself amounts to use for the purpose of business. This is supported by the proviso to s. 32 which provides half depreciation for assets acquired in the year and held for less than 180 days. Once an asset is included in the block of assets it remains there and can only be removed when it is sold, discarded etc u/s 43(6)(c)(i)(B) or used for non-business purposes u/s 38 (2) or where the entire block ceases to exist.

(v) On facts, though the entire division was closed, the assets were a part of the block of assets and depreciation was allowable thereon

Judicial pronouncements

Art Leasing Ltd. v. CIT (ITA No. 1578 of 2009)(Kerala HC)

NBFC - Deduction of bad and doubtful debts

NBFCs are not entitled to deduction of any provision created for bad and doubtful debts, no matter such provision is created on RBI guidelines.

Dy. CIT v. Sun Pharmaceutical Ind LTD (2009) 227 CTR (Guj) 206

Capital or Revenue expenditure - Advance lease rent - S. 37 (1).

Assessee acquiring land on lease for a period of 99 years, making payment of advance rent in the sum of Rs 48 crores, and paying monthly rent of Rs 40 per month, advance rent paid was allowable revenue expenditure.

CIT v. Priya Viilage Road shows Ltd (2009) 185 Taxman 44 (Delhi)

Business Expenditure - Feasibility report of new project – S. 37 (1).

If expenditure incurred for preparation of feasibility report of a new project, is in respect of same business which is already carried on by assessee, even if it is foe expansion of business , namely to start a new unit which is same as earlier business, and there is unity of control and a common fund such expenditure is to be treated as revenue expenditure.

Hira Ferro Alloys Ltd v. DY CIT (2009) 31 DTR (Chhattisgarh) 20

Business expenditure - Puja expenses

Expenditure incurred on Vishwakarma Puja by a company cannot be treated as expenditure wholly and exclusively for the purposes of business of the company, and it cannot be allowed any deduction under section 37(1) towards such expenditure.

The Surat Electricity Co. Ltd. v. ACIT (ITA No. 2152/Ahd/2004)

Donation made out of commercial expediency is an allowable expenditure u/s 37(1)

If the expenditure has been incurred by the assessee voluntarily, even without necessity, but for the promotion of business, the deduction would be permissible u/s 37(1).

S. Zoraster & Co v. CIT (2009) 31 DTR (Raj) 107

Capital or revenue- compensation for termination of agreement

Compensation received by assessee from the other party for termination of the agreement for transfer of property to be treated as capital receipt and not as revenue receipt.

Govindbhai C. Patel v. DCIT (ITA No. 1675/Ahd/2009)

Section 41(1) of Income Tax Act, 1961 applies only to trading liability not to other types of liabilities

Where the assessee received some amount as a liability, which was not claimed as deduction or expenses in any of the years, and the same was written off as compensation/ damages for relinquishment of right to sue in court of law, the provisions of section 41(1) or section 68 would not apply to the writing off that liability.

Mr. Bomi S. Billimoria v. ACIT (ITA No.2120/Mum/1998)

Gains on sale of shares allotted under cashless ESOP plan not taxable as capital gains when the date of exercise of options and date of sale is same

It was held that in case no payment has been made for acquiring shares under Employee Stock Option Plan, the gain on sale of said shares should not be liable to capital gains tax. As the date of exercise of options and date of sale is same and further, there is no difference between the sale price and the deemed cost of acquisition, in any case, it is not short term capital gains.

ACIT v. United Motors (I) Ltd. (2009-TIOL-693-ITAT-MUM)

Income from transfer of leased premises is taxable as 'Capital Gains' under the Income-tax Act

It was held that income from transfer of a leased premises without transferring its own business amounts to extinguishment of the taxpayer's right in the capital asset as per section 2(47) of the Income-tax-tax Act, 1961 (the Act).

The Tribunal also observed that such transfer of a leased premise without transferring the business cannot be considered as loss of source of income. Further, the source of income is always the business which is capable of producing some income and not the building from where the source of income is operated. Accordingly, the Tribunal held that the building itself cannot be considered as source of income.

Prasanna Trust v. DIT (Exemption) (ITA No. 1391/Bang./2008)

Registration u/s 80G(5)(vi) cannot be denied to a charitable trust even if it is running some activity that yields profit

Even if to achieve the objectives of giving relief to poor and in furtherance of education and giving medical relief, if the assessee is running some activity that yields profit, even then the registration cannot be denied.

ITO v. Arihant Tiles & Marbles (Supreme Court)(Civil Appeal No. 8036 of 2009)

Cutting & polishing marble blocks is "production" for s. 80-IA

The assessee was engaged in conversion of marble blocks into slabs and tiles by sawing and polishing. The question was whether this amounts to "manufacture or production of article or thing" for purposes of deduction u/s 80IA. HELD, deciding in favour of the assessee:

(i) The word "production" is wider in its scope than the word "manufacture". It means manufacture plus something in addition thereto. This ground reality is now noted in s. 2(29BA) inserted by Finance Act, 2009 w.e.f 1.4.2009. In Lucky Minmat 245 ITR 830 (SC), it was held that mere mining of limestone and marble and cutting the same before it was sold will not constitute "manufacture" or "production" but conversion into lime and lime dust could constitute the activity of manufacturing or production. In Aman Marble Industries 157 ELT 393 (SC) it was held that cutting of marble blocks into marble slabs was not "manufacture" but the Court was not concerned whether there was "production".

(ii) While mere extraction of stones and its cutting into slabs may not constitute manufacture the activity of polishing and conversion of blocks into polished slabs and tiles amounts to "manufacture" or "production" because the conversion of blocks into polished slabs and tiles results in emergence of a new and distinct commodity. There is accordingly "manufacture or production" for s. 80-IA

(iii) If the contention of the Department that the activity undertaken by the assessee is not manufacture is to be accepted there would be serious and disastrous revenue consequences because the assessees would plead that they were not liable to pay excise duty, sales tax etc. because the activity did not constitute manufacture.

Growth Avenue Securities v. DCIT (ITA No. 3912/Del/2005)

Even exempt capital gains are includible in "book profits"

The assessee earned long-term capital gains of Rs. 40.57 L which was not chargeable to tax u/s 54EC. As the said gains were credited to the P&L A/c, the assessee excluded the gains whilst computing "book profits" u/s 115JB in view of the Special Bench judgement in Sutlej Cotton Mills 45 ITD 22 (Cal) (SB) where it had been held that non-taxable capital receipts had to be excluded from book profits. The AO and the CIT (A) rejected the claim. On appeal by the assessee HELD dismissing the appeal:

(i) The effect of the judgements of the Supreme Court in Apollo Tyres and HCL Comnet is that if the accounts are prepared as per Schedule VI to the Companies Act, the AO has no jurisdiction to make adjustments to the "book profits" other than what was provided in the Explanation to s. 115JB. There is no scope for excluding non-taxable profits from the "book profits" as s. 54EC is not specified in the Explanation;

(ii) The assessee had itself included the capital gains in its P&L A/c and it was not the assessee's case that its' accounts were not as per Schedule VI;

(iii) It is true that the profits shown in the P&L A/c can be adjusted in respect of matters which are separately disclosed in the accounts or in the notes to accounts. E.g. prior period / extraordinary items shown separately (Khaitan Chemicals 307 ITR 150 (Del)) and current year's depreciation shown separately in the notes (Sain Processing 17 DTR 215 (Del)). However, as it is not the assessee's case that the capital gains was not otherwise includible in the net profit, this principle does not apply;

(iv) Though sub-section (5) of s. 115JB provides that "save as otherwise provided in this section, all other provisions of this Act shall apply", the normal provisions of the Act are not relevant for the purpose of computing "book profits".

Judicial pronouncements /Circulars / Notification
(International Taxation)

CIT v NIIT Ltd. (Taxpayer) [2009-TIOL-533-HC-DEL-IT]

Composite arrangement under franchises agreement not liable for TDS as rent

On the issue of whether the amount paid by the Taxpayer to the franchisees, pursuant to a franchises agreement (Agreement), can be considered in the nature of rent, for the purpose of tax deduction at source (TDS) under the Indian Tax Law (ITL). The HC held that the Agreement, when read as a whole, indicated that the main intention of the parties to the Agreement, was to carry on the business and share the revenues therefrom and not to let out the premises and infrastructure therein, in isolation. Hence, the payments made cannot be considered in the nature of rent and are not liable for TDS.

Raj Rani Mittal v. ITO (ITA NO. 2275/DEL/2009)

Penalty under section 271(1)(c) is not imposable in each and every case wherever income is added

If the income is surrendered with the condition that no penalty be imposed on the assessee then the Assessing Officer would not be justified in imposing the penalty.

Judicial Pronouncements - International Taxation

DDIT (IT) v. Star Cruises (India) Travel Services Pvt. Ltd. (ITA No. 3818 to 3823/Mum/2004 and ITA No. 6499/Mum/2006)

Income of a non-resident shipping company can not be charged to tax in India unless either passengers, who have booked cruise package, are traveling from or to any port in India

Merely because assessee is doing booking of different cruise tour packages for a foreign company, that cannot per se be decisive for holding that said foreign company is having "business connection" in India within the meaning of section9(1)(i).

DCIT v Dolphin Drilling Pte. Ltd. (2009-TIOL-754- 1TAT-DEL)

Applicability of year end rate for conversion of business income earned in foreign currency

The ITAT held that the conversion of business income earned in foreign currency into INR, in accordance with Rule 115 (Rule) of the Indian Tax Law (ITL), is to be made by adopting the conversion rate prevailing at the end of the tax year. This ruling provides guidance on the application of Rule 115 that the conversion of income earned in various foreign currencies into USD, prior to its conversion into INR, is not required. The requirement under the Rule is only to convert ‘income from profits and gains from business’ i.e. the net result at the year-end rate.

It also held that the Taxpayer, a company incorporated in Singapore and engaged in the business of hiring out drill-ship in India, is entitled to claim depreciation on the value of the drill-ship. For admissibility of the depreciation on the drill-ship, the ITAT took into account the diverse evidence of ownership of the drill-ship furnished by the Taxpayer, including the purchase agreement, the registration certificate, the customs clearance record etc. Considering this evidence, the ITAT confirmed that the Taxpayer had adequately substantiated both its ownership over the drill-ship as well as the actual cost incurred and held that the Taxpayer was entitled to depreciation on the drill-ship.

JCIT v. State Bank of Mauritius Ltd. (2009-TIOL-712-ITAT-MUM)

Foreign company having Permanent Establishment in India cannot be taxed at the rate applicable to domestic company

It was held that the foreign company having Permanent Establishment (PE) in India cannot be taxed at the rate applicable to domestic company in view of insertion of Explanation 1 to section 90 of the Income-tax Act, 1961 (the Act) by Finance Act 2001 with retrospective effect from 1 April 1962. Accordingly, it will have to pay tax at the rate prescribed in the Finance Act (i.e. at higher rate) even if a taxpayer is covered by the provisions of the India-Mauritius tax treaty (the tax treaty).

Circulars / Notifications

Notification No. 94/2009/F.NO. 142/25/2009-SO (TPL), dated 18-12-2009

Valuation of perquisites

Rules are prescribed for the valuation of certain kind of perquisites after abolition of fringe benefit tax and the same would be applicable w.e.f April 1, 2009. You can view the same by clicking on the following link:

http://law.incometaxindia.gov.in/TaxmannDit/DispCitation/ShowCit.aspx?fn=http://law.incometaxindia.gov.in/DitTaxmann/Notifications/IncomeTaxAct/2009/Not94_2009.htm

CCE v. Nicholas Piramal (India) Ltd. (CEA No. 9 of 2009)(Bombay HC)

Method prescribed in Rule 6(3)(b) of Cenvat Credit Rules, 2002 is mandatory and not directory

Once the law itself has laid down the circumstances under which credit can be availed, it is that method by which the credit can alone be availed; it is not open to an assessee to contend that some other method is also available and the assessee has the choice of claiming credit or reversing the same.

CCE v. Manigarh Cement Works (Appeal No. E/516/08)(Mumbai CESTAT)

Benefit of Cenvat Credit qua such service having no nexus with manufacture or clearance of excisable goods cannot be allowed

Any service which is apparently covered by the parameters of the inclusive part of the definition of "input service" should also satisfy the quintessential requirements of the main part of the definition and, accordingly, any person claiming the benefit of CENVAT credit on input service in terms of the inclusive part of the definition of "input service" should establish that such service was used, directly or indirectly, in or in relation to the manufacture of his final products or the clearance of such products from his factory.

Circulars / Notifications

Circular No. 907/27/2009- CX,_New Delhi, dated the 7th December, 2009, F.No.267/141/ 2009-CX8

Clarification on issues related to reversal of cenvat credit on WIP/ finished goods written off in the books of accounts

References have been received from field formations stating that as per Rule 3(5B) of CENVAT Credit Rules, 2004, if the value of inputs is fully written off, then the manufacture is required to pay an amount equal to cenvat credit taken. However, there is no provision to demand reversal of credit taken on inputs which have gone into manufacture of work in progress (WIP), semi finished goods and finished goods which have also been written off fully in the books of accounts.

2. The matter has been examined. Rule 3(5B) of the CENVAT Credit Rules, 2004, provides that if the value of any input on which cenvat credit has been taken is written off fully in the books of accounts, then the manufacturer is required to reverse the credit taken on the said input. As far as finished goods in concerned, it is stated that excise duty is chargeable on the activity of manufacture or production. Even though liability for payment of tax has been postponed to the time of removal of goods for the factory, but still the legal liability to pay the excise duty has been fastened on the goods, when it has been manufactured or produced. Therefore, normally all goods manufactured suffer excise duty at the time of removal, but if the manufactured goods are destroyed due to natural causes etc., Rule 21 of Central Excise Rules, 2002, provides for remission of duty. Further, Rule 3(5C) of CENVAT Credit Rules, 2004, also requires reversal of credit on the inputs when the duty is ordered to be remitted under the said Rule 21. Therefore, if the goods have been manufactured, in that case, a manufacturer is liable to pay excise duty unless duty is remitted under Rule 21. Therefore, if the value of finished goods is written off, the manufacturer would be liable to pay excise duty or he would be required to reverse the credit on the inputs used, if duty has been remitted on finished goods.

3. As regard writing off work in progress (WIP), it is stated that if the WIP has reached the stage, when it can be considered as manufactured goods, in that case, the same treatment as applicable to finished goods, discussed in para2 above would apply. However, if the activity carried out on the WIP goods cannot be considered as amounting to manufacture, in that case, the said goods should be considered as input and the treatment for reversal of credit applicable to input would be applicable.

Circular No. 909/29/09-CX, F.No. 6/4/2009-DS (CX.1 & 4), dated 12 December 2009

Inclusion of After Sale Service and Pre-Delivery Inspection Charges in the Assessable Value

Please refer to the Minutes of the Conference of Chief Commissioners at Shillong on 30th and 31st October 2009 with regard to the issue mentioned above at point No 2.9.

2. On this issue, the Board has vide point No 7 in circular No. 643/34/2002-CX dated 1-7-2002 clarified as follows:

What about the cost of after sales service charges and pre delivery inspection (PDI) charges, incurred by the dealer during the warranty period ?	Since these services are provided free by the dealer on behalf of the assessee, the cost towards this is included in the dealer's margin (or reimbursed to him). This is one of the considerations for sale of the goods (motor vehicles, consumer items etc.) to the dealer and will therefore be governed by Rule 6 of the Valuation Rules on the same grounds as indicated in respect of Advertisement and Publicity charges. That is, in such cases the after sales service charges and PDI charges will be included in the assessable value.

3. The tribunal in the case of Maruti Udyog Limited [2004 (170) E.L.T. 245 (Tri. - Del.)] held that these charges are not includible in the assessable value as these do not accrue to the manufacturer. But recently, the Tribunal has in the case of Maruti Udyog Ltd, [2009 (238) ELT 186 (T-Del)] doubted the correctness of its earlier decision referred to above, and referred the following question for consideration by a Larger Bench.

"Whether the charges towards pre-delivery inspection and after-sale-services received by dealers from buyers of the cars are to be included in the assessable value of cars in the light of the definition of 'transaction value' given in Section 4(3)(d) of the Central Excise Act."

4. Further, the Supreme Court has in the case of Grasim Industries (C.A. No.3159/2004), referred the question as to whether the concept of transaction value under new Section 4 has made any material departure from deemed normal price concept of erstwhile Section 4(1)(a) of the Act for consideration of the Larger Bench.

5. In view of the above decisions referring the matter to larger bench, the conference was of the view that in this matter show cause notices should be issued demanding duty on the value of these activities, and transferred to Call Book pending the decision of Larger Bench on the issue.

6. The view expressed in the Chief Commissioners Conference has been accepted by the Board and accordingly you may direct the officers in your jurisdiction to continue issuing show cause notice and transfer them to call book, pending the decision of larger bench on the issue.

Circular No. 910/30/2009 – CX , New Delhi, the 16 December 2009

Subject :Clarification regarding labelling and repacking etc. amounting to manufacture.

It has been brought to the notice of Board that certain dealers are receiving liquid chemicals in bulk in containers and offloading the same at the dealers' premises or godown into drums of 200ltrs for subsequent marketing of these materials to customers. Doubts have been raised as to whether such activity would amount to manufacture in terms of Chapter Note 10 to Chapter 29. As the said Chapter Note has been amended in 2008 budget, it has been contested that the said activity is covered by the present wordings of the Chapter note. The relevant portions of the chapter note reads as under:

Before Amendment (01.03.2008)

10. In relation to products of this Chapter, labelling or relabelling of containers and repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to 'manufacture'.

After amendment (01.03.2008)

10. In relation to products of this Chapter, labelling or relabelling of containers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to 'manufacture'.

1. Whether an operation amounts to repacking from bulk packs to retail packs or not, is a question to be decided on facts. However before examining the implication of the substitution of word 'and' by 'or', it is necessary to examine whether the activity itself is covered by term repacking from bulk packs to retail packs. Hence the first issue which needs to be decided is whether the "container/ lorry tanker" can be considered as bulk pack.

2. Tribunal has in the case of Ammonia Supply Co. [2001 (131) ELT 626 (T)], held that "As per Note quoted above, labelling or relabelling of the container should take place at a time when the goods are packed from bulk packs to retail packs. The assessee was not getting Ammonia in bulk packs. They were getting it in tankers. Ammonia gas brought in tankers can never be termed as brought in bulk packs. So the assessee was not repacking the goods from bulk packs to retail packs. Accordingly the activity undertaken by the assessee in filling the smaller container from bulk container namely tankers can never fall within the fiction of manufacture as envisaged by Note 10 quoted above."
3. Therefore the tankers cannot be termed as bulk packs and therefore the activity of transferring the goods from tankers into smaller drums cannot be said to be covered by the said chapter note 10.

OTHER LAWS

OTHERS

M/s Orissa State Financial Corporation V. Commnr. of Commercial Taxes & Ors. (Civil Appeal No. 1434 of 2003)(SC)

Sales Tax Has Precedence Over Bank Mortgage

Rakesh Kumar Gupta v. PIO (CIC) (Appeal No. CIC/LS/A/2009/000647)

Assessment records of third parties can be demanded under RTI

The Applicant, an informer of the department, filed a RTI application seeking inspection & copies of all records available with the income tax department including assessment orders of Escorts Ltd, Dr. Naresh Trehan and connected parties. The application was rejected by the PIO on the ground that there was no overriding public interest in disclosing the information relating to third parties and the disclosure would lead to an invasion of privacy of the assessees. On appeal by the applicant, HELD allowing the appeal:

(i) U/s 3 of the RTI Act information as defined u/s 2(f) which is not exempt from disclosure u/s 8(1) or 9 and is held by a public authority has to be disclosed. As the information sought is information as defined u/s 2(f) and is held by the Income Tax department which is a Public authority, the limited issue is whether the exemption clauses applies:

(ii) S. 8(1) (b) which exempts the disclosure of information which has been expressly forbidden by any court of law or tribunal does not apply as there is no such order.

(iii) S 8(1) (d) which exempts the disclosure of information which would harm the competitive position of a third party does not apply because the information sought is not of commercial confidence and its disclosure does not harm competitive interest.

(iv) S. 8(1) (e) which exempts disclosure of information held in fiduciary relationship does not apply because the returns are filed by the assessees under a statutory requirement and not pursuant to a fiduciary relationship with the income-tax department.

(v) S. 8(1) (h) which exempts disclosure of information which would impede the process of investigation does not apply because the mere fact that an investigation is underway and assessments are not finalized is not a sufficient ground in the absence of anything to show that the investigation would be impeded.

(vi) S. 8(1) (j) which exempts disclosure information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual does not apply to corporate entities and can only be claimed by natural persons and not by corporate entities. There is a difference between having a legal personality and owning 'personal information'. Personal information is information relating to a natural person, not a legal person.

(vii) As regards the individual about whom information is sought (Dr. Naresh Trehan), though the information is "personal", it does not satisfy the condition of "not having been disclosed to the public authority as part of a public activity" because information given in discharge of a statutory obligation, is a public activity and therefore, information provided by an assessee to the Department for purposes of income tax assessment is information disclosed in relation to a public activity and not eligible for exemption.

(viii)The argument that the disclosure of the information would lead to unwarranted invasion of the privacy of the individual also does not apply for two reasons. Firstly, the information has been provided by the assessee to meet his legal obligations and the disclosure of the same to another person cannot be construed as being an unwarranted invasion of the privacy of the individual. The Citizen's right to Information should be given greater primacy than privacy. Information provided by individuals in fulfillment of statutory requirements is not covered by the exemption u/s 8 (1) (j). Secondly, as there has been large evasion of taxes by the group, if citizens monitor assessments through RTI, it could be a major gain for public revenue and perhaps a good check on corrupt officials.

(ix) The Appellant, as informer, is assisting the Department by bringing instances of tax evasion to its notice, and if he is using information that he has received through RTI Applications for this purpose, it cannot be considered to be misuse of information in any way, nor can it be considered to be an unwarranted invasion of privacy of the assessee. And even if the exemption clauses of s. 8 (1) is applicable it certainly serves a larger public interest, if tax evasion is curbed.

(x) The contention that the Appellant is likely to misuse the information and could endanger the life and property of the assessee is a mere apprehension and cannot be accepted as it would defeat the objective of the RTI Act.

(xi) Accordingly, the PIO was directed to provide inspection of the records and the other information sought by the appellant.

Due Dates of key compliances pertaining to the month of January 2010:

5th Jan.	***Payment of Service Tax & Excise duty for December***
6th Jan.	***Payment of Excise duty paid electronically through internet banking***
7th Jan.	***TDS/TCS Payment for December***
10th Jan.	***Excise Return ER1 / ER2 /ER6***
15th Jan,	***PF Contribution for December , Excise payment by SSI***
21st Jan.	***ESIC Payment for December***