Lakshmi Kumaran & Sridharan tax

TAX

amicus

An e-newsletter from Lakshmikumaran & Sridharan, New Delhi, India

October 2012 / Issue–16

Contents

October
2012

Article

Advance Pricing Agreements – Towards compliance by cooperation

By **R. Subhashree**

India recently notified the rules for Advance Pricing Arrangement (APA). Though originally part of the Direct Taxes Code (DTC), APA has been implemented now. It comes shortly after the recommendation of the committee on GAAR which has suggested tweaking of rules to make them more investor friendly. India is often described as a place where transfer pricing is difficult. APA is a dispute mitigation mechanism which helps assessees to ensure compliance and prevent transfer pricing audit/penalty and litigation. APA is said to usher in certainty in tax. If one looks at the number of instances, APA scheme has been fairly successful in USA, Australia and Japan.

Like transfer pricing provisions which are broadly in line with OECD guidelines, the new APA provisions also largely follow the pattern/ procedure found in developed economies. An APA once signed will be in force for an agreed period. The new scheme provides for pre-filing consultation, filing of application, submission of documents and information, negotiation to arrive at an acceptable transfer pricing method, agreed period for which APA will be applicable and contains provisions for revocation.

Given the fact that countries like Australia and China do not charge any application fee, it has been argued that the application fee fixed under the Indian APA provisions is quite high, ranging from Rs. 10 lakhs to Rs, 20 lakhs based on the amount of international transaction entered into or proposed to be undertaken. The application fee will not be refunded in case the applicant withdraws application. Finalising an APA has many cost components like gathering data, expert advice, negotiations and so on. A company may not risk failing an APA application because it will be incurring cost and could, in addition face a transfer pricing audit. Under Rule 10K of the Income-tax Rules, 1962, an applicant is afforded an opportunity to present his case to the competent authority before the application is rejected.

The normal apprehension of companies to part with data and the possible use of the data against them, has not been specifically addressed in the newly inserted rules. However, this is a feature of any APA and of even advance rulings. In his discussion paper 'Resolving legal uncertainty: The unfulfilled promise of advance tax rulings', Yehonatan Givati[1] states that *'corporations may refrain from requesting an advance pricing agreement, since in order to obtain an agreement they need to disclose details of their business operations, thus "red flagging" ambiguous tax issues to be considered by the IRS. These tax issues may remain undetected in a regular audit.'*

The APA rules empower tax authorities to revoke the agreement on the ground of fraud or misrepresentation of facts. Also as per Rule 10R, the agreement may be cancelled in case of failure

[1] Discussion Paper No. 30 (6/2009), Harvard Law School

to file annual compliance report, material errors in annual compliance report or finding of any failure to comply with the terms of the agreement. The provisions require compliance with principles of natural justice like offering personal hearing and providing reasons for cancellation in writing.

A common criticism against APA Scheme is that it offers a method for private parties to contract with tax authorities and pre-empt problems. It is not by itself a solution to the larger issue of transfer pricing. Dr. Kerrie Sadiq in his paper 'The taxing effects of the Advance Pricing Arrangement Program: A review of APAs and their impact on stakeholders'[2] states that *'disparity of tax treatment between participants and non-participants is clearly in conflict with the fundamental principle of equitable treatment of taxpayers'.* An assessee who is not able to or chooses not to finalise an APA will have to prepare himself for greater scrutiny and additional compliance costs.

The Indian APA provisions do not provide for retrospective application, that is extending the agreement reached to transactions prior to the period of agreement. An assessee already facing audit or likely to face audit may try to enter into an APA and could be refused. There is provision for renewal of the agreement as per Rule 10-S. Such renewal will be treated as a new application for agreement, using the same procedure as outlined in these rules except pre-filing consultation provided for in Rule 10H.

The APA rules provide for unilateral, bilateral and multilateral APA. Though bilateral and multilateral APAs are purported to be more useful in tackling the problem of double taxation and harmonising transfer pricing, it is in practice quite difficult. For instance Glaxo Smithkline settled a 14-year dispute with the IRS (USA) by paying over $3 billion which was a substantial part of the amount disputed. Despite provisions for tri-partite discussion between the company and the revenue authorities in the U.S. and the U.K., and reaching an agreement with the U.K. on transfer pricing, resolution was not easy.

Certainty in tax and mutual trust between tax payer and collector are utopian ideals. However, the APA rules appear to be fair and provide an option to the assessee for compliance through cooperation.

[The author is a Manager, Knowledge Management Team, Lakshmikumaran & Sridharan, New Delhi]

[2] Journal of Australian Taxation, (2007) 10(1) 105

CUSTOMS

Notifications & Circulars

Drawback – New All Industry Rates of Drawback notified: New All Industry Rates of Drawback 2012-13, effective from 10-10-2012 have been notified by the Indian Finance Ministry. Notification No. 92/2012-Cus. (N.T.), dated 4-10-2012 supersedes earlier Notification No. 68/2011-Cus. (N.T.) in this regard. As per Circular No. 27/2012-Cus., dated 5-10-2012 issued to highlight the changes, the rate of drawback has been increased for most of the items which were in the original schedule i.e. the schedule which was in force before October, 2011. In September last year, a new schedule was notified when DEPB was merged with Drawback. Drawback caps have mostly not been provided where the higher of the composite rate or customs component of the rate is 3.5% or lower. There is also a relative increase in the assigned caps. While separate entries have been created for many items, dosage and pack-size specifications for medicaments have been removed for many items.

Mega Power Projects – Exemption restricted to specified projects: Exemption to goods required for setting-up mega power projects has been restricted to specified projects. Further, the exemption is available to goods where the requirement for the same has been certified by the Joint Secretary in the Ministry of Power, before 19-7-2012. Earlier, the exemption was available to any mega power project of specified capacities. Notification No. 49/2012-Cus., dated 10-9-2012 issued for the purpose also restricts exemption to goods required for expansion of any existing mega power project to only two specified power projects. Similar amendment in respect of exemption from excise duty to such power projects has been made in Notification No. 12/2012-C.E. by Notification No. 34/2012-C.E., dated 10-9-2012.

Re-import of aircraft parts from SEZ – Exemption: Parts and components of aircraft replaced or removed during the course of maintenance, repair or overhaul of the aircraft in an SEZ, have been exempted from Customs duties when brought to any other place in India (DTA) if there is no sale and the goods are being returned to the owner of the aircraft. Notification No. 52/2012-Cus., dated 13-9-2012 issued for the purpose amends Notification No. 94/96-Cus.

EOU – Exemption to goods re-imported due to rejection by buyer: Exemption under Notification No. 52/2003-Cus. to goods re-imported by EOU due to failure of the foreign buyer to take delivery of the goods will also cover re-import on account of rejection by the foreign buyer. After amendments by Notification No. 53/2012-Cus., dated 13-9-2012 issued for the purpose, it seems, goods rejected after taking delivery would also be covered under the exemption.

LDCs – Effective rate of duty on specified goods imported from Least Developed Countries, reduced: Rate of Customs duty on specified goods imported from 29 Least Developed Countries has been further reduced across the board. The extent of exemption on goods specified in 469 entries has been increased by 25%. All goods not so specified in the notification have been fully exempted. Notification No. 56/2012-Cus., dated 1-10-2012 issued in this regard amends Notification No. 96/2008-Cus.

SAFTA – More products covered for exemption: List of sensitive products not eligible for the reduced rate of Customs duty has been further pruned to cover more products under the effective rate of duty when imported from Pakistan and Sri Lanka. After being amended by Notification No. 48/2012-Cus., dated 6-9-2012 issued for the purpose, Notification No. 125/2011-Cus. now provides for reduced rate of duty on different products covered under 135 entries as compared to 120 entries earlier.

Storage of sensitive items in duty free shops – PSUs exempted from BG: Central and State Public Sector Undertakings have been exempted from furnishing bank guarantee or other forms of security for storage of sensitive goods in duty free shops operated by them. As per Circular No. 26/2012-Cus., dated 10-9-2012, while the condition to provide double duty bond will remain, BG for 25% of the duty liability is now not required to be furnished.

Marble and other specified stones from Sri Lanka importable through any EDI port: Import Licensing Note 4 at the end of Chapter 25 and Note 2 at the end of Chapter 68 of the ITC (HS) which restricted import of marble or other specified monumental stones from Sri Lanka under the India-Sri Lanka Free Trade Agreement (ISFTA) only through the Port of Kolkata, has been deleted. DGFT Notification No. 16, dated 26-9-2012 issued for the purpose also clarifies that such goods may be imported through any EDI port, subject to all the conditions applicable to imports under ISFTA.

Ratio decidendi

Seizure lapses when SCN not issued within time even in case of provisionally released goods: The Bombay High Court has held that even if the seized goods are provisionally released under Section 110A of the Customs Act, 1962, the effect of Section 110(2) i.e. release of goods if no show cause notice has been issued within prescribed time, does not get extinguished. The court held that there is nothing in Section 110A to detract from the consequence of release of goods unconditionally if, by virtue of Section 110(2), within the total period of one year, no SCN is issued. The court hence quashed the *supurdarinama* while holding that the vehicle released provisionally and subject to conditions under Section 110-A, shall be deemed to have been released unconditionally. [*Jatin Ahuja* v. *Union of India* – Delhi H.C. Order dated 4-9-2012 in WP (C) 2952/2012, CM NOs.6364/2012, 8854/2012 & 9968/2012].

Rebate on exports to SEZ not deniable for not filing bill of export: The Revisionary Authority in the Department of Revenue, Ministry of Finance has held that rebate on goods exported to SEZ was not deniable on the ground that bill of export was not filed. It was noted that the clearance of goods to the SEZ and the receipt of the same by the SEZ were not disputed by the department. The Authority observed that according to Circular No. 29/2006-Cus. supply from DTA to SEZ would be eligible for the rebate claimed under Rule 18 of the Central Excise Rules, 2002. [*In RE: Indo Amines Ltd.* – 2012 (284) E.L.T. 147 (G.O.I.)].

Refrigerators with freezers, having separate external doors for each – Classification of: CESTAT Mumbai while relying on Circular No. 23/2008-Cus., dated 29-12-2008 has held that combined refrigerator-freezer with separate external doors, for household purposes, will correctly merit classification under tariff item 8418 10 90 and not under tariff item 8418 21 00 of the Customs Tariff,

which covers household type refrigerators. The Tribunal therefore denied the benefit of Notification No. 85/2004-Cus., which extended concessional rate of customs duty on specified goods imported from Thailand under FTA between India and Thailand. [*Hitachi Home and Life Solution Ltd.* v. *Commissioner* - 2012-TIOL-1167-CESTAT-MUM].

Interest on delayed refund – Application date, and not order date, relevant: CESTAT, Ahmedabad has held that interest on refund shall be payable starting from three months after receipt of the refund application and starting not from three months after the date of final adjudication. The assessee in the instant case had filed application for refund after re-assessment of bills of entry and the same was allowed by CESTAT earlier, rejecting department's plea to transfer the amount to Consumer Welfare Fund. On the matter of interest on such refund, the Tribunal, relying on Apex Court order in the case of *Ranbaxy Laboratories* held that interest on refund shall be paid from three months after receipt of application. [*Gupta Steel (Ship Breakes)* v. *Commissioner* - 2012-TIOL-1256-CESTAT-AHM].

CENTRAL EXCISE

Notifications

Petrol and diesel – Effective rate of excise duty revised: The effective rate of excise duty on petrol and diesel has been revised as Rs. 1.20 per litre and Rs. 1.46 per litre respectively. This change made by Notification No. 35/2012-C.E., dated 14-9-2012 is applicable to such fuels intended for sale without brand name. Before this change, petrol (motor spirit) and diesel (sold without brand name) attracted effective rate of excise duty of Rs. 6.35 per litre and NIL respectively under Notification No. 12/2012-C.E.

Domestic LPG – Exemption amended: The entry relating to exemption meant for LPG and other such gases as in S. No. 81 of Notification No. 12/2012-C.E. has been amended to delete reference to subsidy scheme and to include specified public sector oil companies. The amendment made through Notification No. 36/2012-C.E., dated 18-9-2012 appears to be the outcome of the decision of the government to sell domestic LPG at non-subsidised or commercial rate. There is no change in exemption and the effective rate continues to be NIL.

Ratio decidendi

TV receivers cleared after disassembling, classifiable as TV receivers and not as parts: The assessee in the instant case was engaged in assembling parts of television sets in its factory in Delhi and these television sets were disassembled again and cleared as parts to sister units of the assessee. The Department sought to classify the goods cleared from the Delhi factory under the Chapter Heading 8528 as television receivers whereas, the assessee resorted to classification under the Chapter Heading 8529 as parts of television receivers. The Supreme Court held that once the television receivers were assembled, manufacturing process was over and goods/components transported from the Delhi factory

had essential characters of the finished television receivers. It held that the said goods were complete articles, presented in unassembled or disassembled form and Rule 2(a), and not Rule 1, of the Interpretative Rules was applicable and the goods cleared from the Delhi factory were classifiable under Chapter Heading 8528 as television receivers. [*Salora International Ltd.* v. *CCE* - 2012 (284) E.L.T. 3 (S.C.].

Time-limit under Section 11B not applicable for refund of duty paid mistakenly for second time: The assessee, during the period between June 2002 and September 2002, paid an amount twice as duty for the clearances made during the said period. Subsequently, refund of amount deposited in excess was claimed on 1.11.2003. The Department rejected the refund claim on the ground of limitation. The High Court held that the amount deposited for the second time was not duty of excise and the same was a mistaken deposit of an amount with the Government which would not be covered under Section 11B of the Central Excise Act, 1944 and the time limit mentioned in the said Section would not apply. [*Swastik Sanitarywares Ltd.* v. *Union of India* - 2012-TIOL-757-HC-AHM].

Area-based exemption not deniable for clerical error of mentioning wrong notification: The assessee, intending to avail area-based exemption for unit in Uttarakahand, filed declaration under Notification No. 50/2003-CE but by mistake, mentioned the number of a different notification and also failed to mention the Khasra No. in the application. The Tribunal held that an inadvertent clerical error would not disentitle the rightful claim of the assessee to exemption which it was otherwise entitled to. The Tribunal noted that the Khasra No. had been mentioned in the lease deed submitted by the assessee and the premises was visited by the departmental officer. Thus, claim of the department that the address was not mentioned in the application would also not hold good. [*Packaging India Pvt. Ltd* v. *CCE* – 2012 (283) E.L.T. 390 (Tri-Del.)].

Cenvat Credit admissible on tool kit supplied as per statutory requirement: Cenvat credit can be availed on tool kit, even though it may be a bought out item and not fitted on to the motor cycle or used in or in relation to its manufacture. CESTAT, Delhi held that tool kits are accessories cleared along with the final product and are inputs as per Rule 2k(i) of Cenvat Credit Rules, 2004. The Tribunal reasoned that tool kit is supplied as per statutory requirement under the Central Motor Vehicle Rules, 1989 and hence, the same is an accessory of the vehicle. [*Hero Motocorp Ltd* v. *Commissioner,* 2012 (27) S.T.R. 473 (Tri. – Del)].

Fabrication of electric pole is manufacture: Processing of pipes to fabricate steel tubular poles cleared for use as electric poles amounts to manufacture. In the case before the Tribunal, the assessee procured MS black pipes / tubes which were cut to required sizes and after subjecting it to the process of swaging and welding, the steel tubular pole thus formed was corrected and then the top portion was welded with MS cap and bottom portion provided with a base plate to complete the manufacture of the final product of steel tubular pole. The Department had contended that fabrication of such a pole did not amount to 'manufacture' and thus denied credit on the inputs used. [*Commissioner* v. *North Sun Enterprises Industrial Estate,* 2012 (284) E.L.T. 75 (Tri.-Del.)].

SERVICE TAX

Notification

ST-3 Return for first half year: Service Tax Return (ST-3) for the first half year (April-September, 2012), to be filed on or before 25th October, 2012, is now required to be filed for the period April – June, 2012 only. For the period starting from 1st July, 2012, a new return, to be notified, will have to be used. Service Tax Rules, 1994 have been amended for this purpose by issuing Notification No. 47/2012-S.T., dated 28-9-2012. The CBEC has also clarified that revised return format and last date for filing such return will be notified separately.

Ratio decidendi

Time limit to avail Cenvat credit: CESTAT, Chennai has held that for taking Cenvat credit, no time-limit has been prescribed in the Cenvat Credit Rules, 2004. In the case before the Tribunal, the assessee had taken Cenvat credit for the period from October 2004 to March 2009 in the year 2009. Credit was denied on the ground that such credit ought to have been taken within a reasonable period of one year. The Tribunal held that though it has been mentioned in the Cenvat Credit Rules that an assessee can take credit immediately, no time limit has been prescribed therefor. The order denying credit was set aside by the Tribunal. [*Central Bank of India* v. *Commissioner,* 2012-TIOL-1314-CESTAT-MAD].

Predominant activity and not incidental activity, to determine classification of service: Cargo handling incidental to predominant activity of transportation cannot change the nature of service of transportation to that of cargo handling. In the instant case, the service provider was involved in mining of bauxite ore, loading, transportation and unloading the same at specified places. The Department argued that registration was taken under Goods Transport Agency service (GTA) only to avail abatement of 75% and that loading and unloading were undertaken at places other than the mine. In the instant case, the Tribunal considered the distance of transportation, absence of any abnormal consideration for the service or any significant component of cargo handling other than transportation. The Tribunal concluded that the definition of Cargo Handling Service included cargo handling incidental to freight and specifically excluded mere transportation. [*R.K. Transport Company* v. *Commissioner,* 2012 (27) S.T. R 496 (Tri. – Del)].

Service tax not leviable on amount received towards transfer of goodwill: Payment towards goodwill on transfer of business cannot come under the category of Business Auxiliary Services. In the instant case, separate agreements were entered into for transfer of goodwill and for collection, delivery and handling of fly ash. Revenue contended that service tax liability arose under both agreements and the income received was only towards commission and not towards goodwill. Taking note of the fact that there were two contracts, CESTAT, Mumbai held that Service Tax was not leviable on the amount received towards goodwill on transfer of business [*Commissioner* v. *S S Engineers & Contractors,* 2012-TIOL-1282-CESTAT-MUM].

VALUE ADDED TAX (VAT)

Notifications

Rate of entry tax enhanced in Punjab: The applicable rate of entry tax on goods covered under Section 3A of the Punjab Tax on Entry of Goods into Local Areas Act, 2000 has been enhanced by 0.5% by Notification No. S.O.83/P.A.9/2000/S.3-A/2012 dated 18th September, 2012.

Rate of additional tax enhanced in Uttar Pradesh: Rate of additional tax leviable under Section 3-A of the Uttar Pradesh VAT Act on goods described in Schedule V appended to the said Act has been increased from 1 to 1.5%. Schedule V pertains to residuary list, however, the said increase is not applicable to cement, motor vehicles of all kinds including chassis thereof but excluding tractors and tyres & tubes excluding tyres and tubes of cycles, cycle-rickshaw, animal driven vehicle and tractor as described in Schedule II, Part-A, to the said Act. Notification No. KA.NI.-2-898/XI-9(1)/08-U.P.Act-5-2008-Order-(82)-2012 dated 7th September, 2012 has been issued in this regard.

WCT-TDS rate enhanced in Jharkhand: The rate of deduction of TDS in respect of works contract in Jharkhand has been enhanced from 2% to 4% with effect from 1-4-2012 as per Notification No. S.O 24 dated 3rd October, 2012.

Ratio decidendi

Form H under CST Rules not required for direct export sales: The assesee was an incorporated entity engaged in development and export of IT software. Returns were filed under the Central Sales Tax Act disclosing the total direct export sales claiming exemption on the export sales and concessional rate of tax at the rate of 2% on the inter-state sales. The CTO however, levied CST on the total turnover which included direct export sales as well on the ground that the assessee failed to produce proof of exports/exemption by way of Form H issued under Rule 12(10) of the CST Rules. The petitioner contended that the question of a dealer producing Form H would arise only in case of penultimate sales i.e. when the sale is effected in the course of export of the goods under Section 5(3) of the CST Act. Section 5(3) of the CST Act read with Rule 12(10) of the CST Rules, requires the issuance of Form H duly signed and filled by the exporter along with the evidence of export of goods where the last sale or purchase of any goods preceding the sale or purchase occasioning the export of goods out of the territory of India shall be deemed to be export sale, if such sale took place for the purpose of complying the agreement or order with relation to such export. There is no requirement to produce Form H in case of direct exports. The court set aside the impugned assessment orders holding that the direct exports are not exigible under the CST Act and the requirement to produce Form H would be relevant only when Section 5(3) of the CST Act is applicable. [*HCL Technologies Limited* v. *The Commercial Tax Officer, Hyderabad,* 2012-VIL-63 AP HC].

Concessional rate of CST – Admissibility to infrastructure provider: The petitioner in the instant case was in the business of providing passive telecom infrastructure to several telecom operators. The petitioner purchased some goods against Form C which were used in the construction

of the telecom infrastructure. The issue before the High Court was whether imposition of penalty under Section 10A read with Section 10(d) of the CST Act, was valid on the ground that the said goods purchased against Form C i.e. concessional rate of tax, were not meant for re-sale or used in the manufacture or processing of goods for sale or for use in the telecommunications network. The Assessing Authority contended that the towers constructed by the appellant cannot be regarded as 'telecommunication network' as the appellant was not a telecommunication service provider using such towers and equipments.

The court, relying on precedent decisions, observed that the concessional rate of tax i.e. 2% tax would be available under Section 8(3)(b) read with Rule 13 of the CST Rules either for re-sale or for use by the purchasing dealer in the manufacturing or processing of goods for sale or for use in the telecommunications network. It noted that there was no condition attached to clause (b) of Section 8(3) that the purchasing dealer must either re-sell the goods as such or must use them in the manufacture or processing of goods for sale and there was no obligation to sell or re-sell and mere use in the telecommunications network would be sufficient to bring the transaction within the fold of Section 8(1). Setting aside the penalty, the court held that the purchase of goods by the petitioners from outside the state, comprising goods specified in the registration certificate issued under the CST Act, against issuance of Form C were the goods that were employed in erection and maintenance of cell phone towers which were integral to the telecommunication network, and therefore entitled to the concessional rate of tax. [*Indus Towers Limited* v. *The Commercial Tax Officer, Hyderabad,* 2012-VIL-77 AP HC.

INCOME TAX

Notification

Tax Residency Certificate – IT Rules amended: The Central Board of Direct Taxes (CBDT) has amended Income Tax Rules, 1962 by inserting Rule 21AB by Notification No.39/2012 Dated 17-9-2012. It specifies particulars for the purpose of tax residency certificate to be obtained from the government of foreign country for availing benefit under Double Taxation Avoidance Agreement (DTAA) entered into between India and that country. The new rule will come into force from 1-4-2013. CBDT has also prescribed Forms 10FA & 10FB being the form of application and tax residency certificate for Indian residents for availing DTAA benefit in other countries.

Ratio decidendi

Adjustments in stock valuation: Ruling against stock valuation which converts a capital receipt into revenue income, the Supreme Court has held that the assessee could value closing stock of 'incentive' sugar at levy price which was less than cost price. As per an incentive scheme 40% of sugar production was permitted to be sold at market price instead of the notified levy price for public distribution system and repayment of loans taken from the banks/ financial institutions for establishing the new unit(s). The department contended that the closing stock should be valued at cost or market price whichever is lower and not at levy price. The Apex Court reasoned

that in certain cases adjustments may have to be made having regard to the special character of assets, the nature of the business, the appropriate allowances permitted etc. in order to arrive at taxable profits. [*Commissioner of Income Tax, Coimbatore* v. *Bannari Amman Sugars,* Supreme Court order dated 26-9-2012, Civil Appeal No. 7014 of 2012]

Test of dependent agent PE and place of management: Taxability of revenue earned by an entity operating India specific websites providing an online platform for facilitating the purchase and sale of goods and services to users in India was examined by ITAT, Mumbai. The foreign firm operated through two of its group companies in India. The group companies were held to be dependent agents, as they exclusively assisted the foreign company in return for reimbursement of expenses with markup and had no other source of income. However, the dependent agents did not constitute a permanent establishment (PE) since they did not perform any of the functions listed under Para 5 of Article 5 of the DTAA with Switzerland like maintaining stock of goods, processing of merchandise, negotiate or enter into contract on behalf of the foreign enterprise. Since the companies in India extended only market support and all deals between buyers and sellers were settled through website, the companies did not constitute a place of management. The Tribunal thus held that in the absence of a permanent establishment as per the DTAA, there was no tax liability in respect of the impugned amounts. [*EBAY International AG* v. *ADIT* [2012] 25 TAXMANN.COM 500 (Mumbai - Trib.)]

Section 14A – Manner of applying Rule 8: The taxpayer in this case contended that the interest cost needs to be split into three components namely (i) interest incurred directly for earning exempt income, (ii) interest income incurred for earning taxable income and (iii) common purpose interest cost which is not attributable to any particular income. Hence, the first category would fall under Rule 8D(2)(i) and the third one in Rule 8D(2)(ii) for being apportioned based on tax free investments and total assets while the second one incurred on term loans etc. would not be considered for applying the Rule 8D. The ITAT accepted these contentions on the grounds that the department had accepted this proposition in its arguments before Bombay High Court in the case of *Godrej Boyce* v. *DCIT* [328 ITR 81] while supporting the validity of the rule and could not revise its stand. It further held that to apportion common interest expenses which are to be allocated in terms of the formula under Rule 8D(2)(ii), interest directly attributable to tax exempt income (as provided in the rule), and interest directly attributable to earning taxable income will be excluded. [*ACIT* v. *Champion Commercial Co. Limited,* ITA 644 /2012 (Kolkata ITAT)].

Presumptive income under Section 44BB: The assessee in this case was engaged in the business of providing equipment on hiring and manpower for exploration and production of mineral oil and natural gas and was assessed under Section 44BB of the Income-tax Act, 1961. 10% of amounts received by the assessee for the specified activities was treated as income. The assessee had adopted a position that the rate of 10% should be applied on the receipts exclusive of service tax received along with invoice amount. Accepting the stand of the assessee the ITAT held that the amount of service tax being statutory liability does not involve any element of profit hence service tax paid by the assessee

could not form part of amount for the purpose of deemed profits u/s 44BB. [*DCIT* v. *Mitchell Drilling International Pty. Ltd,* ITA 698/Del/2012 (Delhi ITAT)].

Offshore supply and onshore services in composite contract – Taxability of supplies and software: GSM equipment manufactured by the assessee company (incorporated in Finland) was sold (along-with software) to Indian telecom operators from outside India on a principal to principal basis, under independent buyer-seller arrangements. Installation activities were undertaken by the Indian subsidiary under its independent contracts with Indian telecom operators. The department contended that the supply and installation constituted a composite contract and even the income relatable to supply of equipment is taxable in India. The Delhi High Court held that as regards sale of goods, the determinative factor would be as to where the property in the goods passes and that since in the instant case property passed on the high seas, taxable event had taken place outside India. On the taxability of the software component the court held that sale of copyrighted article is to be distinguished from grant of copyright in an article. Thus, sale of a copyrighted article would not fall within the purview of royalty. It added that amendment in Section 9 by Finance Act, 2012 introduced retrospectively is not applicable to DTAAs. [*DIT* v. *Nokia Networks,* ITA 30 of 2008 (Delhi HC)].