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MONTHLY REPORT FOR MAY, 2014

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**CENTRAL EXCISE -BY SHRI PRADEEP K MITTAL-
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- Conversion of long/straight pipes and tubes into smaller dimension pipes or giving different shapes/curves such as bends, elbows, T pieces or Y pieces, joints, blocks, caps, fittings, flanges, collars, held to be not amounting to manufacture within the meaning of Section 2(f) of Central Excise Act, 1944. Aroni Agri Equipments (P) Ltd Vs. CCE 2014(300) ELT 530. (Tri).
- Once the goods are sold at ex-factory and the freight and insurance has been recovered from the buyer, freight and insurance charges are not includible in the assessable value and excise duty is payable on the amount of freight and insurance – since the sale is ex-factory. CCE Vs. Generla Metallisers Ltd 2014(300) ELT 534 (Tri).
- Cutting and slitting of jumbo rolls of aluminum foil into smaller size does not amount to manufacture. Although duty has been paid erroneously and, therefore, the Cenvat Credit can be taken of the excise duty so paid on the raw materials. CCE Vs. Associated Capsules Ltd 2014(300) ELT 536.
- The Allahabad High Court, while allowing the appeal of Department, has observed that even if one commissioner (out of committee of two commissioners), while granting permission to file an appeal before CESTAT, granted approval on two different dates, even this permission (though considered and granted on two different dates – strictly speaking, could not be called a meeting of committee) was held to be allowed and the order dismissing the appeal by the CESTAT has been set

aside by the Allahabd High Court. CCE Vs. Devson Steel 2014(301) ELT 295 (All).

- The Commissioner (Appeal) has dismissed the appeal of the appellant on the ground that the same is barred by time. The same was challenged by way of an appeal before Tribunal who also dismissed even without notice to the appellant. The High Court has held that the Tribunal, before dismissing the appeal and rejecting the case set up by the appellant, should have given an opportunity to the appellant to present his case. Shivam Textiles Vs. CCE 2014(301) ELT 302 (Guj).
- The cost of transportation, while charged separately in the invoice, for transportation of goods from the place of removal to the place of delivery, is liable to be excluded from the transaction value on which excise duty is payable by the assessee. CCE Vs. Garware Enterprises Ltd 2014(301) ELT 349 Tri.
- No penalty is imposable when the assessee has reversed the cenvat credit attributable to the surplus electricity which has been sold (and not used in the manufacture of final products). Bhusan Power & Steel Ltd Vs. CCE 2014(301) ELT 353 Tribunal.
- The Tribunal has held that even different plants are functioning in the same premises, they would be treated as one factory as has been held by the Tribunal in the case of Dhampur Sujgar Mills Ltd Vs. CCE 2001 (129) ELT 73 (Tri) and followed by Tribunal in the case of Century Denim Vs. CCE 2014(301) ELT 358 (Tri).
- The Excise duty paid on the MS Plates, MS sheets which have been used for the repair and maintenance of plant and machinery of the factory,

are eligible for Cenvat Credit. Sarjoo Sahkari Chini Mills Ltgd Vs. CCE 2014(301) ELT 387 (Tri).

**SERVICE TAX - BY SHRI PRADEEP K MITTAL
-9811044365**

- Where the Tribunal has given sufficient and cogent reasons for not imposing penalty and for not invoking extended period of limitation of five years, no question of law arises giving rise to filing of an appeal by the Department before High Court. CCE Vs. Gujarat State Petronet Ltd. 2014(34) STR 321. Guj.
- Where the party has not filed statutory appeal before the Custom Excise & Service Tax Appellate Tribunal within the time prescribed under Section 35 due to delay and laches, he cannot be allowed to challenge the order of Commissioner (Appeal) by way of a Writ Petition before the High Court under Article 226 since the alternative remedy is available to him. TL George Vs. CCE 2014(34) STR 325. Ker.
- Where the party does not make pre-deposit as a condition of stay order within the time provided by the appellate authority and such pre-deposit has been made after substantial delay, the High Court has restored the appeal and allowed the appeal to be heard on merits primarily for the reasons that the appellant was a Government Department - Municipal Corp. Karnal Vs. CCE 2014(34) STR 339 P&H.
- Where a party is engaged in providing, repair, upkeep, maintenance to Indian Habitat Center, these services cannot be categorized as "Business Auxiliary Service" and, therefore, demand of service tax, prima-facie not sustainable and hence stay granted. Old

World Hospitality (P) Ltd Vs. CCE 2014(34) sTR 361 (Tri).

- Where the party has paid service tax on labour/service component and the paid VAT/ Sales Tax on the spares parts used in providing “after-sales-service”, the party cannot be called upon to pay Service Tax on the value of spare parts/components used during providing after sales service. Doon Valley Motors Vs. CCE 2014(34) STR 380 Tri.
- The Party, who is a commission agent of mutual funds, has been allowed refund of Service Tax paid by them due to bonafide mistake in as much as the Andhra Pradesh High Court in the case of Karvy Securities Ltd Vs. CCE has held that the “mutual funds” are goods as per Section 2(7) of Sales of Goods Act and, therefore, benefit of Notification No.13/2003 dated 20.6.2003 shall be available. CCE Vs. Christopher John 2014(34) STR 395.
- Where there is a supply of technical know-how consisting of patent, secret information, process knowledge and use of trade marks, this service is classifiable under “Intellectual Property Rights” and therefore, demand not sustainable during the period in question. Duraline Corporation Vs. CCE 2014(34) STR 398 (Tri).
- The business activity of private placement of shares not traded in any stock exchange is covered under “merchant banking service” and service tax payable under this head. However, period prior to 2001, this activity cannot be taxable under “Management Consultancy Service”. CLSA India Limited Vs. CCE 2014(34) STR 407. (Tri).
- Where the agreement by the contractor provides supply of manpower for the purpose of (a) harvesting

and (b) transport of sugar cane from field to sugar factory and the fees/amount on the basis of sugarcane supplied on tonnage basis. The service tax cannot be levied under the head "Manpower recruitment and supply services". Bhogavati Janseva Trust Vs. CCE 2014(34) STR 410 Tri.

- Where a party received incentive for early payment or cash payment, such incentive is not liable to service tax as this incentive is in the nature of discount on goods sold and, therefore, no service tax is payable on such incentive under the head "Business Auxiliary Service" Tradex Polymers (P) Ltd Vs. CCE 2014(34) STR 416. Tri.

COMPANIES ACT 1956 - BY SHRI PRADEEP K MITTAL-9811044365

- The District Court and Magistrate Court has a power under Section 633 of Companies Act, 1956 to grant relief to only those cases which are pending before them. However, the High Court has powers to grant relief not only in those cases which are pending before District court or Magistrate Court but also in cases which yet to be filed by the ROC or in other words, in contempt of being filed. Visram Financial Services (P) Ltd Vs. V Rajendran 2013(117) CLA 351 (Madras).
- The Division Bench of Calcutta High Court in the case of Namakar Vinimay (P) Ltd Vs. Yashdeep Trexim (P) Ltd 2013(117) CLA 378 has held that the definition of "Company" under Section 3(1)(d) of Companies Act, 1956 does not limit the company incorporated in India but also include the companies incorporated outside India but registered in India.

- The petition under Section 397/398 for the recovery of loan advanced to the company and for enforcement of agreement is not maintainable and is liable to be dismissed. The petition is maintainable for removal of acts of oppression and mis-management. Once an UPC has been produced to show dispatch of notice of either Board Meeting or notice of AGM, then onus shifts upon the Addressee to prove that he has not received the notice. Cessation of office of Additional Director by operation of law does not constitute an acts of oppression. *Aslam Ali Vs. Narbada Valley (P) Ltd 2013(117) CLA 207.*
- In case the petitioner has proved that he is a lawful purchaser of shares after payment of consideration and has submitted necessary evidence to the company and informed the company of loss of shares in transit, yet the company goes ahead and transfer the said shares in favour of some other person, the company cannot be heard to say the petitioner to enforce its claim against such wrongful transferee of shares., The company is liable to pay compensation for such wrongful acts. *Gulshan Mahindra Vs. Reliance Industries Ltd 2014 (118) CLA 399 CLB.*
- The Supreme Court, while interpreting Section 446 of the Companies Act, 1956 has observed that while granting leave by the company court, hearing winding up proceedings of the company in liquidation, will ensure that its claims/rights are adjudicated by the civil court and may decide the conditions or terms on which such permission shall be granted. *Erach Boman Vs. Tukaram Shridahr Bhat 2014(118)CLA 344 SC.*
- The bearer of share warrant of the company is not a member. To claim the rights of a member, name of persons should appear on the Register of Member.

Kishori Lal Aggarwal Vs. Alliance Engineers (P) Ltgd
2014(118) CLA 406 CLB.

- The Calcutta High Court has upheld the objections raised by the Central Government with respect to share exchange ratio as it is their duty to see that there is no unfairness either to the members or creditors of the company. Where there is a conflict of opinion amongst the valuers, a third independent valuer who may be a chartered accountant from the panel maintained by the OL, could be appointed to determine the share exchange ratio. Heritage Housing Finance Ltd 2014(118) CLA 429 Cal.
- Where a special notice has been given by a shareholder holding a very insignificant shareholding and seeking removal of chairman of a company in the ensuing Annual General Meeting only for the purpose of seeking undue publicity, the company can be exempt from publishing such notice. BSE Ltd Vs. Sureshchandra V Parekh 2014(118) CLA 435.

**CORPORATE LAWS - BY SHRI PRADEEP K MITTAL -
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- In a complaint under Section 138 of NI Act, the joint account holder cannot be held liable unless he has also signed and issued the cheque in question. In other words, all persons to the joint account must sign and only in that event, all such persons shall be liable for dishonor of cheque in a complaint under Section 138 of NI Act. Aparna A Shah Vs. Sheth Developers (P) Ltd 2014(118) CLA 366 SC.
- In the event of amalgamation/merger of transferor company with the transferee, the transferee company is not entitled to continuation of tenancy unless the landlord of the premises has consented to such

continuation of such tenancy and even if the landlord has accepted the rent for sometime, this will not make any difference. The landlord will be entitled to file suit for eviction on the ground of sub-letting. *Ambalal Sarabhai Enterprises Ltd Vs. Rajeev Daga & others*. 2014(118) CLA 392 (Calcutta).

- The Division Bench of Delhi High Court has held an order of BIFR where a Scheme of Rehabilitation has been approved providing for certain relief contrary to the provisions of Section 72A of Income Tax Act, as by virtue of Section 32 of SICA, the provisions of SICA has a over-riding effect on all other provisions of laws including Income Tax Act, 1961. *Lord Krishna Chloro Alkalies Ltd vs. Director General of Income Tax* 2014(207) 460 Delhi DB.
- Where the transferor company is a tenant of premises and upon merger of transferor company with the transferee company, it shall amount to sub-letting unless permission of landlord of the premises is obtained - the eviction petition under the local rent laws on the ground of sub-letting shall be maintainable against such transferee company. *Ambalal Sarabhai Enterprises Ltd Vs. Rajeev Dagar* 2014(118) 392 Cal.
- Where there is a bonafide dispute about the payability of the amount stated in the company petition, the company petition under Section 433(e) of the Companies Act, 1956 shall not be maintainable. *Sasken Communications Technology Ltd Vs. Cellcast Interactive India (P) Ltd* 2014 (208) DLT 405. Delhi
- Mere issuance of a show cause notice does not give rise to any cause of action where the SCN was issued under Money Laundering Act. The issuance of SCN does not amount to adjudication of a guilt. The writ

petition to challenge the SCN is liable to be dismissed as the party shall have the opportunity to file reply, place all evidence on record and further shall have the right to cross examine the witness whose testimony has been relied upon by the Government. Arun Kr Mishra Vs. Union of India 2014(208) DLT 56 (Delhi DB).

CORPORATE CRIMINAL LAWS - BY SHRI PRADEEP K MITTAL -9811044365

- The statement so recorded and later on retracted can still be relied upon as long as same is corroborated by some other statement or evidence. Once penalty has been imposed on partnership firm for violation of the provisions of FERA, the penalty could also be imposed partners as well. Brij Trading Co Vs. Enforcement Directorate. 2014(208) DLT 133 Delhi.
- In a complaint under Section 138 of NI Act, without verifying the role of each of the accused persons, it shall cause harassment and inconvenience – more particularly when the complaint is lacking in material particulars about the role played by each of the persons who are made party as accused persons. The complaint is liable to be quashed. In a case where complaint was filed in 2005 and the non-bailable warrant were received in 2012, the petition for quashing of criminal complaint filed in 2013 is within time. Complaint is liable to be quashed since role of each of accused was not specified. Arun Garg Vs. Delhi Paints and Oil Traders. 2014(207) DLT 303.DHC.
- The offence under Section 138 of NI Act, can be compounded either during the pendency of appeal or even after disposal of the appeal filed by the accused person or even by the complainant. There is no legal

bar to such compounding. However, the accused shall have to pay 15% of the value of the cheque being cost payable (in view of the judgment of the Supreme Court) to Delhi Legal Services Authority. V S Yadav Vs. Reena 2014(207) DLT 9A Delhi.

- The Delhi High Court has upheld the penalty levied by the lower court because of illegal occupation of the residential quarter of the company by the ex-employee after he ceased to be an employee of the company. The court also upheld the contention of the complainant company that they became entitled to file petition under Section 630 of Companies Act, 1956 after sanction of scheme of arrangement under Section 391 of Companies Act, 1956 after the employer company merged with the complainant company. Karan Singh Vs. Texmaco Infrastructure & Holding Ltd 2014(209) DLT 138.

**CIVIL LAW - BY SHRI PRAVEEN K MITTAL -
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- In the event of existing Agreement to Sell in respect of immovable property, yet the seller sell the very same property to another purchaser and if it is established that the said purchaser has a notice of existing agreement to sell and pendency of Suit for Specific Performance, the such subsequent buyer get no title to the said immovable property despite Sale Deed in his favour. Sushil Kumar Bagga Vs. Dewan Chander Batra 2014(207) DLT 346. Delhi.
- It is the settled position in law that in a suit between a landlord and tenant, it is only title as landlord which is relevant and not the title as owner. As far back as in Shri Ram Pasricha Vs. Jagannath

MANU/SC/0473/1976 : (1976) 4 SCC 184, it was held by the Hon'ble Supreme Court that under the general law, in a suit between landlord and tenant, the question of title to the lease property is irrelevant. Recently also in State of Andhra Pradesh Vs. D. Raghukul Prasad MANU/SC/0649/2012 : (2012) 8 SCC 584, it was held that relief of eviction of a tenant is not based on the title of the landlord to the leased premises and even if an averment to the said effect, of landlord being owner, is made in the plaint, as long as no relief of declaration of title is claimed and only the relief of eviction of tenant on the ground that lease has come to an end is claimed, the Court is not called upon to decide the question of title. Precision Steel Vs. Reeta Salwan MANU/DE/4436/2013. Delhi.

- In case the services of probationer has been terminated during the probation period, due to unsatisfactory service, such termination does not amount to “retrenchment” within the meaning of Section 2(oo) of Industrial Disputes Act and no retrenchment compensation under Section 25 FF is payable to him by the employer. Air India Ltd Vs. Mahinder Singh 2014(207) DLT 479 Delhi.
- Once an issue has been decided in earlier stage of proceedings in a suit, then the same cannot be raised and agitated in a subsequent stage of the same proceedings and principle of res-judicata shall apply. Erach Boman Vs. Tukaram Shridahr Bhat 2014(118)CLA 344 SC.
- The application under Order 9 Rule 13 CPC can be decided on the basis of affidavit and it is not necessary that oral testimony be led or cross examination of witness be carried out. RM Enterprises Vs. R S Gupta 2014(208)DLT 234.

ARBITRATION & CONCILIATION ACT, 1996 - BY SHRI PRAVEEN K MITTAL-9810826436

- Objection to the jurisdiction of the Arbitrator has to be specifically taken before the Arbitrator at the first instance i.e. by way of a separate application before filing Written Statement or in the Written Statement itself. If no objection is taken before the Arbitrator, the same would be deemed to have been waived by the party. The same party cannot be allowed to raise such objection in a petition under Section 34 of the Act before the Court.
- In case the party has not separately filed an application under Section 8 of Arbitration & Conciliation Act, 1996 but filed Written Statement and in the Written Statement, a specific plea has been taken that there exists an arbitration agreement and also filed a copy of the Agreement, the court is duty bound to refer the disputes/claim before the Arbitrator as provided in the Arbitration Agreement. Sharad P Jagtiani Vs. Edelweiss Securities ZLtd 2014(208) DLT 487.

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