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GST – Designing a compliance friendly regime

By **Iype Mathew**

Introduction

India is now poised to introduce its biggest indirect taxes reform by launching the Goods and Services Tax regime. GST when introduced will usher in a nationwide common market which is expected to be less intrusive, compliance friendly, and self-policing in nature. The passage of the Constitutional Amendment Bill was a very big hurdle crossed. We hear claims that this achievement represents - a grand national consensus, an example of cooperative federalism, a rare and historic political consensus, etc. Good that at last the larger interest of the nation prevailed over the self-serving interests of different political groups. There lies an equally tough road ahead to be crossed in completing the remaining tasks. This job is also to be done well and thoughtfully. A few important issues in this regard are being focused in this article for general consideration.

Rate of GST

Indirect taxes are essentially regressive in nature because the burden of this tax generally passes on fully to the ultimate consumer without making any distinction as to whether the consumer is rich or poor, big or small, or strong or weak. In other words, indirect taxes impose a greater burden on the poor than on the rich. By its very nature there is an inverse relationship between the tax rate of an indirect tax and the ability of the tax payer to pay the tax. Thus a regressive tax takes a larger percentage of income from low-income earners than from high-income earners.

In the case of supply of goods and services, it is impractical to adopt progressive rates for its levy and collection. We generally see that governments apply indirect taxes uniformly to all consumers on what they buy. Therefore indirect taxes have to necessarily be low in order to mitigate the hardship it causes on the poorer people in general. And in India where almost 1/3rd of its people are extremely poor, there is hardly any justification for governments, Central or State, to aim at a high rate for GST in the future. It will be a great opportunity now, for these governments to set an upper cap of 18% for GST, at least in principle, in the general interest of the vast majority of its people.

The aim of the governments should also be to eventually reduce the standard GST rate, slowly and steadily from 18% to 16% and ultimately to 14%. Today the main concern is to ensure that there is no fall in the revenue collection on account of switching over to GST model, and 18% is estimated to be a safe revenue neutral rate (RNR) for that purpose. But for the historic reason that governments in India found it convenient to source its revenue mainly through indirect taxes, it does not mean that this dependence on a regressive tax, should be perpetuated. Direct taxes are

where all the attention should be. It is openly admitted by experts that India can and should widen its direct taxes net and put greater efforts in regulating and effectively controlling this source of revenue.

Dual Tax Administration

Any tax can be levied and collected only by authority vested by law. In India the power to make laws is indicated in the Constitution wherein the matters on which the Parliament and the legislature of any State can make laws, have been clearly specified in the form of Union list, State list and Concurrent list. The progress so far made as regards GST is limited to the creation of this source of power to make the law. The actual law for the levy and collection of GST will eventually be separately passed by the Union and the States, and these laws will comprise of the Acts, the Rules, the Tariffs, the Exemptions and the procedures (forms, returns, registers etc.). When GST is introduced a multiplicity of indirect taxes will be replaced by a single levy, which will comprise of two portions, one for the Union and the other for the State, and the character of this levy would have changed from that of an origin based levy to that of a destination (consumption) based levy. These changes will not only reduce compliance cost but will also make it easier and simpler for the assesse, and most importantly promote business, trade and commerce. Being a single levy, the two parts of GST (CGST and SGST) will be imposed concurrently on every transaction of supply of goods and services and on the same value. Because of such a concurrent levy, it is now proposed to design common processes and documents for registration, payment of tax and filing of return. All these features will no doubt considerably simplify tax compliance requirements.

But assessees and experts additionally wish that tax payers are also brought under the control of a single tax administration. It may be mentioned that a large number of traders who now only pay VAT and therefore interact with only one State VAT authority, will now be required to additionally interact with Central indirect tax authority when GST is introduced which they would not prefer.

India is a federal democracy wherein the States enjoy as much autonomy in matters coming within their purview, as does the Union in respect of its matters. Any dilution or interference in the autonomy of the functioning of States within the Union of India, is certainly not desirable, and will create strong reactions and protests. Finance and Home are two subjects which are extremely important and at the core of politics and governance. The Union and the States, can only adopt a policy of mutual respect and cooperation, while planning for legislation in these matters, and be prepared to strengthen and compliment each other in these subject areas. Therefore when both the Centre and the States are jointly empowered to raise indirect tax revenue, they will naturally have separate laws and separate infrastructure for its control and regulation. There is no escape from such a dual

administration arrangement. Simpler laws and procedure, common forms and formats, low rate of GST and automation of transactions, are what will ease and save the situation. Focus should therefore be on these aspects, and a culture of a clean and convenient taxation system is bound to set-in.

Date of Implementation

Switchover to GST involves large scale preparations including the setting-up of the IT infrastructure. There should be no desperation because of any deadline. If the change is forced-down, with half-hearted preparations, the consequences can be chaotic, and therefore certainly avoidable. On its journey of transforming into a developed economy, GST is extremely important for India in order to create a robust indirect tax system and to instill a genuine culture of complete tax compliance. Hence assessment of lead time to prepare the tax payers and the tax authorities for the change-over, has to be carefully done. 1st April, 2017 is being mentioned as the change-over date. But if a couple of more months are indeed required to complete the preparations reasonably well, there should be no hesitation in letting it be so. Afterall it took us 16 years to come this far, and a little more extra time should not matter at all.

Conclusion

The decision to be taken by the governments at the Centre and in the States, for implementing GST, will have far reaching cost and price implications for producers and consumers. The gains of a GST regime are in efficiency, competitiveness and increased revenues, but these gains are possible only when, by design, GST is a compliance friendly regime.

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GST – Statutory Update

The Constitution Amendment Bill on Goods and Services Tax (GST) has been passed by the Indian Parliament. While Rajya Sabha (Council of States - Upper House) passed the same after certain amendments on 3 August, 2016, Lok Sabha (House of People - Lower House) passed the amended Bill on 8 August 2016. The Bill seeks to empower the Parliament and State Legislatures to make law for levy of GST which will replace Central Excise duty, AED, CVD, SAD, Service Tax, VAT, Entertainment Tax, Luxury Tax, Purchase Tax and Octroi. It also seeks to provide exclusive power to Parliament to make laws to levy tax on supply of goods or services or both in the course of inter-State trade or commerce. A new Article 279A is proposed to be inserted in the Constitution of India according to which GST Council will be constituted. This body will recommend rate, threshold limit, special provisions for certain States and date from when petroleum crude, diesel, petrol, natural gas and aviation turbine fuel will come under GST. Being a Constitution Amendment Bill, this Bill is required to be ratified by majority of State Legislatures. Till 17-8-2016, Assam, Bihar and Jharkhand have

ratified the same. On ratification by majority of States and on receipt of President's assent, the Bill will become Act and Constitution will stand amended. Thereafter, laws in respect of Central GST, IGST and State GST are required to be framed and provided with legislative approval for GST to come into force.

CENTRAL EXCISE

Notifications and Circulars

Revised returns – Provisions have come into effect from 17-8-2016: Central Board of Excise and Customs (CBEC) has notified the effective date for operation of provisions regarding filing of specified revised returns under Central Excise Rules, 2002. According to Notification No. 42/2016-C.E. (N.T.), dated 11-8-2016, certain amendments made by Notification No. 8/2016-C.E. (N.T.), dated 1-3-2016 in this regard would come into force from 17th of August, 2016. As per new sub-rules 12(8) and 17(7) inserted for this purpose, revised monthly return of production and removal of goods can be submitted by the end of the calendar month in which the original return is filed. In case of annual return, revised return can be submitted within one month from the date of submission of such annual return.

Excise duty on jewellery – SSI exemption revised: In order to relax the new levy of Excise duty on jewellery, the SSI exemption available to small scale jewellers has been further modified. According to latest round of amendments and clarifications, no excise duty would be payable if the aggregate value of clearances of articles of jewellery or parts, falling under Heading 7113 of the Central Excise Tariff, during the current financial year, does not exceed INR 10 Crores. Notification No. 28/2016-C.E., dated 26-7-2016 amends Notification No. 8/2003-C.E. for this purpose. Further, it has been clarified that computation of eligibility and SSI exemption limit is to be done individually for each manufacturer or principal manufacturer, irrespective of the number of jobworkers employed or the number of premises from which job workers operate. Circular No. 1040/28/2016-CX, dated 26-7-2016 also states that value of exports, except those made to Bhutan, would not be counted towards computation of eligibility and exemption limit.

Ratio Decidendi

Manufacture – Loading of software in a device does not amount to manufacture: Authority for Advance Rulings has held that activity of loading of business software in an imported device, classifiable under Heading 8517 of the Central Excise Tariff, would not constitute 'manufacture' under the Central Excise law. Going through the facts, the authority was of the view that the device, as imported, was not incomplete or unfinished article inasmuch as it was already embedded with basic input-output system to perform primary functions. It was held that uploading of software into such device will not result in new and different article having a distinct name, character or

use and that the original commodity i.e. the device will not cease to exist on uploading of software. The ARA in this regard also noted that if the intention of the legislature was to treat uploading of software into such devices as manufacture, Notes to Chapter 85 would have included goods of Heading 8517 also, deeming such activity to be manufacture. [*Nucleus Software Exports Ltd.* v. *Commissioner* - 2016-VIL-16-ARA]

Exemption to pipes for carrying water also covers casing pipes: Casing pipes used for tube wells for drilling purpose to extract water, and do not physically carry water, are also eligible for the benefit of Notification No. 6/2002-C.E. CESTAT Delhi, while holding so, observed that wording of the notification is to be interpreted in a way so as not to frustrate the purpose of the notification. CBEC Circular No. 659/50/2002-CX, dated 6-9-2002, clarifying that exemption would be available to pipes required for obtaining untreated water from its source to the plant, was also relied upon by the Tribunal in this regard. [*Commissioner* v. *Ambuja Pipes P. Ltd.* – Final Order No. 52376/2016, dated 6-7-2016, CESTAT Delhi]

Recovery of dues of proprietorship firm from successor company: In a case involving conversion of proprietorship firm into partnership firm and then a company, CESTAT Kolkata has upheld recovery from the company. The Tribunal was of the view that there is transfer of liability along with transfer of registration, licences, etc., and that in the assignment of business agreement, entire business was taken over by the appellant, including liabilities. Words 'morefully described in Schedule A' in the contract for transfer of assets, properties, liabilities and duties, were interpreted by the Tribunal as 'including' the liabilities as specified and not limiting them. Delhi High Court decision in the case of *Freezair India (P) Ltd.* was distinguished by the Tribunal in this regard. [*Laxmi Electrovision (P) Ltd.* v. *Commissioner* – Final Order No. FO/A/75724/2016, dated 3-8-2016, CESTAT Kolkata]

Clandestine removal – Duty payment during investigation is not admission of evasion: Mere payment of some amount during investigation by itself cannot be held as admission of duty evasion. CESTAT Delhi while holding so was of the view that evasion/clandestine removal has to be decided based on material evidence collected during investigation. Reliance by the department on statements of certain persons was also rejected by the Tribunal noting that specific details, cross verification and corroboration were lacking in the statements. Department's case based on recovery of certain invoices from the premises of ex-employee, was further rejected by the Tribunal relying on detailed opinion of the hand-writing expert. [*Future Link India* v. *Commissioner* – Final Order No. 51787/2016, dated 16-5-2016, CESTAT Delhi]

Anchor rings and load spreading plates are parts of tower for wind operated electricity generators: Larger Bench of the Appellate Tribunal has held that anchor rings and load

spreading plates, specifically designed to be placed in the foundation of the wind operated electricity generator, are parts of tower for the generators and hence are eligible for exemption under Notification No. 6/2006-C.E. CESTAT in this regard observed that the goods were specifically designed for attaching tower to the ground and are in effect extension of the tower. Further, relying on Supreme Court decision in the case of *Gemini Instratech,* 2015 (323) ELT 220 (S.C.), the three Member Bench of the Tribunal held that windmill doors would also be eligible for the exemption. [*Rakhoh Enterprises* v. *Commissioner* – Order dated 13-6-2016 in Appeal Nos. E/88906/2013-Mum, E/407/2009-Mum and E/1813/2010-Mum, CESTAT LB]

Valuation when processing on job-worked goods is not 'manufacture': The Supreme Court has rejected the contention of the department that fabric returned from the premises of the job worker after processing under Rule 12B of the Central Excise Rules, 2002, and subjected to further processes like cutting, stitching ends, ironing, folding and packing would be liable to duty on the value at which the assessee cleared the same to its customers. Upholding the decision of the CESTAT, the Court observed that Rule 12B and CBEC Circular No. 557/53/2000-CX, dated 3-11-2000 were correctly interpreted by the Tribunal. The Tribunal in its Order impugned before the Supreme Court had held that the goods will continue to be classifiable under Chapter 52/54/55 and that such process undertaken would not amount to manufacture. The Tribunal had also held that though there is value addition, yet in terms of the said Rules and Circular, the value to be adopted is only the value at the end of the job worker, i.e. cost of grey fabric plus job charges. [*Commissioner* v. *Kitex Ltd.* – 2016 (338) ELT 174 (SC)]

Cenvat credit admissible on structural steel: CESTAT Mumbai has, relying on various Supreme Court and High Court decisions and rejecting department's reliance on the Larger Bench decision in the case of *Vandana Global,* held that Cenvat credit on structural steel would be admissible. It was of the view that much water has flown on the issue as various High Courts have either distinguished or overruled the view taken by the Larger Bench in the case of *Vandana Global.* Reliance in this regard was also placed on Gujarat High Court decision in the case of *Mundra Ports and SEZ,* wherein the Court had held that the amendment dated 7-7-2009 in the Rule is not clarificatory in nature. The demand in the dispute was from October 2005 till November 2008. [*Gurunanak Metal Works* v. *Commissioner* – Appeal Nos. E/1097/11, E/994/11 and E/1069/11 , heard on 10-3-2016, CESTAT Mumbai]

Cenvat credit on steel items when not deniable: CESTAT Delhi has also allowed Cenvat credit on steel item used in fabrication of structures. Tribunal in this regard was of the view that mere assertion of legal definition without supporting fact cannot be sustained to deny credit. In this case, various MS Steel items were used in fabrication of structures, cable tray and angles,

etc. Reliance was also placed on the Supreme Court's decision in the case of *Rajasthan Spinning and Weaving Mills Ltd*. wherein the Court had observed that nature of usage of the item has to be examined in the factual context to determine eligibility. [*Sangam India Ltd.* v. *Commissioner* – Final Order No. 52297/2016, dated 1-7-2016, CESTAT Delhi]

Cenvat credit on items used for making steel platform, not available: CESTAT Kolkata has denied Cenvat credit on items used for making steel platform on which welding of railway wagons was undertaken by the assesse. It was of the view that such steel structure/fish plates cannot be considered either as capital goods or inputs of such structures under Rule 2 of the Cenvat Credit Rules, 2002. Penalty was however set aside taking note of case law in favour of the assessee. [*Titagarh Wagons Ltd.* v. *Commissioner* – Order No. FO/A/75679/2016, dated 26-7-2016, CESTAT Kolkata]

Cenvat Rule 6(3A) is only a procedure contemplated for application of Rule 6(3): Non-intimation of the option, as prescribed under Rule 6 of the Cenvat Credit Rules, 2004, to department is condonable. While holding so, Bangalore Bench of CESTAT rejected the contention of the department that once the option has not been intimated in writing, the assessee is bound to pay the amount as calculated under the first option (payment of 10%). It was observed that sub-rule (3A) is only a procedure contemplated for application of Rule 6(3) and that it is not stated anywhere that on failure to intimate, the manufacturer loses its right to avail second option. [*Cranes & Structural Engineers* v. *Commissioner* – Final Order No. 20617/2016, dated 8-8-2016, CESTAT Bangalore]

CUSTOMS

Notification and Circular

Minimum Import Price (MIP) requirement abolished for many iron and steel products: Director General of Foreign Trade (DGFT) has removed requirement of Minimum Import Price (MIP) on several iron and steel products. List of products which can be imported only on mandatory specified minimum import price has been pruned to 66 from initially notified 173 products falling under Chapter 72 of the ITC (HS) Classification. It may be noted that 173 products were under the stated import restriction from 5-2-2016 till 4-8-2016. New Notification No. 20/2015-20, dated 4-8-2016 issued by the DGFT under the Indian Ministry of Commerce allows MIP restrictions for two more months on the specified 66 products. Imports under Advance Authorisation scheme of the Indian Foreign Trade Policy are however exempted from such requirements.

Exports under MEIS Scheme using E-commerce platform – CBEC notifies procedure: As per Para 3.05 of the Foreign Trade Policy, benefits under Merchandise Exports from India Scheme (MEIS) is also available to exports of specific goods through courier or foreign post offices using E-commerce platform. Circular No.

36/2016-Cus dated 29-7-2016 issued in this regard prescribes information to be provided by the exporter and procedure which is to be followed by the Foreign Post Office (FPO). Format of Postal Bill of Export (PBE) has also been prescribed in this regard. It is stated that such exports may take place through FPOs at Delhi, Mumbai & Chennai and that other procedure as applicable for processing of shipping bills including procedure for amendments etc., shall also apply to PBE.

Special Advance Authorisation Scheme for export of apparels, notified: Special Advance Authorisation Scheme for promotion of export of apparel articles and clothing accessories of Chapter 61 and 62 of ITC (HS) has been introduced. DGFT Notification No. 21/2015-20, dated 11-8-2016 issued for this purpose, inserts Para 4.04A in the Foreign Trade Policy 2015-20, with effect from 1-9-2016. The scheme allows duty-free import of input fabric including interlining, based on SION, by actual users. Drawback, both All Industry Rate (AIR) and Brand Rate, would also be available for non-fabric inputs used. Notification Nos. 45/2016-Cus. and 110/2016-Cus. (N.T.), both dated 13-8-2016, have also been issued by the Ministry of Finance to make the scheme effective and to amend the AIR Drawback Schedule to provide for alternate AIRs. CBEC Circular No. 37/2016-Cus., dated 13-8-2016 issued in this regard further clarifies certain declarations to be made in the shipping bill for such physical exports.

Ratio Decidendi

Valuation – No case for enhancement of value just by citing contemporaneous imports: There is no case for the department for enhancement of value just by citing imports by other importers through different contracts unless it is able to reject the transaction value strictly as per provisions of law including the provisions of Customs Valuation Rules as applicable. Holding so, Bangalore Bench of the CESTAT noted that Revenue was not able to prove any undervaluation or mis-declaration and thus convincingly reject the declared transaction value. It was also noted that the imports relied upon by the department were not contemporaneous inasmuch as those contracts were of later date when admittedly there were drastic fluctuations in the international price of the commodity involved. [*Peekay Steel Castings Pvt. Ltd.* v. *Commissioner* - Final Order Nos. 20391 to 20395/2016, dated 6-6-2016, CESTAT Bangalore]

Valuation – Additions under Rule 10(1)(c) on basis of answer to a question, not correct: Chennai Bench of CESTAT has rejected the addition of design and validation fees, machine installation and commission support charges, in the value of imports by the adjudicating authority on basis of reply to the questionnaire. Commissioner (Appeals) had in the order impugned before the Tribunal held that an answer to one of its questions in the questionnaire merely is not enough to order for addition and that SVB has to

do the investigation and find out whether the parameters for addition exist or not. The Tribunal upheld the Commissioner (A) order and held that the contention of the department that based on reply to the questionnaire, the adjudicating authority passed an order holding that the said fees were addable to transaction value under Rule 10 (1) (c) of the Customs Valuation Rules, 2007, was unsustainable. The Appellant was importing components and parts from related party for manufacture of plastic fuel tanks for making supplies to OEMs in India. [*Commissioner* v. *Yapp India Automotive Systems P. Ltd.* - 2016-VIL-513-CESTAT-CHE-CU]

Ship demurrage charges not includible in value of imported goods: Chennai Bench of CESTAT has held that ship demurrage charges paid by the importer for delay in discharge of cargo at the port of import are not includible in the value of imported goods. The Tribunal in this regard relied on the recent Apex Court decision in the case of *Mangalore Refineries and Petrochemicals Limited* [2015 (325) ELT 214 (SC)] and Larger Bench decision of Tribunal in *Grasim Industries Ltd.* [2013 (296) ELT 39 (Tri-LB)]. Imports in this case were made during the period of 2002-04 before the introduction of Customs Valuation Rules, 2007 which contains an *Explanation* under Rule 10(2) *ibid* for inclusion for such charges. [*IOCL* v. *Commissioner* - 2016-VIL-505-CESTAT-CHE-CU]

Direction to pay EDD while remanding matter back to SVB to decide on merits, is illegal: CESTAT Chennai has held that directions made by the Commissioner (Appeals) in the remand order to pay Extra Duty Deposit of 1% till the time the matter is decided by the SVB authorities will prejudice the mind of authority and therefore such pre-condition cannot be imposed. The Commissioner (A) had not decided the case on merits but had remanded the case back for *de novo* adjudication. The Tribunal relied on the Madras High Court Order in the case of *Terumo Penpol Ltd.* [2015-TIOL-1423-HC-MAD-CUS]. [*KMF Automotive Private Ltd.* v. *Commissioner* - 2016-VIL-504-CESTAT-CHE-CU]

Finance Act, as enacted, represents ultimate will of Parliament and not Budget Proposals and FM's Speech: Assessments of imported goods during the financial years 1993-94 and 1994-95 were challenged on the ground that same were made at tariff rate which was higher than the rate proposed in the Budget proposals of those years. The Appellant also sought Court directions to the Central Government to grant exemption to the imported goods as per the Budget proposals. The Supreme Court, while rejecting the plea, held that what has been relied on are only Budget proposals and FM's Budget Speech whereas the Finance Act, as passed by the Parliament, represents the ultimate will of the Legislature. Directions to issue exemption notifications were also declined by the Court on the ground that power to exempt duty under the Customs Act, 1962 is also subject to amending power of the Parliament. [*Amin Merchant* v. *Chairman, Central Board of Excise & Revenue* - 2016-VIL-38-SC-CU]

Provisional clearance when denial of EPCG licence challenged: Customs Authorities have been directed to release goods provisionally against a simple bond and undertaking when the importer had challenged denial of EPCG license before appropriate appellate authorities. The appellant had imported capital goods in anticipation of an EPCG license and came to know of rejection of application only after import against which appeal was filed and the same was pending. The Tribunal allowed the appellant to clear the goods provisionally under a bond with an undertaking to pay duty upon failure of the appeal. [*Kalyan Silks Trichur Pvt. Ltd.* v. *Commissioner* - 2016 (336) ELT 611 (Ker.)]

SCN issued by Customs Authority on identical facts based on which earlier SCN issued by DGFT quashed, not correct: The appellant in this case was issued show cause notice by the Customs authorities on the ground that they had violated the conditions of export of frozen buffalo meat in terms of the Exim Policy and also committed fraud under DEPB/VKGUY Scheme. On this very identical issue, they were issued SCN by DGFT more than a year before the present SCN, in which they were exonerated by the DGFT after a detailed enquiry. The High Court after perusing the impugned notice opined that it was nothing but a repetition of the same allegations which have been examined in detail by the DGFT. Following the decision of Supreme Court in the case of *Titan Medical system Pvt. Ltd.*, 2003 (151) ELT 254, the Court allowed the writ petition and quashed the impugned SCNs, terming it an abuse of the process of law. [*FNS Agro Foods Ltd.* v. *Commissioner* - 2016 (337) ELT 31 (Del.)]

SERVICE TAX

Circular

Freight Forwarding service – Capacity in which service is provided is important

By way of Circular No. 197/7/2016 dated 12-8-2016, service tax liability of freight forwarders on transportation of goods from India has been clarified by CBEC. Freight forwarders may act as agent of the airline, carrier or ocean liner without bearing any liability for the actual transportation. In such cases, since he is an intermediary, applying Place of Provision of Services Rules, the service of freight forwarding will be liable to service tax even while actual transportation will not attract service tax. Where the freight forwarder acts on his own account (as principal) , undertakes risk of transportation, he is providing the service of transportation of goods outside India and will not be liable to pay service tax on the same.

Ratio Decidendi

Tax liability discharged under different Acts on advice of department – Penalty not imposable: The petitioner urged that he had discharged tax liability under service tax and later under excise laws as per the advice/direction of the department. However the Settlement Commission imposed a penalty on the petitioner which was adjusted against refund

of excise duty due to the petitioner. The Delhi High Court held that there was no justification to impose penalty when the petitioner had acted with *bona fide* and he had not attempted to evade tax. [*Alpha Infravision P Ltd* v. *UOI*, 2016 (43) S.T.R. 344 (Del.)]

Extended warranty provided by dealer – Manufacturer not liable under BAS : The department contended that service of replacing of defective parts, provided by the dealer on directions of the car manufacturer would be taxable under Business Auxiliary Service (BAS). The assessee argued that extended warranty was provided to take care of the contingency of a defective part and the uncertainty of the taxable event took it out of the realm of taxation. Also, the activity of the dealer in replacing the defective part, insuring against the risk etc., could not be covered under the definition of BAS which covers service in relation to procurement of goods and services which are input services for the client. The Tribunal held that there is no enhancement of business or increase arising from extended warranty scheme but such enhancement arises from defects in the cars and that such provision of warranty is not a service as also not a taxable service. [*CCE & ST* v. *Honda Siel Cars India Ltd*, 2016 (43) S.T.R. 390 (Tri.-Del.)]

Tax deposited under mistake of law – Limitation under Section 11B not applicable: The petitioner sought refund of tax paid under Erection, Commissioning and Installation Services since as per law there was no liability to pay but the tax was deposited by mistake. The department had issued a Show Cause Notice but it was not adjudicated upon. The department denied refund holding the claim to be time-barred. The Court held that limitation as regards refund application could not apply to the impugned sum as it was neither excise duty nor service tax and the same cannot be retained by the Union of India. [*G.B.Engineers* v. *UOI*, 2016 (43) S.T.R. 345 (Jhar.)]

Sale of space for advertising - Levy of service tax and VAT mutually exclusive : At issue was the demand from VAT authorities seeking to tax the activity of procuring of outdoor media space which was used by its clients to display advertisements. The petitioner argued that he had been discharging service tax on the same and that since service tax and VAT are mutually exclusive, VAT authorities could not demand tax or if the activity was indeed a transfer of right to use, chargeable to VAT, service tax discharged thereon should be refunded. Finding considerable merit in the argument that the levy of service tax and VAT are mutually exclusive, the High Court set aside the assessment orders and notices of the VAT authorities and ordered that the matter should be considered afresh in light of the principles laid down in *Tim Delhi Airport Advertising* v. *Special Commissioner*, W.P. (C) No. 1625/2014 decided on 2-5-2016. [*Pioneer Publicity Corporation P Ltd* v. *CVAT*, 2016 (43) S.T.R. 358 (Del.)]

Adjustment of excess service tax paid – Provisions not to be given narrow interpretation: Reasoning that where an assessee, having paid

excess services tax opts to adjust the same instead of claiming refund, forgoing interest, a strict interpretation of procedural requirements should not be adopted, the Tribunal held that though the assessee had adjusted the tax paid in excess of what was statutorily permissible, it need not be penalised. As per Rule 6(4) and 4B of Service Tax rules, 1994 the assessee was allowed to adjust a maximum of one lakh rupees (of excess service tax paid) in subsequent months. Also, it had not intimated the department about the adjustment, as required. However, the Tribunal upheld the impugned order setting aside the demand of interest and penalty observing that it was a mere technical breach. [*CCE & ST* v. *State Bank of Hyderabad*, 2016 (43) S.T.R. 415 (Tri.-Hyd.)]

Cenvat credit of GTA service availed outside factory when available : Observing that the department had not appreciated the law as regards 'place of removal' and 'point of clearance' correctly, the Tribunal granted relief to the assessee who claimed credit of tax paid on GTA service (input service) from his factory in Sikkim to Siliguri. The department argued that the assessee was availing area-based exemption and place of removal would be the factory in Sikkim and inputs used outside the factory were not eligible inputs. However, the Tribunal was of the view that as per the definition of input service read with definition of place of removal, in certain cases, place of removal extended beyond the factory gate and as such the assessee could claim credit of tax paid on GTA service. [*Alkem Laboratories* v. *CCE & ST*, 2016 (43) S.T.R. 457 (Tri.-Kolkata)]

Runway – Activities pertaining thereto, liable to service tax: The two substantial questions of law which came before the High Court were (a) whether the activities pertaining to 'runway' will be entitled for exemption (b) whether repair and maintenance of runway undertaken by the petitioners was taxable under 'management, maintenance or repair service', even when it is specifically excluded from the scope of 'commercial or industrial construction service'. Since the terms 'road' and 'runway' were not defined in the Finance Act, 1994, reference was made to their understanding in common parlance. The difference was noticed even in commercial parlance between these two words. It was held that it would be incorrect to say that 'road is a genus of which runway is species' and thus the benefit of exemption cannot be extended for activities pertaining to 'runway'. Further benefit of exemption to services relating to management etc. of non-commercial Government buildings was denied. For the second question, the Court held that, merely because repair of road and airports is specifically excluded from the definition of commercial or industrial construction does not mean that it cannot form part of other taxable service. It is the management of properties as also their maintenance or repairs, irrespective of whether they are immovable or not, which is a management, maintenance or repair service. Once it is taxable, then, whether it is in relation to road or airport is not material. [*D P Jain & Company Infrastructure* v. *UOI*, Writ Petition No.7890 of 2015, Order dated 18-6-2016, Bombay High Court]

VALUE ADDED TAX (VAT)

Notifications

Assam VAT - Rate of tax increased for specified goods: The rate of tax of goods falling under the Second Schedule of Assam Value Added Tax Act, 2003 has been increased from 5% to 6% by Notification No. FTX.55/2005/Pt-VII/29, dated 2-7-2016. The said notification is effective from 4-7-2016.

Telangana VAT – Cell phones to be taxed @ 5%: By Notification G.O.MS. No. 186, dated 28-7-2016, Entry 131 relating to cell phones or mobile phones, has been inserted in Schedule-IV of Telangana Value Added Tax Act, 2005. The rate of tax applicable on the goods falling under Schedule-IV to the said Act is 5%.

Ratio Decidendi

Setoff when sales also made to exempted units: Allahabad High Court has held that Section 4-BB of the Uttar Pradesh Trade Tax Act, 1948 (UPTT Act), which provides for set-off of tax, did not make any distinction between sales made to exempted units and taxable sales, i.e. set-off is not restricted to only those sales upon which tax was levied or collected. The Court in this regard noted that the set off claimed is of all taxes that have been paid on the purchase of raw material and that the same is not restricted in any manner to only those sales upon which tax has been levied or collected. Relying on the judgment of Supreme Court in *Bharat Petroleum Corp. Ltd.* [1992-VIL-05-SC], it was held that there was a clear absence of quantitative correlation to the total tax paid on raw material and their utilisation in the manufacture of taxable goods. Further, the Court observed that Section 4-BB was in the nature of a beneficial provision and had to be accorded an interpretation in favour of the assessee.

The assessee had paid tax on the purchase of raw material and packing material and undertook both taxable sales and sales in favour of units which had been granted exemption from payment of tax under Section 3-B of the UPTT Act. The assessing authority however reduced the set-off by the amount of tax not paid on the exempted sales undertaken by the assessee. The issue before the Court was whether the tax paid on purchase of raw material and packing material was liable to be adjusted in full from the ultimate tax liability or was it liable to be adjusted only to the extent of taxable turnover. [*Maiden Industries* v. *Commissioner of Trade Tax* - 2016-VIL-405-ALH]

Replacement of damaged and defective goods under warranty when constitutes 'sale': The appellant is engaged in the business of manufacture and sale of a product and sources its parts from a foreign supplier. It provides to the customers a warranty for replacement of defective parts, for which they are getting reimbursed by the supplier for the price of the spare parts replaced under a warranty extended to them. The issue before the Tribunal was whether such transaction constitutes a sale and thus is taxable under the Maharashtra Value

Added Tax Act, 2002 (MVAT Act).

Rejecting appellant's contention that there is no privity of contract between the foreign supplier and customers, the Tribunal observed that the appellant herein is a mere assembler of the goods manufactured by the supplier and the same warranty extended by the supplier is the warranty extended to the appellant's customers. The Tribunal relied on the judgment of *Commissioner of Trade Tax v. Mohd. Ekram Khan & Sons* [136 STC 515 (SC)], wherein issue of credit notes by the manufacturer against the replacement of defective parts undertaken by the appellant-dealer was held to be a sale by the Supreme Court. It was held that replacement of damaged and defective goods by the appellants is a "sale" as the price of the same is received by the appellant from the supplier and thus, such transaction is taxable under the MVAT Act. [*B & R Industrial Automation Pvt. Ltd. v. State of Maharashtra* - 2016-VIL-24-TRB]

Toothpaste and mouthwash not covered as medical drugs: The issue in the instant case was whether the products, "Triguard Toothpaste" and "Triguard Mouthwash", would be covered under Schedule C Entry 29 of Maharashtra Value Added Tax Act, 2002 (MVAT Act) which reads as *"Drugs (including Ayurvedic, Siddha, Unani, spirituous Medical Drugs and Homeopathic Drugs), being formulations or preparations…."*. The department was of the view that the products were not drugs and therefore covered under Schedule E, Entry 1 for goods not provided for elsewhere, and taxable at the rate of 12.5%. The Tribunal also, finding no evidence to support the contention that the products are sold exclusively under prescription, upheld the view of the Revenue department.

Reliance in this regard was placed on the common and commercial parlance test laid down by a catena of case laws including *Puma Ayurvedic Herbal (P) Ltd. v. CCE, Nagpur* [AIR 2006 SCC 1561]. It was observed that Triguard toothpaste is treated by public at large and in commercial sense as toothpaste and additional medical properties would not lead this toothpaste to be treated as medicine. It was also observed that the composition of "Triguard Mouthwash" was not different from the components of the commonly available mouthwashes in the market and that the product is used to treat bad breath which cannot be said to be a disease or a disorder. [*FDC Ltd. v. State of Maharashtra* - 2016-VIL-23-TRB]

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