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ARTICLE

Anti-profiteering measure and price control mechanism under GST

By **Brijesh Kothary**

The revised model Goods and Services Tax (GST) law has been released by the Government, taking into consideration various representations received from the stake-holders. The revised model law is widely viewed by the industry to be liberal in many aspects, as it has done away with taxability of securities and free supplies between unrelated persons, exclusion of Government subsidies from the definition of consideration, simplification of job-work procedures, capping of tax rates, among other provisions.

The consumers are also given a reason to smile as the revised model law proposes to bring in a price control mechanism (Section 163) to ensure that input tax credits availed by any registered taxable person or the reduction in the price on account of any reduction in the tax rate under GST, have actually resulted in a commensurate reduction in the price of the said goods and/or services. For this purpose, the Government proposes to constitute an Authority or entrust an existing Authority to exercise powers and functions and impose penalty where it finds that the price has not been reduced on account of additional input tax credit or reduced tax rate under GST regime.

Need for anti-profiteering clause in GST law

Countries like Canada, New Zealand, Australia and Malaysia have witnessed a significant increase in inflation for a very short period, after implementation of GST. GST is a multi-stage, consumption-based value added tax which proposes to abolish the cascading effect in the present tax structure. Such change in the tax structure provides room for improved profit margin at every stage of supply chain. Therefore, strict measures are proposed to be implemented to ensure that the benefit of an efficient tax system are passed on to consumers.

In India, it is estimated that approximately 55% of the basket of items in the Consumer Price Index (CPI) will be exempted from payment of GST and approximately 30% of the basket of items in the CPI will be taxed at lower rate of 5%. Therefore, it is expected that the Indian economy may not experience inflationary pressure due to GST implementation. Nonetheless, the Government may leave no stone unturned to ensure that the benefits arising on account of GST implementation reach the consumers. It is therefore expected that the Government may bring in place a legislation to monitor unreasonable profiteering practices by the registered taxable person, after implementation of GST.

Anti-profiteering clause in other enactments

The concept of price control and anti-profiteering has previously been implemented

by the Government of West Bengal way back in 1959 (under *the West Bengal Anti-Profiteering Act, 1958*), to fix maximum price or rate chargeable by a dealer for items of daily use such as rice, wheat, pulses, spices, edible oil, sugar, paper, drugs and medicines, etc. In 2010, the Act was amended to intensify the drive against dealers who store scheduled items illegally for profiteering. The Act provides for punishment with rigorous imprisonment upto 2 years, or fine or both and also for forfeiture of the stock of goods.

In Australia, the Competition and Consumer Commission (under *the Competition and Consumer Act, 2010*) was empowered to conduct price surveillance, monitoring and inquiry in relation to goods and services. These activities were undertaken to ensure that the price reduction on account of transition to GST regime is passed on to the consumers. Any violation under the Act would require an assessee to directly compensate its customers. In case the customers were not identifiable, the assessee would be obliged to donate the unreasonable profits to a charity or provide its services for free, for certain period.

GST has most recently been implemented in Malaysia in 2015. In Malaysia, the price control mechanism on account of GST does not fall under the purview of the GST Act, but under the Ministry of Domestic Trade and Consumer Affairs. The Price Control and Anti-Profiteering Act, 2011 has been enacted to control price of goods and charge for services and to prohibit unreasonably high profiteering by suppliers. The mechanism to identify unreasonably high profit is governed by the amendments brought about to the Act in 2014, read with the Price Control and Anti-Profiteering (Mechanism to Determine Unreasonably High Profit) (Net Profit Margin) Regulations, 2014 (for brevity '2014 *Regulations*').

The 2014 Regulations have identified a certain period during which any increase in the net profit margin of any goods or services on account of GST implementation is viewed adversely and the following conditions are taken into consideration for determining if profit is unreasonably high:

- any tax imposition;
- the supplier's cost;
- any cost incurred in the course or furtherance of business;
- supply and demand conditions;
- the conditions and circumstances of geographical or product market; or
- any other relevant matters in relation to the prices of goods or charges for services.

Determination of unreasonably high profit

The 2014 Regulations prescribe formulae for evaluating net profit margin of businesses in Malaysia from 2-1-2015 to 30-6-2016. By applying the prescribed formula, it must be ensured that:

- the net profit margin from 2-1-2015 to 31-3-2015 does not exceed the net profit margin as at 1-1-2015 and

- the net profit margin from 1-4-2015 to 30-6-2016 (after excluding the effect of GST and sales tax refunds) does not exceed the net profit margin as at 1-1-2015.

If the net profit margin on supply of goods or services under GST regime exceeds the net profit margin as at 1-1-2015, then the supplier is called upon to justify his prices and profits. If the justification is found to be unsatisfactory, the supplier is issued notice to show cause why penal provisions should not be invoked. Further, if the court finds the supplier guilty, he may face fines and possibly, imprisonment.

The 2014 Regulations has faced criticisms from the industry as net profit margin is determined in absolute numbers rather than on percentage basis, which is generally followed by the trade. It was proposed that anti-profiteering and price control should be undertaken by comparing the percentage markup on goods or services {[(Sale price - Cost price) / Cost price] X 100} and corresponding percentage markup as at 1st of January or April. This proposal was not accepted and the 2014 Regulations were amended, thereby extending the period of determination of unreasonably high profit margin from 1-7-2016 to 31-12-2016 using the existing formulae.

Anti-profiteering clause in Indian context

Unlike other countries, the anti-profiteering clause is likely to be covered under the GST Act in India. A strict interpretation of Section 163 of the revised model law requires a registered taxable person to pass on the benefit of every rupee accruing on account of additional input tax credit or reduced tax rate, to the next level of supply chain. Even the transition provisions under the revised model law (Section 169) proposes to allow the credit of eligible duties and taxes in respect of inputs held in stock, subject to the condition that the person passes on the benefit of such credit by way of reduced prices to the recipient.

It may not be practically possible for a business to have one-to-one correlation between procurement and supply of goods and services, particularly the input tax credits on common input services. It is therefore desirable that the industry makes representation before the appropriate authority, to consider the following points before enforcement of anti-profiteering and price control clauses in Indian GST law:

- The law should allow an assessee to demonstrate group, division or business vertical wise net margin, rather than for individual goods and services.
- There should be flexibility for demonstrating profitability in percentage terms and not in absolute value.
- Any price variation pre and post GST regime on account of additional input tax credit or reduced tax rate alone should trigger penal provisions.
- Any increase in net margin that arises after adjusting price for additional input tax credit or reduced tax rate should not be viewed adversely.

- Any increase in net margin for reasons and circumstances beyond the control of business should not be doubted.

Concluding remarks

A registered taxable person engaged in supply of goods and/or services may map all transactions by comparing price variances on account of change in tax structure. The mapping may take into account applicable taxes under the existing laws (Central Excise Duty, VAT, CST, Entry Tax, Service Tax) as well as under the proposed law (CGST, SGST or IGST), keeping other factors constant. Wherever possible, the transaction mapping for goods should be maintained at product level, using the cost accounting records.

A detailed analysis of price change on account of uncertain factors like currency demonetization, inflation, seasonal price fluctuations, etc. and its impact on the company's pricing policy may also be undertaken to justify increase in net profit margin, if any. It is also advisable that an assessee migrating to GST regime identifies and quantifies input taxes that are not eligible as credit under the present regime. Such data may help assessees to demonstrate why price of their goods and/or services have not been reduced even after additional input tax credit eligibility or reduced tax rate under GST regime.

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GOODS & SERVICES TAX (GST)

Jharkhand extends due date for enrolment: By Press Release dated 16-12-2016, Jharkhand Government has extended the due date for enrolment of existing VAT dealers at the GSTN portal. The original schedule mentioned 15-12-2016 as closing date for dealers in Jharkhand which has been extended till 22-12-2016. The press release further states that the log in id and password for accessing the relevant page of GSTN portal for enrolment will pop up once the dealer logs in with his existing credentials in the Commercial Taxes Department's website. An FAQ on certain issues has also been released by Jharkhand Government. It covers issues like non-receipt of provisional id and password, non-working provisional id and password and tax payer not able to access GSTN portal after creating user id. Taxpayers having multiple VAT-TINs against one PAN in the State have been advised to wait till January, 2017 when provisional id and password will be communicated.

CENTRAL EXCISE

Notification

Point of sale devices and goods required for manufacture thereof, exempted: Ministry of Finance has granted full exemption from Central Excise duty to Point of Sale devices (POS) and to all goods for manufacture of such devices. Notification No. 35/2016-C.E., dated 28-11-2016 issued for this purpose amends basic jumbo Notification No. 12/2012-C.E. The exemption will be valid only till 31-3-2017.

Ratio decidendi

Interest on wrongfully availed Cenvat credit – Consideration of PLA amount as evidence of sufficiency of balance: CESTAT Delhi has held that available balance in the form of Cenvat credit and PLA balance can be considered to reckon the interest liability in case of wrongfully availed Cenvat credit. Rejecting the plea of the department that cash balance in PLA account cannot be considered to arrive at the balance, the Tribunal noted that the said amount is already in deposit with the government and maintained by the assessee for debit when dutiable goods are cleared. The original authority was directed to recalculate the interest liability taking into account the combined balance. [*HEG Ltd.* v. *Commissioner* – 2016 (341) ELT 366 (Tri.-Del.)]

Area based exemption - Absence of declaration when not fatal: Noting that details of excisable goods manufactured and cleared, and exemption availed under Notification No. 49/2003-C.E. were intimated to the department in monthly ER-1 Return filed for the new unit, which clearly indicated notifications along with details like description of goods, quantity manufactured, etc., CESTAT Delhi has allowed the benefit of area based exemption to the unit. The Tribunal was of the view that said intimation can be considered as adequate compliance of the condition of the notification. It was also noted that it was not the case of the department that the party was located in a non-notified khasra or manufacturing product in the negative list or that they have not commenced the production before the cut off date. [*Indica Industries Pvt. Ltd.* v. *Commissioner* - Final Order No. 54841/2016, dated 8-11-2016, CESTAT Delhi]

No recovery of proportionate input credit on loss of final goods unless cogent evidence of clandestine removal available: The assessee was engaged in repacking of detergent powder in smaller packs and there was loss in the quantity of final products due to presence of moisture, handling losses and old machinery. With regard to the same, the department alleged that the assessee was not entitled to take credit on the entire input, since there was an increased trend of losses. CESTAT Chennai however held that since there was no cogent evidence that the assessee was selling the products elsewhere without payment of duty, recovery of proportionate input credit on loss of final excisable goods was not sustainable. [*ECOF Industries Pvt. Ltd.* v. *Commissioner* - 2016 (7) TMI 297 CESTAT- Chennai]

Definition of 'capital goods' under clause (1) to Explanation to Rule 57Q(1) is subject to sub-rule (1) of Rule 57A: The Madras High Court has held that the expression 'capital goods' as defined in clause (1) to Explanation under sub-rule (1) of Rule 57Q is subject to Rule 57A. Rule 57A excludes capital goods as defined in Rule 57Q, if they are used for producing or processing of any goods or for bringing about any change in any substance or in relation to the manufacture of the final products or used

for any purpose for manufacture in the factory. In the instant case, credit on cement and steel used in the construction of the foundation on which machinery was fixed, was held as eligible under the erstwhile Central Excise Rules, 1944. [*Dalmia Cements (Bharat) Ltd.* v. *CESTAT, Chennai* – 2016 (341) ELT 102 (Mad.)]

Cenvat credit on the basis of customs duty paid challans, when valid: CESTAT Mumbai has allowed benefit of Cenvat credit taken on the basis of customs duty paid challans in respect of warehoused ex-bonded imported goods. The assessee, due to problems with warehousing period, could not file ex-bond bill of entry and cleared the goods on payment of customs duty which was duly accepted by customs authorities. The Tribunal in this regard noted that duty payment challans contained material particulars like bill of entry no., description of goods, bond no., assessable value, duty and interest amount and that there was no allegation in the show cause notice that the goods were diverted or were not received in the factory. [*Cable Corporation of India Ltd.* v. *Commissioner* - 2016-VIL-906-CESTAT-MUM-CE]

Electricity wheeled out – Application of Cenvat Rule 6: CESTAT Delhi has held that the embargo created in Cenvat Rule 6 has no application for payment of amount of 6% on electricity wheeled out from the factory. The Tribunal in this regard observed that electricity is classified as excisable goods under Central Excise Tariff Act, 1985, but no rate of duty has been prescribed for such goods. It was also noted that electricity is neither 'nil' rated nor exempted from payment of Central Excise duty. CESTAT however denied Cenvat credit in respect of inputs proportionately used in production of electricity wheeled out. [*Topworth Steels and Power Ltd.* v. *Commissioner* - 2016-TIOL-3080-CESTAT-DEL]

Pre-deposit on appeal to Tribunal – No adjustment of amount deposited before Commissioner (Appeals), available: CESTAT Ahmedabad has rejected the contention that the amount paid under Clause (i) of Section 35F of the Central Excise Act, 1944, which was paid at the time of filing appeal before the first Appellate Authority [Commissioner (A)], can be adjusted against the amount of deposit required to be made under clause (iii) while filing the appeal before the Appellate Tribunal. Reliance in this regard was placed by the Tribunal on the Bombay High Court decision in the case of *Greatship (India) Pvt. Ltd.*, laying down certain principles of interpretation of taxing statutes. [*Gunnebo India P. Ltd.* v. *Commissioner* - Order No. A/11706/2016, dated 21-11-2016, CESTAT Ahmedabad]

Packing of pre-determined quantity of various 'O' ring and 'U' cap seals in plastic bags as 'seal kits' does not amount to manufacture: Mumbai CESTAT has held that packing of pre-determined quantity of various 'O' ring and 'U' cap seals in plastic bags and sold to customers as 'seal kits' does not amount to manufacture as goods were already marketable when supplier/manufacturer manufactured the same and cleared to the appellant. It further stated

that merely because the goods were being sold as 'seal kits' does not make the activity of packing a 'manufacturing activity' in the absence of any Chapter Note providing that packing of pre-determined quantity would amount to manufacture. Tribunal in this regard relied on the judgement of the Apex Court in the case of *Neycer India Ltd.* [2005 (184) ELT A37 (S.C.)]. [*Electropneumatics & Hydraulics (I) P. Ltd.* v. *Commissioner* - 2016 (341) ELT 273 (Tri-Mumbai)]

Operation theatre lights covered under Heading 9018 and not under Heading 9405: CESTAT New Delhi has held that the operation theatre lights are classifiable under Chapter heading 9018 as instruments and appliances used in medical, surgical or veterinary sciences and not under tariff heading 9405 which deals with lamps, search lights and spot lights. The Tribunal in this regard noted that operation theatre lights are specialized lamps having shadow less operation, heat diffusing capacities and color correction capabilities especially designed for surgeries and other medical purposes. [*Commissioner* v. *Cognate India* - 2016 (9) TMI 888-CESTAT New Delhi]

Cutting, bending and grinding of copper tubes to turn the same into gas compressors amount to manufacture: Charging tubes, discharge tubes and section tubes after being subjected to the process of cutting, bending, grinding, smoothening etc. are not classifiable under heading 74.11 (including copper tubes), since they form parts of gas compressors after being subject to the abovementioned processes and are thus classifiable under heading 8414.91 (parts of gas compressor). CESTAT New Delhi further held that the aforesaid activities of cutting, bending and grinding would amount to manufacture under Section 2(f) of the Central Excise Act, 1944 since the pipes no longer remain to be simple pipes and tubes in common trade parlance and the resultant products have character, use and name distinct from the generic term of copper tube. [*Sigma Enterprises* v. *Commissioner* - 2016 (341) E.L.T.152 (Tri – Del)]

CUSTOMS

Notifications and Circulars

Minimum Import Price for certain iron and steel products to continue till 4-2-2017: Import of certain iron and steel products falling under 19 codes of ITC (HS) Classifications would continue to be governed under the minimum import price till 4-2-2017. DGFT Notification No. 31/2015-20, dated 3-12-2016, issued in this regard, specifies the price per MT on CIF basis in respect of the covered products. It may be noted that this regime was initially brought in respect of large number of products, (last notification which expired on 4-12-2016, placed such restrictions on goods covered under 66 HS codes), has been subjected to criticism in WTO.

Export/Import documents – Printing of specified documents abolished: Printing of GAR-7 forms, transshipment permit, exchange control and export promotion copies of shipping bill and exchange control copy of bill of entry, will not be required in specified circumstances of imports and exports. CBEC Circular No. 55/2016-Cus., dated 23-11-2016 issued for this purpose however states that where printing is required due to reasons like manual BoEs, insistence of importer, exporter, etc., printouts may be provided on demand.

Mate receipt for exports in containers, abolished: Central Board of Excise and Customs (CBEC) has directed Customs not to insist on issuance of mate receipt in case of containerized cargo. Circular No. 56/2016-Cus., dated 24-11-2016 observes that the main purpose of mate receipt was to ensure that the export container is loaded on the vessel, and that with the advent of automation and changed business workflow, there is no need for issuance of said receipt.

Express Cargo Clearance System introduced: To carry out automated assessment and clearance under the Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010, Express Cargo Clearance System has been introduced on pilot basis in Mumbai from 5-12-2016. This advance automated system on the lines of ICES will speed up the customs clearance of couriers, which with the advent of e-commerce has shown phenomenal increase. Circular No. 58/2016-Cus., dated 2-12-2016 has been issued in this regard.

Wheat exempted from import duties: Basic customs duty on wheat falling under tariff item 1001 19 00 or 1001 99 10 has been made 'nil' with effect from 8th of December, 2016. Notification No. 60/2016-Cus. of the same date amends Notification No. 12/2012-Cus. and omits Sl. No. 34A while amending Sl. No. 34. It may be noted that Sl. No. 34A which provided for 10% duty on wheat was to be effective upto 28th of February, 2017.

Ratio decidendi

Valuation – Different prices for goods imported in same vessel by same importer no ground to reject transaction value: Fact that two consignments with different prices were imported in same vessel by the same importer is no valid reason for disregarding the transaction value. Holding so, CESTAT Bangalore observed that Revenue department had not brought any documentary evidence to say that transaction value has to be deducted. The Tribunal held that the rejection of transaction value was arbitrary in the present case. [*Koyenco Feeds (P) Ltd.* v. *Commissioner* – Final Order No. 21016-21018/2016, dated 30-9-2016, CESTAT Bangalore]

SAD refund permissible when imported goods sold in parts after breaking up: CESTAT Chennai has allowed benefit of Notification No. 102/2007-Cus., where the imported goods were not sold as such. The importer had sold not only individual parts of the imported goods but also broken these parts further for sale. Refund of SAD was denied by the Revenue department contending that description in the

sales invoices issued by the importer did not match with the description in the bill of entry. [*Neoteric Informatique Ltd.* v. *Commissioner* – Final Order No. 42040/2016, dated 28-10-2016, CESTAT Chennai]

Non-mentioning of specific source of power does not invalidate entire executive action: The issue involved was whether Notification dated 13-5-2013 issued by DGFT under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 is sustainable as revision effected under the said notification (revising the rate from Rs. 75 to Rs. 110 per kg.) was not made by way of an order published in official gazette. The Court held that such revision effected under the impugned notification was valid as Central Government has the power to fix the rates which comes with power to revise the rates as well. Further, DGFT acts as a limb to Central Government and not delegatee, therefore, mere non-mentioning of the source does not invalidate the entire executive action. It was held that the notification for revision of rates would be treated as an act of Central Government under Section 5 of the above mentioned Act and, hence, valid in law. [*Union of India* v. *Navin Kr. Jha* - 2016 (341) ELT 561 (Cal.)]

Interest on delayed refund – Relevant date when complete application received: Bombay High Court has allowed interest on delayed refund of Customs duty in a case where Revenue department had denied interest alleging that the refund application was not complete at the relevant time and that it was completed only thereafter. The Court in this regard noted that said refund application was earlier rejected on the ground that the petitioner had not complied with the conditions set out in the Essentiality Certificate, i.e. on merits, and not because the application was incomplete. Supreme Court decision in the case of *Ranbaxy Laboratories Ltd.*, dealing with interest under Section 11BB of the Central Excise Act, 1944 was relied by the Court for this purpose. [*Shelf Drilling International Inc.* v. *Union of India* - Writ Petition No.7808 of 2016, decided on 16-9-2016, Bombay High Court]

Chemical testing required even after physical examination of goods: CESTAT Delhi has rejected Revenue department's contention that once physical examination is done, there is no further requirement for chemical analysis. The Tribunal in this regard was of the view that physical and virtual examination have been held to be inaccurate in many decisions and chemical testing of the goods would reveal the true nature of the goods beyond doubt. [*Commissioner* v. *R.S. Overseas Pvt. Ltd.* - Final Order No. 55020/2016-CU(DB)/2016, dated CESTAT-Delhi]

Valuation – Non-inclusion of technical know-how fees and royalty in respect of goods imported for trading: In a case relating to import of perfumes and deodorants, CESTAT Mumbai has rejected the contention of the department to include technical know-how and royalty payments made to the foreign exporter. The Tribunal in this regard observed that the said payments were made in respect of some other products. The department had asked for inclusion of said payments as

appellant as well as the supplier were both part of the same group which held share in both the entities, leading to their becoming interconnected undertakings. Payments for technical know-how and royalty were made to the group company. Appeals were allowed by the Tribunal observing that the price to unrelated buyers in respect of said imports was also comparable. [*Hindustan Lever Ltd.* v. *Commissioner* - 2016-TIOL-3054-CESTAT-MUM]

Compliance of provisions of Legal Metrology Act after import but before clearance: CESTAT Allahabad has held that there would be no violation of provisions of Notification No. 44 (RE-2000)/1997-2002 if importers are allowed to rectify the shortcomings in the information, required as per said notification, before the goods are cleared from the control of the Customs department. Further, reasoning of the authorities below that purchase orders were never placed on record by the noticee, before the personal hearing nor at the time of filing of bill of entry nor subsequent to that and, that the same appeared to him as afterthought, was not found sufficient by the Tribunal to not follow the precedent decision in the case of *Keshan Corporation*, which held that goods should not be confiscated if provisions of the notification were complied before clearance of the goods. [*Khurana Bearings* v. *Commissioner* - 2016-VIL-874-CESTAT-ALH-CU]

SERVICE TAX

Notification

Services by bank for settlement of amount upto Rs. 2000 transacted through payment card, exempted: Services by an acquiring bank, to any person in respect of settlement of an amount up to Rs. 2000, in a single transaction transacted through credit card, debit card, charge card or other payment card service, have been exempted. Notification No. 52/2016-S.T., dated 8-12-2016 issued for this purpose amends basic Notification No. 25/2012-S.T. Meaning of 'acquiring bank' has also been incorporated as explanation to the new Entry 64 in the basic notification.

Ratio decidendi

Payment towards shared expenditure cannot be treated as towards service: In a case involving receipt of goods through pipeline in the premises of one person and where as soon as such goods are received, the same were consumed in the ratio of 60:40 by the two parties, Supreme Court of India has set aside the demand of service tax from one of the party in respect of payment received from another for incineration expenses. The Court in this regard noted that though the handling facility was installed in premises of one entity, for installation of these facilities both the parties had contributed towards the investment and that the handling facility expenditure was shared equally between the two. The Apex Court was of the view that the handling portion and maintenance including incineration facilities was in the nature of joint venture between the two of them and the parties had simply agreed to share the expenditure.

It was held that payment which is made by the second party to the first is the share of the second which is payable to the first and that by no stretch of imagination, it can be treated as 'service' provided. [*Gujarat State Fertilizers & Chemicals Ltd.* v. *Commissioner* - 2016-VIL-67-SC-ST]

Cenvat credit on rent paid for the second unit which is job worker to principal unit, admissible: CESTAT Chennai has allowed Cenvat credit of tax paid on rent paid for the second unit of the assessee which was working as a job worker to the principal unit. Noting that there was absence of any *mala fide* and that the service provider as well as service recipient were identified, the Tribunal observed that the unit known to law shall not be deprived of Cenvat credit when expenditure of rent was incurred by principal unit on behalf of the second unit. [*Murugappa Morgan Thermal Ceramics Ltd.* v. *Commissioner* - Final Order No. 42146/2016, dated 9-11-2016, CESTAT Chennai]

Cenvat credit – Common services when cannot be said to have been utilized in dutiable goods and in trading: According to CESTAT Chennai, common services cannot be considered as utilized in dutiable goods and in trading when the items in which trading was done were not brought to the factory. The matter was however remanded back to the original authority for providing an opportunity to the assessee to substantiate such contention with suitable evidence. The assessee had argued that the traded goods were only received and stored in the godown belonging to Divisional Office, from where they were directly sold to farmers and that they had not availed any credit on transportation. [*Subramaniya Siva Co-op Sugar Mills Ltd.* v. *Commissioner* - Final Order No. 42058/2016, dated 28-10-2016, CESTAT Chennai]

Cenvat credit – Exclusion clause in respect of motor vehicles, explained: Explaining the exclusion clause in respect of motor vehicles in the definition of 'input service', CESTAT Delhi has allowed Cenvat credit in respect of renting of motor vehicles for transport of employees to factory. The department had denied the benefit contending that the motor vehicles were not capital goods for the assessee. The Tribunal however was of the view that the expression "which is not a capital goods" appearing in said exclusion clause would require examination vis-a-vis the service provider and not vis-a-vis the services recipient. [*Marvel Vinyls Ltd.* v. *Commissioner* - Final Order No. 54033/2016-EX(SM), dated 7-10-2016, CESTAT Delhi]

Refund under Notification No. 41/2007-S.T. – Limitation – Relevant date: In the case where exports were made in April-June 2008 and tax was paid on GTA service under reverse charge, in December 2008, CESTAT Delhi has allowed the benefit of Notification No. 41/2007-S.T. for refund claim filed in February 2009. The Tribunal observed that refund claims are to be filed within sixty days from the date of accrual of right to refund which crystallized only when the tax was paid. Department's contention that time period of 60 days, as per clause 2(e) of the notification, has to be counted from the end of the relevant quarter during which the said goods have been exported, was hence rejected

by the Tribunal. Reliance in this regard was placed on Delhi High Court Judgement in the case of *Sony India,* in a dispute involving refund of SAD. [*National Steel and Agro Industries Ltd.* v. *Commissioner* - Final Order No.54916/2016, dated 8-11-2016, CESTAT Delhi]

Rebate under Notification No. 41/2012-S.T. when tax paid under RCM on GTA service used in exports: CESTAT Delhi has allowed the benefit of rebate under Notification No. 41/2012-S.T. in a case where the service tax was paid by the assessee on GTA service received for export of goods. Department had denied the benefit citing clause 3(b) of the said notification, which disentitles the persons liable to pay the service tax under Section 68 of the Finance Act, 1994 (reverse charge mechanism) from claiming the rebate when such taxable service has been provided to the exporter. The Tribunal in this regard relied upon Apex Court decision in the case of *Malwa Industries,* where in the Court called for interpreting the notification so as to achieve the purpose and object of its issuance. It was observed that there was no doubt that the assessee fell within the gamut of the notification whose stated purpose was to grant refund of service tax on services used for export. [*Bharat Heavy Electrical Ltd.* v. *Commissioner* - Order No. FO/54901-54904 /2016-(SM), dated 30-9-2016, CESTAT Delhi]

Refund under Notification No. 41/2007-S.T. - Consolidated certificate is valid: Consolidated certificate given by Chartered Accountant providing details of invoices, instead of certifying each and every invoice individually, would fulfill the criteria for the purpose of benefit under Notification No. 41/2007-S.T. CESTAT Delhi has allowed the benefit of the notification, rejecting the contention of the department that the said notification requires submission of all original invoices, duly certified. [*Wolkem India Ltd.* v. *Commissioner* - Final Order No. 54702-54705/2016-CU(DB), dated 7-10-2016, CESTAT Delhi]

VALUE ADDED TAX (VAT)

Notifications

Rajasthan Amnesty Scheme notified: By Notification No. F.12(16)FD/Tax/2009-65, dated 2-12-2016, issued under Rajasthan Value Added Tax Act, 2003, the State Government has notified New Amnesty Scheme, 2016 for waiver of amount of interest, penalty and late fee subject to the conditions specified therein. The said scheme is applicable to a dealer or person against whom total outstanding demand created up to 31st July, 2016 under the following Acts is less than Rs. 25 crores:

i. Rajasthan Sales Tax Act, 1954
ii. Rajasthan Sales Tax Act, 1994
iii. Rajasthan Value Added Tax Act, 2003
iv. Central Sales Tax Act, 1956

Reversal of Input Tax Credit - Gujarat VAT Act amended: By Notification No. (GHN–68) VAT-2016-S.11(6)(6)-TH, dated 10-11-2016, the rate of reversal of input tax credit under the Gujarat Value Added Tax Act, 2003 for the following goods has been prescribed in the following manner:

S.No.	Description of Goods	Non-entitlement of tax credit	Restriction and conditions, if any
1.	i. Pan-Masala ii. Aerated & Carbonated beverages iii. Mobile Phones iv. Goods taxable at the rate of 20% or more (including additional tax), excluding cigarette made from tobacco	*To the extent to which the amount of tax exceeds 2% of taxable turnover* of purchases within the State for which tax credit is admissible.	The input tax credit shall be reduced when the goods are *sold/ resold in the course of inter-state trade and commerce.*
2.	i. Pan-Masala ii. Aerated & Carbonated beverages iii. Mobile Phones iv. Goods taxable at the rate of 20% or more (including additional tax)	*Whole of tax*	The input tax credit shall be reduced when the goods are *consigned or dispatched for branch transfer or to the agent outside the State.*

Similarly, by Notification No. (GHN–70)VAT-2016-S.11(6)(7)-TH, dated 28-11-2016, the rate of reversal of input tax credit under the said provisions for the following goods has been prescribed as:

S.No.	Description of Goods	Non-entitlement of tax credit	Restriction and conditions, if any
1.	Natural Gas	*Whole of tax*	The input tax credit shall be reduced when the goods are *sold/ resold in the course of inter-state trade and commerce or consigned or dispatched for branch transfer or to agent outside the State*

Railway track machines – Rate of tax under Haryana VAT: By Notification No. 22/ST-1/H.A. 6/2003/S.59/2016, dated 9-11-2016, description of goods under Entry No. 72 of Schedule C appended to the Haryana Value Added Tax Act, 2003 has been substituted with "Rail Coaches, engines, wagons and *all types of railway track machines,* spares and parts thereof". It may be noted that the term 'all types of railways track machines' has been added to the description under the entry and therefore, the goods covered therein will also attract tax at the rate of 5.25%.

Ratio decidendi

Battery charger is an accessory and not part of mobile phone: Karnataka High Court has held that a battery charger is an accessory to the mobile phone and not a part of the same. The High Court in this regard followed Apex Court decision in the case of *State of Punjab* v. *Nokia India Pvt. Ltd.*, [2014 (16) SCC 410] wherein it was held that a battery charger cannot be held to be a composite part of the mobile phone but is an independent product which can be sold separately, without selling the mobile phone.

The petitioner contended that the description of the entry under the Punjab VAT provisions, as discussed in *Nokia* case, was different from that under the Karnataka VAT and that since the entry under the KVAT Act is adopted from the Central Excise law, the Rules of interpretation under the said law would become applicable. It was contended that the mobile battery chargers sold along with mobile phones in one retail package should be treated as taxable at the same rate as mobile phone itself under Third Schedule appended to the KVAT Act.

The High Court however took the view that the *Nokia* case is very clear that mobile battery chargers are mere accessories to the mobile phone itself and are not part of the same. Consequently, it was held that mobile battery chargers are to be taxed separately irrespective of their being packed in a common package with the mobile phones. It was also observed that the *Nokia* case is binding on all courts/ authorities in India and is not based on any particular entry for tax rate under any particular State VAT legislation. Reference was also made to the High Court's decision in the case of *Lava International Ltd.* v. *State of Karnataka* [2016-VIL-376-KAR] dated 10-11-2016 wherein the demand for differential amount of tax on mobile battery chargers was upheld relying on *Nokia* case. [*ABM Tele Mobiles India Pvt Ltd.* v. *Assistant Commissioner of Commercial Taxes* - 2016-VIL-632-KAR]

Battery charger sold along with mobile phone – Assessments when not to be re-opened: The Allahabad High Court has in a Division Bench Order distinguished the Supreme Court decision in the case of *State of Punjab* v. *Nokia India Private Limited* [2014 (16) SCC 410]. The writ petition in the present case was filed challenging the notice issued under Section 29 of the Uttar Pradesh Value Added Tax Act, 2008 by the department wherein reassessment was sought on the premise of a subsequent decision of the Supreme Court in *Nokia*.

The Allahabad High Court however made the

following observations to distinguish the facts of the present case from *Nokia:*

- There was no new factual material so as to issue a notice to Samsung India in the present case to initiate reassessment proceedings.
- Rule 3(b) of the General Rules of Interpretation of First Schedule of the Customs Tariff apply to three distinct categories of goods being (a) mixtures, (b) composite goods consisting of different materials and (c) goods put up in sets for retail sale. In the present case, the goods are put up in sets for retail sale, the Supreme Court has not given any finding as to the applicability of the essential character test for category (c) goods and therefore, in a set containing the cell phone and the battery charger, the essential character of set is that of cell phone and the entire set is to be classified as a cell phone.
- Under the Legal Metrology Act, 2009, MRP of the product has to be mentioned on the package. Only one MRP of the product can be mentioned on the package and that is of the entire package. There is no finding on this issue in *Nokia.*
- In the present case, the price of the battery charger is estimated in the most arbitrary manner, there is no mechanism under the statutory provisions for computation of tax in case of a composite contract. This argument was never considered in *Nokia.*

In light of the observations made by the High Court, the notice issued to the petitioner in the present case, was quashed. [*Samsung India Electronics Pvt. Ltd.* v. *State of U.P.* - 2016-VIL-643-ALH]

No liability on bank to pay purchase tax for accepting EXIM Scrips: The Supreme Court of India has held that State Bank of India is not liable to pay purchase tax for accepting Exim Scrips (Export Import License) or Replenishment licenses on payment of premium. The Reserve Bank of India in order to mop up unutilized Exim Scrips in the hands of the holders who were willing to dispose of the same through specified branches of the SBI, authorized all designated branches of SBI to purchase Exim Scrips from holders, at a premium of 20% of the face value. It was stated that all Exim Scrips purchased by SBI were to be cancelled. The assessing authority sought to levy purchase tax under Section 5(6a) of the Bengal Finance (Sales Tax) Act, 1941.

The Supreme Court however, noting that the Exim Scrips or REP licenses would constitute 'goods' when they are transferred or assigned by the holder to a third person for consideration, thereby attracting sales tax, held that when such scrips or licenses are returned to the grantor or the sovereign authority for cancellation or extinction, they cease to be a marketable instrument. The Court further held that SBI neither held nor purchased any goods, rather it merely acted as per the directions of RBI as its agent and as a participant in the process of cancellation, to ensure that Exim Scrips or REP licenses were

no longer transferred. Observing that the intention was not to purchase, but to nullify the Exim Scrips or REP licenses, it was held that SBI is not liable to pay purchase tax under the Act. [*Commercial Tax Officer* v. *State Bank of India* - 2016-VIL-65-SC]

Distinct entity – Separate TIN alone not enough: The controversy in the present case was whether the petitioners, who are two units of National Textile Corporation Limited, having separate distinct TINs, could be treated as two separate entities and the transfer of yarn from one unit to the other for the purpose of manufacture of cloth (exempted commodity) would amount to sale under the Tamil Nadu Value Added Tax Act, 2006.

The Madras High Court took the view that the Revenue had applied the wrong test whereby the units were held to be separate entities as each had a distinct TIN. It was held that the correct test was to ascertain whether both the units form part of a single entity. Relying on the Andhra Pradesh High Court judgment of *K.C.P Ltd* v. *State of Andhra Pradesh*, 88 STC 374 and the Kerala High Court decision in *Government Wood Works* v. *State of Kerala*, 69 STC 62, it was held that keeping in mind that the registration certificates of both units clearly state that the same are units of NTC, the finding of the Revenue – that merely because of separate TINs the petitioner-units are two distinct legal entities and the inter-unit transfer of yarn between the two is a sale transaction – is wholly untenable. [*National Textile Corporation Ltd.* v. *Assistant Commissioner* - 2016-VIL-637-MAD]

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