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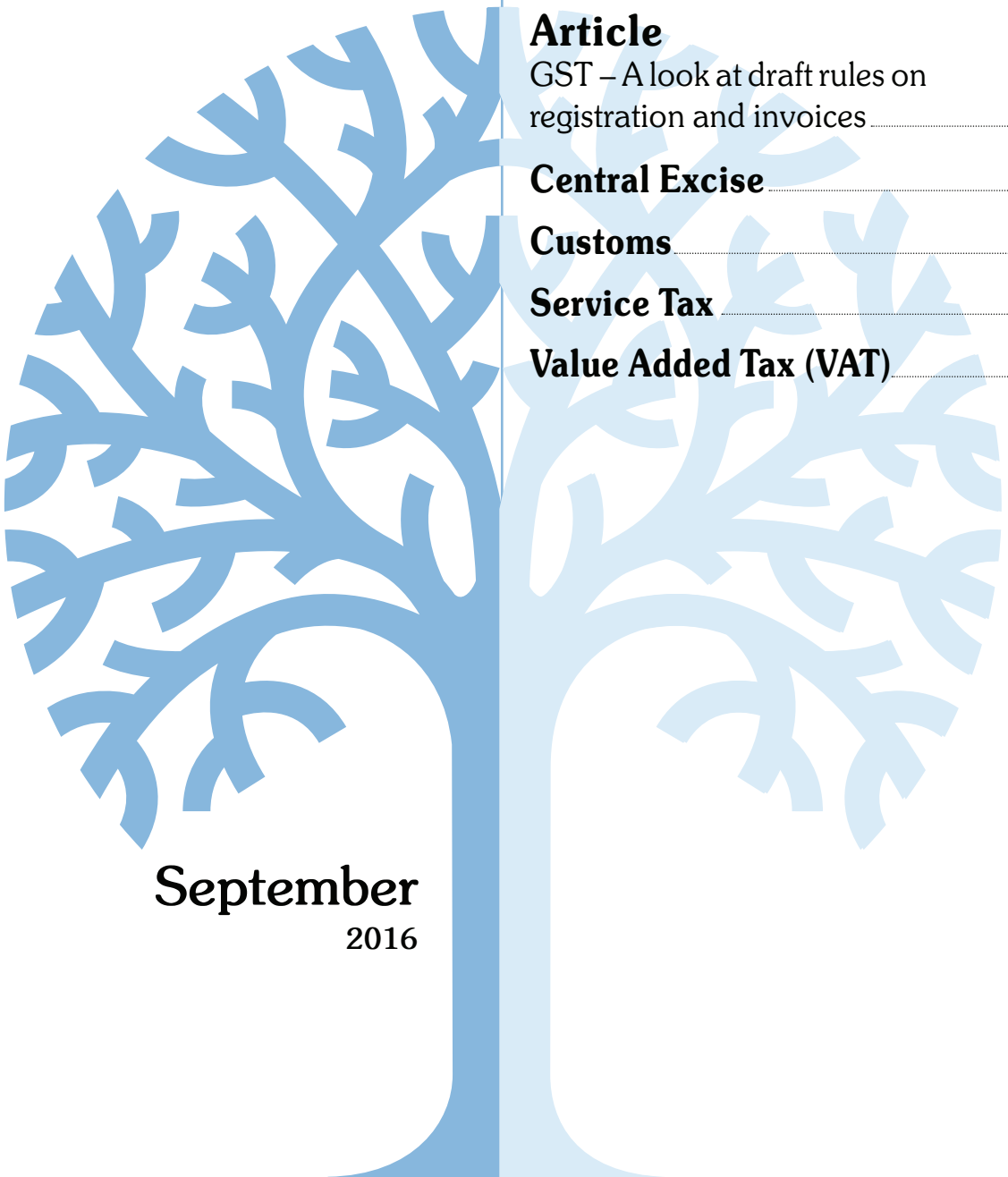

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Article

GST – A look at draft rules on registration and invoices

By **Dr. G. Gokul Kishore**

India is on the expressway in implementing the biggest reform ever in its indirect tax system. Till July, possibility of implementation of Goods & Services Tax (GST) was perceived as riddled with uncertainty but the Indian political parties have come together and ensured that the Indian Constitution stands amended to pave the way for bringing GST. The extremely fast paced subsequent developments by way of notification of effective date for various provisions of the Constitution Amendment Act on GST, constitution of GST Council and the decisions taken on threshold limit and dual control in the first meeting of GST Council, reinforce the government's commitment to the deadline of 1st April, 2017 though the industry is pleading for more time to get prepared. The tax administration is releasing draft rules and forms almost daily. This article seeks to take a cursory look at the draft rules on registration and invoices and the forms or formats floated by the CBEC for comments just a few days before and the same are set to be approved by the GST Council in its meeting on 30 September.

GST Registration

Section 19 of Model GST Law talks about registration and it says registration shall be obtained in the manner as prescribed. The draft rules now made public prescribe the various forms and conditions. GST is a tax of the electronic age and therefore, everywhere there is a great push on IT front and automation of processes. The initial provisions of draft registration rules mandate the aspiring registrant to get PAN verified which happens automatically by connecting to Income Tax Portal and mobile number and e-mail id through OTP. Application for registration under GST is required to be made online either directly on GSTN Portal or through Facilitation Centres and the draft rules state that these centres will be notified separately. It is not clear whether these centres are GST Suvidha Providers (GSPs) or will be different entities.

GST law makes a major departure from the existing indirect tax laws in that even a person who is not 'engaged' in a particular business activity i.e. even if the activity is not performed on routine basis, registration would be required in certain cases. Therefore, the model law provides for registration of casual taxable person and non-resident taxable person who undertake transactions in India occasionally or for limited period without having fixed place of business. Those falling under this category, will be required to deposit GST in advance on estimated basis and the application form seeks specific details in this regard. Existing excise and service tax assessees who obtain services of independent technical personnel or consultants from abroad who visit India for such purpose, may need to take note of such provisions.

The 26 forms released by CBEC for registration and all registration related processes including format of show cause notice when GST RC is proposed to be cancelled and order that may be passed in such cases, makes one think whether GST is all that simple, as it is stated. Provisions relating to registration in the Model Law eloquently talk about issuance of notice and hearing the person concerned at every stage when adverse action is proposed like rejection of application, rejection of request for amendment, etc. The draft rules prescribe various time-limits like three days for issuance of GST RC, seven days for applicant to provide clarification or document sought by officers and another seven days for the officer to grant RC. The draft rules also contain provisions whereby registration will be deemed as granted if there is any inaction on the part of the Department to act within the above time-lines.

As GST is system-driven, the applicant has to upload the prescribed documents. While no fee is payable for filing application for registration, it is not clear whether user fee will be payable in future for filing returns, etc., or there will be some other mechanism to defray such expenses of GST-N (the company maintaining front-end IT infrastructure). As GST Model Law has unique provisions like TDS registrants and TCS registrants, the present set of draft forms include such categories of persons also.

The strict side of GST law can be seen from the provisions on *suo motu* registration and field visits by officers. As per Rule 10 of the draft rules, if a person is liable for registration but has not obtained the same and such liability is found out during investigation, survey, etc., by the department, then the department will issue a temporary registration. Unless appeal is filed against such temporary registration, the person concerned is required to register normally within 30 days. Rule 17 of draft rules empowers departmental officers to conduct physical verification of business premises after grant of registration and the details of verification shall be uploaded. Such verification is subject to satisfaction of the officer thus leaving the same open-ended and discretionary.

GST Invoices

GST is all about seamless credit – taxes paid in input supplies to be taken as credit and to be set off against the liability on output supplies subject to conditions and restrictions. For passing such credit, the all-important document is the tax invoice. An elaborate list of information, numbering around 20, has been mentioned in Rule 2 of the Draft Invoice Rules. While providing general business related information may not be an issue, the draft rule also mandates mention of place of supply along with State name in the case of inter-State supplies and place of delivery if the same is different from place of supply. For effective compliance with this provision, one needs to master provisions to determine place of supply in various situations as provided under IGST Law. The form ARE-1 may

continue, with modifications, as the draft rule requires mention of the number and date of ARE-1 on the invoices if the supplies are made for export on payment of IGST or under bond. Time limit of 30 days is being prescribed for issuance of invoice to be calculated from the date of supply and this provision is applicable to services only as Section 23 of Model Law requires raising of invoice at the time of supply in respect of taxable goods.

All along in the excise regime, goods removed from factory needed to be accompanied by invoice and therefore, transporter's copy became an important document. Keeping in line with IT driven system of GST, such transporter's copy is not required if the invoice reference number has been obtained by the taxable person. For taxable services, two copies of invoice will be sufficient in the GST regime. The draft rules also prescribe a new document viz., Bill of Supply which needs to be issued by suppliers when non-taxable goods or services are supplied or when supplies are made under Composition Scheme. A consolidated bill of supply for all such supplies during the day, can also be prepared. This bill of supply is in lieu of tax invoice and is fairly simple in terms of information requirements.

The draft rules on returns, payment and refunds can also be discussed. But, owing to space constraint, the same have not been covered in this article. Once the GST Council finalises or approves the draft rules, we may discuss about them also.

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CENTRAL EXCISE

Circulars

Rebate and drawback – Simultaneous availment: Central Board of Excise and Customs (CBEC) has clarified that in the case of exports where Cenvat credit has not been availed but input stage rebate under Rule 18 (except on diesel) has been taken or the inputs (except diesel) are received duty free under Rule 19(2), the exporter would be eligible for customs portion of drawback of duties as per the drawback schedule. Circular No. 1047/35/2016-CX, dated 16-9-2016 issued for the purpose also states that where input stage rebate or benefit under Rule 19(2) is availed in respect of diesel, drawback of customs portion would not be available.

EOU – Exemption to inputs used in final goods cleared in DTA to holder of Advance Authorisation: Exemption under Notification Nos. 22/2003-C.E. and 52/2003-Cus. would be available to inputs used in processing or production of goods cleared in DTA, by the EOU, to holder of Advance Authorisation. CBEC, in its Circular No. 1046/34/2016-CX, dated 16-9-2016, observes that if EOUs are made liable to pay duty in such cases, then they would be placed in a disadvantageous position as compared to DTA units supplying goods to such authorisation holders.

Ratio Decidendi

Cenvat credit of amount settled before Settlement Commission is not barred: CESTAT Mumbai has held that Cenvat credit of amounts settled before Settlement Commission is not barred by any provision of the Cenvat Credit Rules, 2004. The Tribunal was of the view that denying Cenvat credit which is availed of the CVD paid in pursuance of the order issued by the Settlement Commission would reopen the entire issue which is already settled. It was also noted that Order of the Settlement Commission is not an adjudication order and is a settlement of the case. Revenue department's view that settlement of the case before the Settlement Commission cannot be considered as clean chit given for mis-statement and collusion and that the amount has to be considered as being paid due to mis-statement or suppression of fact, was hence rejected. [*Commissioner* v. *Shreem Capacitors Pvt. Ltd.* – Order dated 10-8-2016 in Appeal No. E/2821/05, CESTAT Mumbai]

Cenvat credit on turbo generator not deniable even if part of electricity sold out: Considering the fact that turbo generator was installed in the factory premises and electricity generated from such generator was consumed in the manufacturing of dutiable goods, CESTAT Delhi has allowed Cenvat credit on such generator even when part of the electricity was sold to the State Government. The department in this case was of the view that since the assessee had enough capacity of captive power plant which would have taken care of its requirement, procurement of additional capital goods (Turbo Generator-3) indicate that the same were brought for generation of electricity for sale only. The Tribunal however allowed the appeal observing that the factum of consumption of electricity generated within the factory partly and sold out partly is an accepted proposition in the law. [*Jayaswal Neco Industries Limited* v. *Commissioner* - Final Order No. 52997/ 2016, dated 11-8-2016, CESTAT Delhi]

Manufacture - Fitting of motor in sewing machines is not manufacture: Relying on Supreme Court decision in the case of *Delhi Cloth and General Mills*, CESTAT Delhi has rejected the contention of the Revenue department that fitting electric motor in sewing machines makes it a complete article and hence there is 'manufacture'. The Tribunal in this regard held that imported sewing machine even after fitment of the motor remains sewing machine only and that it cannot be said that addition of motor has brought into existence any new article which has a character, name or use which is different from the components which have gone into it. The Tribunal was also of the view that exemption available to sewing machines which do not have an inbuilt motor, would also be available to the sewing machines in the present case. [*Singer India Ltd.* v. *Commissioner* - Final Order No. 53099-53101/2016, dated 17-8-2016, CESTAT Delhi]

Manufacture - Labelling and packing of handmade biris do not amount to manufacture: In this case, the assessee was engaged in labelling and packing of handmade biris in printed plastic wrappers and was using machines which used to run with the aid of power. The said activity was undertaken in order to bring into existence retail packs of biris having a brand name. The Revenue department contended that the activity amounts to manufacture. The Tribunal however rejected the contention and held that packing or any activity with respect to packing cannot be incidental or ancillary to manufacture of biri. It was also observed that since the product in question is not mentioned in the Third Schedule to the Central Excise Act, 1944, the activity cannot be termed as manufacture even within the deemed meaning of the term 'manufacture' contained in Section 2(f)(iii) of the said Act. [*Kishan Biri Manufacturing Co.* v. *Commissioner* - 2016 (339) ELT 16 (Cal.)]

Captive consumption – Exemption available to moulds sold but still used within factory: CESTAT Bangalore has held that exemption under Notification No. 67/95-C.E. would be available to moulds which were sold to the customer but were used within the factory on behalf of the customers. The Tribunal in this regard took note of the fact that assessee had used the goods within their factory though on account of their customer and had not removed them outside. It was also noted that said notification does not have any condition that the goods cannot be used in respect of the products manufactured by an assessee for their customers. [*Raja Magnetics Ltd.* v. *Commissioner* - Final Order No. 20640/2016, dated 17-8-2016, CESTAT Bangalore]

Returned goods – No time limit for clearance after receipt: CESTAT Delhi has allowed the benefit of Rule 16 of the Cenvat Credit Rules, 2004, in a case where the Revenue department had denied the same contending that the goods brought back to the factory were not subjected to any process whatsoever for a very long time. Further, the Tribunal was also of the view that return either for repair or after exhibition outside the factory, would be covered by the expression "for any other reason" in the Rule 16. [*Liugong India Pvt. Ltd.* v. *Commissioner* - Final Order No. 53234/2016, dated 26-8-2016, CESTAT Delhi]

End use exemption – Use to be decided at time of clearance from factory: CESTAT Delhi has allowed benefit of Notification No. 6/2002-C.E. to urea cleared for use as fertilizer, in case where there was loss of part of the goods in transportation and in re-bagging and standardization. The Tribunal dismissed Revenue department's appeal, upholding impugned order which had held that use is to be decided at time of clearance of goods from factory. [*Commissioner* v. *Chambal Fertilizers and Chemicals Ltd.* – Final Order No. 52941/2016, dated 5-8-2016, CESTAT Delhi]

Residual Crude Petroleum Oil/ Residual Fuel Oil/ Residual Bottom Oil not classifiable as fuel oil: CESTAT Chennai has held that Residual Crude Petroleum Oil, Residual Fuel Oil or Residual Bottom Oil are not classifiable as fuel

oil under Tariff Item 2710 19 50 of the Central Excise Tariff. It was held that literature of the assessee indicating the item as fuel and use of the items by the buyer as fuel, cannot override the definition and meaning given to the item in the Supplementary Note (8) to Chapter Note 27. The Tribunal however refused to confirm classification under Tariff Item 2710 19 90 or as waste oil, in the absence of sufficient material in this regard. [*Rudraksh Petrochem Pvt. Ltd.* v. *Commissioner* - 2016-VIL-624-CESTAT-DEL-CE]

Oil Cess not having the character of excise duty: The assessee had paid Education Cess and Secondary and Higher Education Cess on the Oil Cess levied under Section 15(1) of the Oil Industry Development Act, 1974 on the petroleum products. Later the assessee filed claim for refund of the said amount on the ground that the Oil Cess was not having the character of duty of excise. The Departmental authority rejected the refund application on the grounds of limitation prescribed under Section 11B of the Central Excise Act, 1944. The High Court however observing that the Oil Cess is levied by the Ministry of Petroleum and Natural Gas and not by the Ministry of Finance, held that the same will not partake the character of excise duty merely because the machinery provisions of the Central Excise Act, 1944 and the Rules made thereunder have been incorporated in the Oil Industry Development Act. Further, it was held that Oil Cess is not mentioned under the Central Excise Tariff Act, 1985 and the payment was made by the assessee under mistake of law, hence refund provisions under Section 11B of the Central Excise Act, 1944 will not apply and the limitation period of 3 years as prescribed in the Limitation Act, 1963 shall be applicable. [*Joshi Technologies International* v. *UoI* - 2016 (339) ELT 21 (Guj.)]

WTLB and Hydra Cranes whether qualify as automobiles – Issue referred to Larger Bench: In this case, the issue involved was excisability of spare parts of Wheeled Tractor Loader Backhoe (WTLB) and Hydra Cranes which were repacked for retail sale. The "parts, components and assemblies of automobiles" are mentioned in the Third Schedule to the Central Excise Act, 1944, thus the activity of repacking of the same qualifies as manufacture, in view of Section 2(f)(iii) of the Central Excise Act, 1944. The Tribunal in the case of *JCB India Ltd.* [2014-TIOL-09-CESTAT-MUM] had held that parts, components and assemblies of Loader, Backhoe Loader and Road Rollers are covered by the Third Schedule. However, in the present case, the Tribunal disagreed with the view taken by the Tribunal in the case of *JCB India Ltd.* on the ground that if a particular word is not defined in the Central Excise Act, 1944 or the Rules made thereunder, then the meaning given to the word in ordinary parlance should be considered. Further, the Tribunal observed that various dictionaries suggest that automobile means a 'passenger car or goods carrier' whereas the WTLB and Hydra Cranes are not designed to carry passengers or goods, thus the same do not qualify as automobiles. In view of the conflicting decision, the issue was referred to the CESTAT President

for constitution of Larger Bench. [*Action Construction Equipment Ltd.* v. *Commissioner* - 2016-TIOL-2344-CESTAT-CHD]

Pictures, graphics and images printed for use on bill boards and hoardings classifiable as product of printing industry: CESTAT Bangalore has held that products like pictures, graphics and images printed on selected material like vinyl coated fabric and films which are non-adhesive and which are used on bill boards and hoardings in outdoor advertisements are classifiable under Heading 4901 of the Central Excise Tariff Act, 1985 as goods of printing industry. The Revenue department was of the view that the goods were classifiable under Chapter Heading 9405 as part of illuminated signs and chargeable to duty @16%.

It was held that for classifying the product under Chapter Heading 9405, the following two conditions are essential (i) signs, the nameplates and the like products ought to be illuminated and have a permanent light source (ii) Parts should not be specified or included elsewhere in the Excise Tariff. Commissioner (Appeals)'s Order was upheld by placing reliance on the decision of *Tanzi Screen Arts* [2001 (131) ELT 656], wherein it was held that texts, graphics, etc., printed on the translucent plastic sheets by means of screen printing to advertise goods and services are classifiable under Heading 49.01 as product of printing industry. Reliance in this regard was also placed on the decision in the case of *Srikumar Agencies* [Final Order No. 659 to 683/2011, dated 9-8-2011]. [*Commissioner* v. *MMT (I) Pvt. Ltd.* - 2016-TIOL-2448-CESTAT-BANG]

CUSTOMS

Circulars & Trade Notices

Dual benefit of EPCG and SHIS under FTP – Option to return one benefit: Exporters who have availed simultaneous benefit of zero duty EPCG scheme and Status Holder Incentive Scheme (SHIS) have been provided with flexibility to choose one of the two schemes. DGFT Public Notice No. 30/2015-20, dated 8-9-2016 prescribes detailed procedure in this regard. It states that in case any of the benefit is being returned, the amount of scrip/ authorisation utilized has to be refunded in cash along with interest. The Public Notice provides for a time frame of 9 months for the exporters to exercise any option, and states that no penal action would be taken against the exporter in such cases of incorrect issuance. CBEC has also consequently issued Circular No. 45/2016-Cus., dated 23-9-2016 which clarifies that after issuance of the said Public Notice, bar relating to dual issuance, in Customs notifications, has become unnecessary.

EPCG authorization for job worker: DGFT has clarified that EPCG authorisations can be issued to a person who does job work for exporter of goods according to Common Service Providers (CSP) benefit available under Para 5.02 of the FTP. Trade Notice No. 18/2016, dated 23-9-2016 states that definition of service providers

includes job workers like those who do various work like knitting, dyeing, printing, labelling, etc., but do not export garments.

TED refund available when no ab-initio exemption provided: DGFT has clarified that refund of Terminal Excise Duty (TED) as per FTP will be available in case where *ab-initio* exemption has not been provided and duty has been paid using Cenvat credit. Trade Notice No. 17/2016, dated 22-9-2016 issued in this regard reiterates that refund, however, would not be available if exemption is available on such clearances.

Ratio Decidendi

Valuation - License fee for right to use the brand name and sales & business support fee are not includible: The appellant entered into foreign collaboration and sub-license agreement with foreign brand owners for the right to use their brand name "H&M" and the "H&M Concept" in operating single brand retail stores in India for sale of imported items like clothes and apparel, footwear, cosmetics etc. As consideration for this, appellant was paying 1% of the whole sale price of goods sold in India as license fee to the foreign brand owner. Business support service fee was also being paid to the foreign brand owner for developing the overall market strategy, store location, store designing and concept, sales as well as for the entrepreneurial risk. The finished goods were imported from approved independent manufacturers located abroad. In these facts, the Authority for Advance Rulings has held that such license fee and business support fee were not includible in the value of imported finished products under Rule 10(1)(c) or any other rule of the Customs Valuation Rules, 2007. [In RE: *H&M Hennes & Mauritz Retail Private Limited* - 2016-VIL-27-ARA]

Valuation – Amount paid towards sample when treatable as charges for design and drawings for manufacture of imported goods: CESTAT Mumbai has held that a sample of the product imported by the appellant from foreign collaborator (brand owner) for providing it to the manufacturer in a third country to be used for manufacture of branded imported goods is in the nature of design and drawings and is addable to the value of said imported goods under Rule 9(1)(b)(iv) of the Customs Valuation Rules, 1988. The Tribunal however held that other amounts paid to foreign collaborator for technical knowhow for marketing, sourcing, production and retail development of contract, etc., are not includible to the value of imported goods. [*Proline Sport System* v. *Commissioner* - 2016-VIL-655-CESTAT-Mum-CU]

Refund – Non-challenge of bill of entry not relevant in absence of 'lis' between department and assessee: Noting absence of '*lis*' between the department and the assessee, CESTAT Delhi has upheld the Order of Commissioner (A) allowing refund. The assessee in the dispute did not claim the benefit of exemption notification at the time of filing of bill of entry and the same was finally assessed without consideration of the applicability of such exemption notification. Relying on the judgment of Delhi High Court in *Aman Medical Products Ltd.* [2010 (250) ELT 30 (Del.)], Tribunal held that non-challenge

to the bill of entry will not be considered to be a bar for claiming refund in such facts and circumstances. [*Commissioner* v. *Kent RO System Pvt. Ltd.* - 2016-VIL-619-CESTAT-DEL-CU]

Interest payable even when less duty paid due to non-updation of EDI system: Due to the EDI system not being updated, the assessee paid CVD at 6% instead of the actual CVD payable at 12.5%. Subsequently, the assessee paid the differential duty. However, a question was raised regarding payment of interest under Section 28AA of the Customs Act, 1962. CESTAT Kolkata rejected the contention of the assessee that interest is payable from the date when DRI pointed out the applicable rate of duty. It was held that non-updation of procedural machinery in the form of EDI system by the department cannot absolve the assessee from payment of interest provided by statutory provisions, especially when the assessee was well aware of the applicable rate of duty at the time of import. [*Jupiter Wagons Ltd.* v. *Commissioner* - 2016-VIL-640-CESTAT-KOL-CU]

Re-exports - Extension of bond is as good as extension of period of re-export: Holding that extension of bond executed for the purpose of Notification No. 158/95-Cus. is as good as extension of period for re-export of goods, CESTAT Mumbai has allowed the benefit of said notification. Contention of the department that since further extension of period for re-export was not sought by the assesse, exemption was not available, was hence rejected. It was observed that period for re-export of goods stood extended till the validity of the bond and hence there was no violation of the conditions of the said notification. [*Kunj Forgings* v. *Commissioner* – Order dated 24-8-2016 in Appeal No. C/520/05-NRB, CESTAT Mumbai]

Re-exports - Drawback of Customs duty paid subsequently on goods initially imported under Advance Authorisation, correct: CESTAT Allahabad has allowed drawback on re-export of goods earlier imported duty free under Advance Authorisation but where duty was subsequently paid. The Tribunal was of the view that Customs duty paid subsequently, after giving up claim under Advance Authorisation, is also Customs duty paid upon importation. The assessee was hence allowed to file manual Shipping Bill under Section 50 read with Section 74 of the Customs Act, 1962. [*Reckitt Benckiser Healthcare India (P) Ltd.* v. *Commissioner* – Final Order No. 70293/2016, dated 23-6-2016, CESTAT Allahabad]

Redemption fine not imposable if no bond/bank guarantee given: CESTAT Kolkata has held that redemption fine is not imposable if neither the goods are available for confiscation nor any instrument releasing them is available. The Tribunal distinguished the Supreme Court decision in the case of *Weston Components* wherein the Apex Court had upheld redemption fine in the absence of goods but where goods were released on bond. [*Carina Creations* v. *Commissioner* – Order No. FO/A/75802/16, dated 8-8-2016, CESTAT Kolkata]

Settlement application once allowed to be proceeded cannot be rejected on grounds accepted earlier: Bombay High Court has held that once the Settlement Commission had itself allowed the Settlement Application to be allowed to be proceeded with under Section 127C of the Customs Act, 1962, the said application cannot be rejected later on grounds which have been accepted while allowing such application to be proceeded with. The application was earlier allowed to be proceeded with after applicant deposited certain amount, however the same was later rejected by the majority decision of the Settlement Commission, holding non-payment of admitted duty and interest. The matter was remanded back to the Settlement Commission. [*Underwater Services Company Ltd.* v. *Union of India* - 2016-TIOL-2179-HC-MUM-CUS]

Detention of goods is not seizure - Non-recording of reasons for detention, fatal: Delhi High Court has held that there is no provision in the Customs Act, 1962 which justifies detention simpliciter of goods by the authorities and that too without recording of any reasons. The Customs and DRI authorities in the case were of the view that there is no need to record any reason for short time detention of goods. The Court in this regard also noted that no Order under Section 110(1) was served to the importer and there was no authority to hold detention and seizure is one and the same thing. The Court further directed DRI to bear the cost of warehousing charges as goods were not cleared because of illegal action of the DRI. [*Worldline Tradex Private Limited* v. *Commissioner* – W.P. No. 5939/2016, decided on 25-7-2016, Delhi HC]

SERVICE TAX

Notification

One time upfront premium on lease of industrial plot exempted from service tax: By way of Notification No. 41/2016-ST dated 22-9-2016, grant of long time lease of industrial plots provided by State Industrial Development Corporations / Undertakings have been exempted from the levy of service tax to the extent of onetime upfront premium payable for the lease. The notification states that such premium may be called as salami, cost, price, development charges or by any other name.

Ratio Decidendi

Composite contract for supply of goods and services – Delhi High Court emphasises segregation of elements and adherence to legislative competence as per Constitution: The Delhi High Court has upheld the constitutional validity of levy of service tax on service portion in a composite contract involving supply of food and, beverage. The petitioners argued that the Parliament does not have the legislative competence to levy tax on service which may be part of goods supplied for instance, food and beverage in restaurants which are already taxed by the State. The Court held that it was important to determine whether a composite contract was capable of being segregated and

if segregation was possible, the Union would have power to tax the service portion. It also stated that it was legally permissible for the Parliament to deploy legal fiction to levy the tax. The petitioners had argued that Rule 2C providing for valuation of the service element at 40% of the value of the composite contract was arbitrary and illegal. Stating that the measure of tax is not determinative of the character of the levy, the High Court further held that the rule clearly spelt out the machinery provision for the levy and there was no uncertainty. Hence, the Rule was not invalid.

However, the Court held that levy of service tax on provision of short-term accommodation was not constitutionally valid. Opining that before the exclusive legislative competence of the Parliament can be invoked under residuary power, legislative incompetence of the State must be established, the Court held that since the luxury tax levied by the State and service tax levied by Centre was on the same taxable event of providing service by way of accommodation in a hotel, the levy of service tax was not valid. It also struck down the instructions and circulars issued regarding the said levy. [*Federation of Hotels & Restaurants Association of India v. UOI*, 2016 (44) S.T.R. 3 (Del.)]

Taxes cannot be deducted by government agency when no tax is due: The petitioner was aggrieved by service tax deduction from payments due to it from the Haryana Housing Board. It urged that the service of constructing flats for BPL category was not exigible to service tax and even if service tax was payable the liability was restricted to 50% since the assessee was a contractor. As per the contract, taxes due were to be paid by the assessee. The Housing Board was issued a notice by the department for payment of service tax and accordingly it deducted the same. Agreeing with the arguments put forth by the petitioner the High Court held that the Housing Board was a governmental authority and the flats had been constructed for residential purpose and not for commerce, industry, business or profession. Hence, there was no liability to service tax as per Notification No 25/2012-ST dated 20-6-2012 (as amended). The Court also declared that that the Board could not pass on the burden of service tax (even if leviable) on to the contractor. [*Bharat Bhushan Gupta & Company v. State of Haryana*, 2016 (44) S.T.R. 195 (P&H)]

Service tax collected when not due and not deposited cannot be recovered from a person who is not a garnishee: At issue was service tax wrongly collected from the petitioner by the service provider and later recovered by the petitioner. The service provider had not deposited the sum with the government and the department had later agreed that no service tax was payable. However, the department sought to recover the amount from the petitioner stating that service tax collected but not deposited with it was recoverable. The petitioner had recovered the amount of service tax and for amount towards deficiency in service. The High Court ruled that when no service tax was due to the government from the

petitioner nor money due from the petitioner to the defaulting service provider, the government does not have the power to recover service tax collected but not deposited. [*General Manager, Food Corporation of India* v. *UOI*, 2016 (44) S.T.R. 211 (Guj.)]

Recovery amounts under dispute - Coercive methods not to be adopted when adjudication is an option: The department attached three immovable properties of the petitioner demanding interest on differential amount payable under VCES and the petitioner paid the amount under protest in order to have the attachment lifted. The High Court held that the conduct of the department in adopting coercive methods, particularly when there was a dispute as to whether sums were due, was not proper. It opined that the department could very well resort to adjudication, issue SCN etc., rather than resort to coercive methods and set aside the attachment. [*Cavim Properties* v. *UOI*, 2016 (44) S.T.R. 217 (Bom.)]

Amounts paid directly to other service providers not taxable under reverse charge as amount paid to foreigners: Amounts paid for stay and travel of foreign service providers, directly to hotel, cab agency etc. cannot be added to the value of management consultancy services provided by the foreign service provider. In the instant case, the assessee argued that service tax had been discharged on the amount paid to the foreign service provider as per contract and stay and other expenses on which service tax had been discharged could not be brought to tax again under reverse charge mechanism. The Tribunal agreed with the assessee that such amounts could not be considered as paid or payable to foreign service providers, and be subjected to tax. [*Tata Quality Management Services* v. *CCE*, Appeal No ST/241/2012, CESTAT Mumbai, Order dated 14-7-2016,]

Cenvat credit available in subsequent period can be used to pay tax demanded for an earlier period: Relying on clarification issued by the CBEC that payment of arrears of tax is different from tax paid under self-assessment by the assessee, the Tribunal held restriction on utilisation of Cenvat credit would not apply to demands confirmed under Section 11A. The assessee discharged service tax on renting of immovable property (which had been under dispute) by utilising the credit in Cenvat credit account once the demand was confirmed. The department objected to this demanding that the payment must be made in cash. However, the Tribunal held in favour of the assessee. [*Bombay Well Print Inks P Ltd* v. *CCE & ST*, Appeal no. ST/89299/2013, CESTAT, Mumbai, Order dated 4-7-2016]

Share subscription fee received towards provision of services to members of club is taxable: The applicant – partnership which was to be converted into a company collected money from shareholders of a company against shares of the company whose object was establishment of a luxurious club. In lieu of shares the members would get services which included provision of a facility provided by the club such as restaurant, swimming pool and gymnasium. Membership of the club was restricted to shareholders of the company. The applicant argued that shares

were goods and consideration for the same is not exigible to service tax and no service/ activity was contemplated for the consideration received. The authority however ruled that since consideration passed from the member to the club (company) both of whom were different persons and the share subscription received was in nature of membership fee. Hence the consideration for providing certain services in future was taxable. It also ruled that refundable deposits received would not be subject to service tax. [*Avadh Infratech Ltd*, Authority for Advance Rulings, Order dated 12-8-2016]

VALUE ADDED TAX (VAT)

Notifications

Himachal Pradesh Tax on Entry of Goods into Local Area – Provisions made for tax on e-commerce: Section 4A has been inserted by Notification No. L.G.R. –D(6)-1/2016-Leg., dated 31-8-2016 in the Himachal Pradesh Tax on Entry of Goods into Local Areas Act, 2010. The new inserted section provides the following:

"4-A. Levy of tax on e-commerce:

(1) Notwithstanding anything contained in Section 3, there shall be levied a tax on entry of goods specified in Schedule-II into local area *made through online purchase or transaction or through e-commerce.*

(2) The tax shall be levied on the value of the goods in the manner prescribed and shall be collected from the person-in-charge of the goods on behalf of the importer.

Accordingly, Entry tax will be charged in Himachal Pradesh on the goods specified in Schedule –II which are purchased online through an e-commerce platform.

Assam Value Added Tax – Rates revised: By Notification No. FTX.55/2005/Pt-VII/63, dated 10-8-2016, the applicable rates of tax of Entries 1, 2 and 3, Schedule-V appended to the Assam Value Added Tax Act, 2003, have been modified. The rate of tax leviable on all goods not covered by the First, Second, Third and Fourth Schedules (residuary rate) and on works contract (Entry 1 and 2, respectively) has been increased from 14.5% to 15%. Further, the rate of tax leviable on lease transactions (Entry 3) has been increased from 5% to 6%. The notification is effective from 10th August, 2016.

Bihar Value Added Tax – Rates revised: By Notification No. S.O. L.G.01-11-/2016/149/ Leg dated 12-8-2016, the applicable rates of tax as specified under Section 14 of the Bihar Value Added Tax Act, 2005 have been modified. While rate of tax on goods specified in Schedule III is increased from 5% to 6%, rate of tax on goods specified in Schedule IIIA, i.e., goods specified in Section 14 of the Central Sales Tax Act, 1956 other than those specified in any of the Schedules appended to the Act has been increased from 4% to 5%. Further, residuary rate of tax on goods not covered under Schedule I, II, III, IIIA and IV

has been increased from 14.5% to 15%. The amendments are effective from 12-8-2016.

Ratio Decidendi

Turnover tax – Value of work entrusted to sub-contractor not includible: The issue before the Supreme Court was whether the value of works entrusted and payments made to the sub-contractor would be included for the purpose of computing liability to turnover tax under Section 6-B of the Karnataka Sales Tax Act, 1957, given the fact that the sub-contractor being a registered dealer has already included the same in his turnover and has paid tax thereon.

The Supreme Court after taking into consideration the provisions of the KST Act and also the Karnataka Sales Tax Rules, 1957 observed that for an amount to be included in the total and taxable turnover for the purpose of levy of turnover tax, the amount should be for a 'transfer of property in goods' which are involved in the execution of a works contract. The provisions specifically restrict the determination of total and taxable turnover in respect of those goods alone where property has been transferred. The Court relied on the decision in the case of *State of Andhra Pradesh* v. *Larsen & Toubro Limited* [2008-VIL-30-SC], where a similar issue was decided in favour of the assessee. The Court in the said case had observed that on the reasoning of accretion of property in goods, even if there is no privity of contract between the contractee and the sub-contractor, it would not do away with the principle of transfer of property by the sub-contractor by employing the same on the property belonging to the contractee.

The Court ruled that since there in no transfer of property in goods, there is no question of inclusion of value of work entrusted to the sub-contractors and payments made to them in the taxable turnover for computing turnover tax. [*Larsen & Toubro* v. *Additional Deputy Commissioner of Commercial Taxes* - 2016-VIL-51-SC]

Transfer of right to use or case of permissive use: The issue in the present two petitions was whether the respective transactions by the petitioners amounted to merely permissive use and therefore is a service taxable under Finance Act, 1994 or whether there is a deemed sale in the nature of transfer of right to use goods, taxable under the Maharashtra Value Added Tax Act, 2002.

In the first case, there was a transfer of technology through hybrid seeds to seed companies ("Sub-licensee"). The test in the *BSNL* v. *UOI* [(2006) 145 STC 91] was applied to the facts of the present case. It was found that the effective control of the seeds and the technology embedded in them is entirely with the sub-licensee. The use of such seeds by sub-licensee could not be dictated by the petitioner and the sub-licensee can use the seeds as it wishes, whereby it may even destroy them. The transfer therein was to the exclusion of the petitioner. It was held that the facts of instant case satisfy the test laid down in *BSNL* and thus, this is a case of transfer of the right to use goods, exigible to tax under MVAT Act.

In the second case, the petitioner had entered into franchise agreements with third parties, whereby the franchisee undertakes to carry on the business of operating sandwich shops in Franchisor's name, for which Franchisor receives a one-time franchisee fee and a weekly royalty fee by the franchisee. The Bombay High Court noted that the franchise agreement is limited to the precise period of time at the end of which the right of the franchisee to display the mark 'Franchisor' and its trade dress, and all other permissions would also end. There are set terms provided by the agreement and a breach of these would result in termination of the agreement. On these findings, the Court took the view that, there being no passage of any kind of control or exclusivity to the franchisees, the agreement between Franchisor and its franchisees is not a sale, but is in fact a bare permission to use and thus, is only exigible to service tax. *[Mahyco Monsanto Biotech (India) Pvt. Ltd.* v. *UOI* - 2016-VIL-457-Bom]

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