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Classification of leasing services – An expanding quandary

By **Garima Srivastava**

After a long wait we have finally voyaged into the Goods and Service Tax regime, and are experiencing many teething problems. Other than filing of GST Returns, issue related to appropriate classification of goods and services and the rates thereon is one of the many burning issues which require immediate action on the part of the government. It may be noted that any inapt classification can result in grave consequences to businesses and their reputation.

Leasing services – The problem

One such service is leasing of cars, aircraft etc. where a conclusive classification and the corresponding rates have not been reached. The rate schedule initially released by the GST Council contained an entry which stipulated that transfer of right to use goods would be taxable as per the rates of the goods being transferred. The industry was apprehensive about the impact on their businesses if such rate of GST as applicable to goods like cars being leased (as high as 50%) was to be followed. It was believed that such high rates would lead to massive costs on industries engaged in leasing of cars as well as to their ultimate recipients. Further, credit on such service is not available which would further escalate the costs.

Subsequently, Notification No. 11/2017-Central Tax (Rate), dated 28th June, 2017 was issued prescribing rate of tax on various services based on a new classification scheme for services under Chapter 99. S. No. 17 of the said Notification covers the following services:

Sl. No.	Chapter, Section or Heading	Description of Service	Rate (per cent.)	Condition
17	Heading 9973 (Leasing or rental services, with or without operator)	(iii) Transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.	Same rate of central tax as on supply of like goods involving transfer of title in goods	-

The industry has been classifying the above services under Heading 9973 which are taxed at the corresponding rates of goods being supplied. Classifying the same under the Heading 9973 implies that service of leasing of motor vehicles would attract GST at the rate of 29% to 50%. However, the above Entry cannot be read in isolation and it is imperative to analyse if there is any other competing entry for such services. S. No. 10 of the said notification also covers a competing entry which was not included in the draft rate schedule. The same has been extracted hereunder:

Sl. No.	Chapter Heading	Description of Service	Rate (per cent.)	Condition
10	Heading 9966 (Rental services of transport vehicles)	(ii) Rental services of transport vehicles with or without operators, other than (i) above.	9	-

On a *prima facie* reading of the above Entry, it is seen that leasing of car may also fall under Heading 9966, covering rental services of *transport vehicles* with or without operator and thereby attract 18% of tax (CGST + SGST).

Thus, the activity of leasing of motor vehicles may get covered under Heading 9966 of the above notification as '*rental services of transport vehicles, with or without operator'* as well as under Heading 9973 covering '*leasing or rental services, with or without operator*'.

Absence of classification principles

In the light of above discussed background, resort may be taken to interpretative rules and classification principles. Unfortunately, classification rules are not available in respect of services, leaving the hapless assessee clueless about classification of such services. It can be said that a pandora's box for classification of services has been opened, when there are two competing entries under the same notification, and there is no classification principle.

Possible solution

It is well established principle that when a general law and a special law dealing with the some aspect as dealt with by the general law, are in question, the rule adopted and applied is one of harmonious construction whereby the general law, to the extent dealt with by the special law, is impliedly repealed. This principle finds its origins in the Latin maxim *generalia specialibus non derogant*, i.e., general law yields to special law should they operate in the same field on same subject. Accordingly, one may argue that Heading 9966 involves rental services of *transport vehicles* with or without operator and *is a more specific heading* as opposed to Heading 9973 which covers a more general category.

Conclusion

Since there are no guiding principles for classification of such services, difference between rates of 18% and 50% may have a long-lasting impact on businesses and their decision-making processes. Similar dispute for leasing of aircraft for non-scheduled purposes exists with the same dispute of 5% (9973) vs. 18% (9966).

In addition, it may be noted that the classification scheme for services appears to have been borrowed from the ***United Nation's Central Product Classification*** though the GST law nowhere mentions any reference to the same. Even otherwise, the persuasive value of the ***United Nation's Central Product Classification*** is yet to be tested in the Indian legal system.

In view of the prevailing quandary, adequate clarity from the legislature will go a long way in adoption of proper principles, and would ensure appropriate classification and finally the rates of GST.

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Goods and Services Tax (GST)

Notifications and Order

GST returns for July 2017 – Last date extended: Due dates for filing GSTR-1 (for companies with turnover of less than 100 crore), GSTR-2, GSTR-3 and GSTR-6 for the month of July 2017 have been revised to 10th Oct., 31st Oct., 10th Nov. and 13th Oct., 2017, respectively. It may however be noted that GSTR-1 has to be filed by 3rd of October by companies whose turnover is more than 100 crore. Notification Nos. 30 and 31/2017-Central Tax have been issued in this regard on 11-9-2017, after the GST Council approved this round of extension in its meeting on 9th of September. The notifications also state that the due dates for filing these returns for the subsequent period (August 2017 and later) will be notified later. According to reports, filing of the monthly summary return in Form GSTR-3B will continue for the months of August to December, 2017.

Form TRAN-1 – Due date for submission and revision: Due date for submission and revision of GST Form TRAN-1 has been notified as 31st October, 2017 by Order Nos. 2 and 3/2017–GST issued by the Commissioner, CBEC. It may be noted that Order No. 2/2017-GST, issued under Rule 120A of CGST Rules, deals with revision of Form TRAN-1 to be filed under Rules 117, 118, 119 and 120 of CGST Rules, while Order No. 3/2017-GST issued in exercise of powers under Rule 117 states that last date for filing such form under Rule 117, will be 31st of October, 2017.

Compensation cess on motor vehicles: After approval by the GST Council, CBEC has issued Notification No. 5/2017-Compensation Cess (Rate), dated 11-9-2017 for increase in the rates of GST Compensation Cess in respect of mid segment cars (engine capacity less than 1500cc), large cars (engine capacity above 1500cc) and on Sports Utility Vehicles (SUVs), from a flat 15% to 17%, 20% and 22%, respectively. No increase has however been made in respect of rates of such cess on small cars (both petrol and diesel), and on hybrid cars and hybrid SUVs.

Rates of GST to be reduced on around 40 items and exemption to unbranded goods clarified: GST rates will be reduced for over 40 goods on the recommendations of the GST Council. Such reduction in rate to 12% is broadly in relation to household goods, including tableware, kitchenware etc., of wood or, porcelain. For medical-grade sterile disposable plastic gloves, computer monitors up to 20 inch, plastic raincoats, GST rates are being reduced to 18%. Cotton seed oil cakes, broom and brushes consisting of twigs or other vegetable organic material, and khadi fabric sold through outlets of Khadi and Village Industries Commission outlets, will be exempted from GST.

Amendments have also been proposed to clarify that the GST rate of 5% will be levied on food products which on May 15, 2017 had a registered trademark or, if the item had a mark or name in respect of which actionable claim is available. The GST Council has recommended this amendment to the framework for applicability of GST on branded food products in order to prevent manufacturers from avoiding payment of 5% GST by de-registering their trademark. Unbranded food items are exempt from GST, while food items like

pulses, flour, etc., are liable to 5% GST if put in a unit container with a brand name.

Exemption from registration to specified job-worker making inter-State supplies: Notification No. 7/2017-Integrated Tax has been issued to provide for exemption from registration under Central GST Act, 2017 to job workers engaged in making inter-State supply of services to a registered person. Such exemption however will not be available to job workers whose aggregate turnover exceeds the specified limit as provided in Section 22(1), or those who opt to take the registration voluntarily. According to the notification this exemption is further not available to job worker who is involved in making supply of services in relation to jewellery, goldsmiths' and silversmiths' wares and other articles of Chapter 71 of the Customs Tariff Act, 1975.

Exemption from registration to persons making inter-State supplies of specified handicrafts: Exemption from registration under Central GST Act has been provided to certain persons making inter-State supplies of specified handicraft items. Notification No. 8/2017-Integrated Tax issued for this purpose provides a list containing many products, made by the craftsmen predominantly by hand. The supplier however would be required to obtain a Permanent Account Number and generate an e-way bill. This exemption is not available to suppliers whose aggregate turnover exceeds the specified limit.

Ratio decidendi

Supply by 'going concern' – Reliance on private contracts: Interpreting contractual terms between the two parties in a sale, involving a written agreement initially specifying that the sale was a supply of a 'going concern', the Australian Administrative Appeals Tribunal has granted relief to the purchaser who was made liable to increased GST in respect of such supply. The Tribunal in this regard took note of the fact that though the parties agreed that the supply was by a going concern, there was a conditional agreement between the parties to apply the margin scheme in case the transaction constituted a taxable supply. It was also noted that the parties had subsequently revised their contract specifically mentioning that the supply was not that by a 'going concern'. [*MSAUS Pty Ltd as the Trustee for the Melissa Trust* v. *Commissioner of Taxation* – Decision dated 31-8-2017 in File Nos. 2012/1228 and 2012/1265, Administrative Appeals Tribunal of Australia]

Provisional release of detained excess goods - Conditions: Observing that statutory provisions as provided in Central Goods and Services Tax Act and the Kerala GST Ordinance provide a mechanism for adjudication following detention of goods including for the provisional release pending adjudication, Division Bench of the Kerala High Court has set aside the Order of the Single Judge Bench. The Single Judge Bench had ordered provisional release of the goods on payment of 50% of demand relating to excess goods, along with execution of a simple bond for the balance amounts. The Division Bench however was of the view that when the statute itself provides for such a mechanism, a deviation therefrom cannot be ordered. Sections 129, 67(2) of CGST Act and Rule 140 of the CGST Rules, 2017 were considered by the Court for this purpose. The goods were detained as there was no nexus between the accompanying documents and actual goods under transport. [*Commercial Tax Officer* v. *Madhu.M.B., Proprietor, Haritha Enterprises* - 2017-VIL-474-KER]

Interest on a delayed refund of overpaid VAT – Fiscal neutrality: The Court of Justice of the European Union has, in a case involving delay in tax investigation partly due to the conduct of the taxable person, directed ascertainment of proportion of duration of the tax investigation

procedure which can be attributed to the conduct of the taxable person, for the purpose of computation of interest for the delayed refund. The Court in this regard was of the view that such legislation, which does not provide for consideration of actual impact of the conduct of a person, is not in conformity with the requirements arising from the principle of fiscal neutrality. The referring court in the dispute was of the view that the tax authority may, by imposing a fine on a taxable person for non-compliance with a duty to disclosure, continue tax investigations without any time limit and without being required to pay default interest, amounting to infringement of principle of proportionality. [*Glencore Agriculture Hungary Kft.* v. *Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság* – Judgement dated 6-7-2017 in Case C‑254/16, CJEU]

Supply of services directly connected with exports: In a case involving sub-contracting of transport arrangements, Court of Justice of the European Union has denied the benefit of exemption as available to supplies of services directly in connection with exports. The court was of the view that the beneficial provision does not apply to a supply of services, where those services are not provided directly to the consignor or the consignee of those goods. The assessee (sub-contractor) was responsible for driving the vehicle, repairs, refuelling, surveillance of the goods and necessary loading and unloading tasks, while another company (contractor), which owned the vehicles, undertook to ensure transport of goods placed under a transit procedure, on the basis of contracts concluded with several consignors. The Court took note of the fact that though the services supplied by the appellant were necessary to the actual performance of the export transaction, those services were not supplied directly to the consignee or to the exporter of those goods, but to a contractual counterparty. [*'L.Č.' IK* v. *Valsts ienemumu dienests* – Judgement dated 29-6-2017 in Case C‑288/16, CJEU]

Customs

Notifications and Circulars

New Drawback Rules and Schedule to come into effect from 1-10-2017: New Customs and Central Excise Duties Drawback Rules, 2017, issued vide Notification No. 88/2017-Cus. (N.T.), dated 21-9-2017, will come into force from 1st of October, 2017. Similarly the new schedule of All Industry Rates has also been notified by Notification No. 89/2017-Cus. (N.T.) and will come into force from the same date. According to the new Rules, "drawback" in relation to any goods manufactured in India and exported, excludes Integrated Tax leviable under sub-section (7) and Compensation Cess leviable under sub-section (9) respectively of Section 3 of the Customs Tariff Act, 1975. Applications for Brand rates have to be made to Principal Commissioner of Customs or Commissioner of Customs, as the case may be, having jurisdiction over the place of export. Meaning of 'Place of export' has also been provided under the new Rules 6 and 7 for this purpose. The new All Industry Rates of Drawback, effective from 1-10-2017, specify only one drawback rate instead of two rates (one when Cenvat credit is availed and

another when same is not availed) which are prevalent at present.

Exemption to specified goods imported for organising FIFA U-17 World Cup in India: Notification No. 75/2017-Cus., dated 13-9-2017 has been issued to provide for exemption to specified goods when imported for the purpose of organisation of FIFA Under 17 World Cup in India in 2017. The notification in this regard lists various products, including broadcasting equipment, power generation and distribution systems and air conditioning equipment, etc., and the list of entities and individuals eligible for such benefits.

Electronic sealing of containers – Procedure prescribed: CBEC has prescribed elaborate procedure for electronic sealing of containers by exporters under the self-sealing procedure. Exporters will have to directly procure the RFID seals from vendors after providing details such as IEC, etc. They would also be obligated to declare the physical serial number of the e-seal at the time of filing online integrated shipping bill. Circular No. 36/2017-Cus., dated 28-8-2017 issued in this regard also provides standard specification of the seal. The new procedure will come into effect from 1-11-2017 according to later Circular No. 37/2017-Cus., dated 20-9-2017.

Charges for late presentation of Bill of Entry to be waived in certain cases: Considering cases where even when bill of entry is filed within prescribed time, the same is subjected to payment of charges for late filing, CBEC has issued instructions to the authorities to provide necessary relief to the trade, particularly to the diplomatic community. Instruction No. 12/2017-Cus., dated 31-8-2017 issued for this purpose states that the Board is of the view that importers should not be penalised for the delay due to any system related fault.

Ratio decidendi

Advance authorisation – IGST on imports for fulfilment of export orders received prior to 1-7-2017: Delhi High Court has in its recent order allowed an Advance Authorisation holder, as an interim measure, to clear import consignments constituting inputs for the fulfilment of its export orders placed on it prior to 1st July 2017, without any payment of IGST levied from 1-7-2017. The Court took note of the fact that if an additional levy is imposed after the acceptance of export orders, the resultant burden cannot be passed on by the exporter to the buyers outside India, and that it might lead to cancellation of export orders, placing the exporter in a piquant situation. The petitioner in the dispute had questioned the applicability of IGST to imports that are made for fulfilment of export orders which were accepted by the petitioner prior to 1st July, 2017. The Revenue department was of the view that since refund of IGST after completion of export obligations was available, the petitioner cannot have any real grievance. [*Narendra Plastic Private Limited* v. *Union of India* – Order dated 11-9-2017 in W.P. (C) No. 6534/2017, Delhi High Court]

CESTAT is not an 'adjudicating authority' and has no power to impose penalty for the first time: Noting that Tribunal has been kept outside the scope of the expression "adjudicating authority" under sub-section (1) of Section 2 of the Customs Act, Madras High Court has set aside the penalty imposed by the Tribunal under Section 112(a) of the said Act. It was observed that any such imposition, for the first time, is part of exercise of adjudication process. The Court in this regard also observed that goods were cleared for home consumption by the proper officer without proper verification and therefore, the blame was to be apportioned between the

importer and the proper officer of the Department. It was held that the discretion was hence properly exercised by the adjudicating authority by not imposing penalty in its Order-in-Original. [*Visteon Automotive Systems India Limited* v. *CESTAT* - 2017-VIL-451-MAD-CU]

External VGA Box – Classification of: CESTAT Chennai has held the goods viz., 'External VGA Box', are to be classified under Heading 8473 of the Customs Tariff Act, 1975. Revenue department's contention of classification under Tariff Item 8529 90 90 was rejected by the Tribunal holding that when the goods cannot be used solely or principally with the video or TV monitor, the same cannot be classified as part or accessory of such items. It was held that the tuner boxes are solely or principally used with computer monitor only, and hence classification under Chapter 84 is more appropriate than under Chapter 85. However, the Tribunal was of the view that classification under TI 8473 30 30 was not proper as the goods were not mounted printed circuit boards. [*Compuage Infocom Ltd.* v. *Commissioner* - 2017-VIL-778-CESTAT-CHE-CU]

Refund – Limitation – Payment of duty under protest: CESTAT Chennai has held that in case the duty has been paid under protest, there is no vacation of the protest on adjudication having been made against the assessee, and that such protest lodged by the assessee would remain till the disputed issue is settled finally by the higher appellate forums. The lower appellate authority had earlier rejected assessee's appeal holding that protest payment was vacated on passing of the order of the original adjudicating authority, and that deposits made prior to adjudication would attain the character of duty, thus requiring refund applications to be filed within limitation. [*ITC Ltd.* v. *Commissioner* - 2017-VIL-751-CESTAT-CHE-CU]

Re-export - Exemption under Notification No. 158/95-Cus.: In a case involving delay in re-export of re-imported goods, CESTAT Delhi has allowed the benefit of Notification No. 158/95-Cus., where permission to extend the period for re-export was not sought by the assessee before the expiry of prescribed time period. The Tribunal in this regard noted that the notification did not require assessee to seek permission before expiry of 6 months. Bank guarantee executed at the time of re-import was hence held as not to be forfeited. [*Leather Sellers* v. *Commissioner* – Final Order 56356/2017, dated 29-8-2017, CESTAT Delhi]

Central Excise & Service Tax

Cenvat credit of duty paid on packing material for exempted inputs: In a case where the assessee had sent duty paid drums to his raw material supplier for packing of inputs to be supplied to him, CESTAT Chandigarh has allowed Cenvat credit on such drums to the assessee. Revenue department was of the view that since drums were not received in the factory of production, assessee was not entitled to avail Cenvat credit of duty paid on these drums as inputs. The Tribunal in this regard observed that since inputs were packed in drums on which duty was paid, in terms of Rule 3 of the Cenvat Credit Rules, 2004, the assessee was entitled to avail Cenvat credit. Revenue neutrality, inasmuch as duty paid through PLA in case of denial of credit

would again be re-credited to the assessee under Notification No. 56/2002-C.E., was also noted by the Tribunal. [*Ambika International* v. *Commissioner* - Final Order No. 61481/2017, dated 8-8-2017, CESTAT Chandigarh]

Cenvat credit on cement used to treat industrial waste, available: Cenvat credit on cement used for treating jerofix (an industrial waste/effluent) emerging during production of lead, zinc and sulphuric acid is available. CESTAT Delhi while holding so observed that such use of cement was a mandatory compulsion before disposing such waste in a landfill. Dismissing Revenue department's appeal, it was held that use of cement, as an input, for manufacture of the final product was hence an essential requirement. [*Commissioner* v. *Hindustan Zinc Ltd.* - Final Order No. 56363/2017, dated 24-8-2017, CESTAT Delhi]

Cenvat credit on construction of houses for rehabilitation: CESTAT Delhi has allowed Cenvat credit on services used for construction of houses for rehabilitation of persons who were living in the land where a thermal power plant was established for setting up of an aluminium smelter project. The activity was found to be related to the business activity as without re-establishment of the persons who were living in the said land the project could not be installed. Reliance in this regard was also placed on Bombay High Court judgement in the case of *Ultratech Cement Limited* -2010 (260) ELT 369 (Bom). [*Bharat Aluminium Co. Limited* v. *Commissioner* - Final Order No. 56327/2017, dated 24-8-2017, CESTAT Delhi]

Area based exemption - Notification No. 50/2003-C.E. grants exemption to unit and is not with reference to factory: CESTAT Delhi has held that area based exemption under Notification No. 50/2003-C.E. is available to new industrial 'units' or existing industrial 'units' undertaking substantial expansion, and is not with reference to a 'factory'. Tribunal in this regard was of the view that each division of a factory manufacturing different identifiable items or undertaking different identifiable processes will have to be considered as a unit of the factory for the purpose of benefit under said notification. Revenue department's view that since the factory is one, assessee cannot avail exemption under said notification for some products and not in respect of some other products, was thus rejected while allowing assessee's appeal. [*Victoria Automotive Inc.* v. *Commissioner* - Final Order No. 56294-56298/2017, dated 29-8-2017, CESTAT Delhi]

Cenvat credit on courier services available even after 2011: CESTAT Ahmedabad has held that Cenvat credit on courier services for various purposes like sending samples, documents, finished goods, etc., is available even after amendment to the definition to input services with effect from 1-4-2011. Revenue department's contention that after deletion of the expression "activities relating to business", Cenvat credit on such services which are not directly connected with manufacturing activity would not be available, was hence rejected. The Tribunal in this regard noted that these services, even though not directly linked to the manufacturing activity in the factory premises, were connected or related to the business of manufacturing activity which also involve marketing/sale of the manufactured goods. [*Haldyn Glass Ltd.* v. *Commissioner* - Order No. A/11924-11951/2017, dated 30-6-2017, CESTAT Ahmedabad]

EOU de-bonding – No liability on work-in-progress stock: Allowing assessee's appeal, CESTAT Delhi has held that there is no justification in confirming duty liability on work in progress stock in terms of Section 3(1) or the proviso of the said section of Central Excise Act, 1944. The Tribunal for this purpose observed that

no excise duty is payable on the goods of a DTA unit before the same is cleared, and hence there could be no duty liability on various work in progress stock before they reached the final product stage to be entered in RG-1 register. It was also noted that various in-process items on which duty was demanded had further undergone process to reach finished excisable stage and duty was paid upon their clearance. [*Nitin Spinners Ltd.* v. *Commissioner* - Final Order No. 56283-56284/2017, dated 24-8-2017, CESTAT Delhi]

Supply of tangible goods for use service – Scope: In a case involving lease of Digital Cinema Equipment to theatre owners for display of movies, CESTAT Mumbai has remanded the matter directing authorities to verify whether contention of the assessee with regard to the theatre owners having freedom to choose movie, number of shows, timing of shows, to determine whether to play a movie or not and having operational control of the equipment through their own men or not, were correct. The Revenue department was of the view that since as per contract the equipment will remain sole property of equipment provider and he shall bear the cost of normal wear and tear and repairs it is clear that the legal right and effective control were with the assessee. Demand for extended period was however set aside by the Tribunal observing that the assessee was paying VAT on the transaction since long and that there were departmental circulars holding that VAT and Service Tax are mutually exclusive.

The Tribunal further allowed Cenvat credit on such equipment given to the theatres by the assessee. It was observed that the equipment was used for providing the output services, namely content delivery services and sale of space for advertisement service. It was held that credit on capital goods is available even if they are removed outside from the premises of the assessee for providing output service. Department's contention that the equipment had no role in the service activity which was limited to sourcing of advertisement and raising invoices/ collecting money etc., was rejected. [*UFO Moviez India Ltd.* v. *Commissioner* - 2017-VIL-774-CESTAT-MUM-ST]

Demand under Cenvat Rule 6(3) – Department to bring on record evidence: Observing that it is incumbent upon the department to bring on record evidence to indicate that Cenvatted inputs have been used partially in the manufacture of dutiable goods and partially in exempted products, CESTAT Delhi has allowed assessee's appeal. The Tribunal in this regard observed that some quantity of silver on which credit was not taken was used in the manufacture of dutiable goods, and not vice versa. The adjudicating authority had refused to accept records maintained by the assessee alleging that the process of refining of silver - whether procured or manufactured, was not separate. Contention of the department that the assessee was not maintaining any register on consumption and other inventory of inputs used in or in relation to exempted goods, was held as indicating only doubts in the mind of the concerned authority. [*Choksi Heraeus Pvt. Ltd.* v. *Commissioner* - Final Order No. 56416/2017, dated 4-9-2017, CESTAT Delhi]

Management Consultancy service – Scope: CESTAT Delhi has declined to agree with the contention of the Revenue department that even transfer of technical know-how which improves the profitability and efficiency of the client organization will be covered under the general category of management consultancy. The Tribunal agreed with the views of the Original Authority which had also considered the opinion given by IIM, Ahmedabad, and had held that the assessee only transferred the available 'know-how' and after that it was for the clients to use the

'know-how' in the manner they desired, while the assessee had no control over the usage of the 'know-how'. [*Commissioner* v. *Ansal Properties and Infrastructures Ltd.* - Final Order No. 56131/2017, dated 23-8-2017, CESTAT Delhi]

Event Management service – Scope: Revenue department's argument that it is not necessary that an event manager should undertake all the activities mentioned in the statutory definition of Event Management service for the purpose of tax liability, has been agreed with by CESTAT Delhi. The assessee in this dispute was procuring services of foreign agents of speakers (for the events) who ensured the availability of speakers to the events, for a fee which was the total gross amount paid by the assessee to such agent. Assessee's claim that such agents were acting as representative of the speakers and as such should be considered as one and the same, with no separate role in between, was hence rejected. [*HT Media Ltd.* v. *Commissioner* - Final Orders Nos. 56358-56359/2017, dated 31-8-2017, CESTAT Delhi]

Cement cleared for self-consumption – Benefit of Notification No. 4/2006-CE: CESTAT Chennai has allowed the appeal of the assessee by granting benefit of Entry 1C of Notification No. 4/2006-C.E. to cement cleared for self-consumption inside factory and closing stock at warehouse. The Tribunal was of the view that these clearances cannot be considered as 'retail sales' under Rule 3(q) of the Standards of Weights and Measures Rules. Exemption was also allowed in respect of cement cleared to manufacturers, asbestos and cement/pipe manufacturers, ready-mix concrete manufactures or otherwise to builders, infrastructure/buildings/ government projects construction, educational institutions, hospitals and societies, on the same grounds. [*ACC Ltd*. v. *Commissioner* - 2017-VIL-747-CESTAT-CHE-CE]

Export of tour operator services – Service provided to foreign tourist: Services provided by Indian tour operators to foreign tourists during the period 1st July 2012 to 1st July 2017, which were paid for in convertible foreign exchange are not amenable to Service tax. Delhi High Court while holding so also held that Rule 6A(1) read with Rule 6A(2) of the Service Tax Rules, insofar as it sought to describe export of tour operator services to include non-taxable services provided by tour operators, is *ultra vires* the Finance Act, 1994 and in particular Section 94(2)(f) of said Act. It was also held that Section 94(2)(f) or (hhh) enabled the Central Government to only determine what constituted export of service while not empowering it to decide taxability of tour operator services provided outside the taxable territory. Holding that legal fiction of treating service rendered outside India to be a service rendered in India cannot be introduced by way of rules, the Court noted that Parliament for the first time under the Constitution (One Hundred and First Amendment) Act, 2016 amended Article 286 (1) to provide that there will be tax on the export of services out of the territory of India. [*Indian Association of Tour Operators* v. *Union of India* - 2017-VIL-435-DEL-ST]

VAT

UP VAT - Advanced Fast Card covered as insecticide: Distinguishing between 'mat' and 'fast card', Allahabad High Court has held that a fast card which is burned to release the active

ingredient is classifiable as insecticide under Entry No. 20 Schedule II of U.P. VAT Act, 2008. The Entry after amendment in 2013 had excluded "Mosquito repellent/destroyer coils, mats and liquid" from its purview covering insecticides. The Court in this regard noted that the chemical composition of both 'Mat' and 'Fast Card' are different having different shape and size, and that the mechanism of their use had no resemblance or comparison. It was observed that 'mat' cannot be used directly by the customer unless it is accompanied by an electric machine/instrument, whereas, fast card sold in rectangular leaflets is required to be merely lighted, which burns out in three minutes killing the mosquitoes and not repelling them as is in the case of mat.

The Court was of the view that not all kinds of products used as mosquito repellent/destroyer were excluded from Entry 20, but only a particular kind of product mentioned, therein, *viz.* coils, mats and liquids. It was noted that otherwise the legislature would have used the expression "excluding Mosquito repellent/destroyer" or "excluding All Mosquito repellent/destroyer" or "excluding Mosquito repellent/destroyer coils, mats, liquids etc.". [*Godrej Consumer Products Limited* v. *Commissioner* - 2017-VIL-471-ALH]

No penalty without giving opportunity of hearing and without recording absence of sufficient cause for non-compliance: Chhattisgarh High Court has quashed the order of the assessing authority as upheld by the revisionary authority to the extent of imposing penalty. The authorities had imposed penalty for late deposit of tax and for delay in submission of return. Relying on various decisions of the Supreme Court and the M.P. High Court, it was held that while passing the order of penalty, the authority (Commissioner) has to record a finding either that no cause was shown by the dealer or that the cause shown by the dealer was not sufficient. It was observed that levy of Entry Tax on lime stone was declared unconstitutional on 6-2-1991, and hence payment of such tax from January, 1991 onwards was deferred by the petitioner-assessee. Allowing the writ petition, it was noted that assessing authority after assessing tax liability simply proceeded to levy penalty in exercise of power conferred under Section 17(3)(b)(ii) of M.P. General Sales Tax Act, 1958 and had not considered the reason assigned by the petitioner as to whether it constituted sufficient cause. It was also held that no reasonable opportunity of being heard to oppose the levy of tax as contemplated by the provisions was afforded to the petitioner. [*Steel Authority of India Ltd.* v. *Additional Commissioner* - 2017-VIL-445-CHG]

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