Lakshmikumaran & Sridharan tax

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An e-newsletter from
Lakshmikumaran & Sridharan, India

April 2016 / Issue – 58

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April
2016

Articles

'Ease of doing business' – A look at certain key Customs rulings

By **Manoj Gupta**

'Ease of doing business' is the buzz-word at present and with the Indian Union Cabinet going ahead with the WTO's Trade Facilitation Agreement, it seems that conditions for doing business in India are bound to improve with significant cut in number of forms, declarations and permissions. Role of Indian judiciary including the Tribunals in this regard is also worth noting. In this background, this article seeks to analyze few decisions of the Courts/ Tribunals relaxing certain Customs procedures which otherwise were perceived as creating hindrances in growth of trade in India.

Registration as per Customs (IGCRDMEG) Rules is procedural

Requirements under Rules 3 and 4 of the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996 were recently held by CESTAT as merely procedural[1]. It was held that intention of the statute is to ensure that the goods imported by the manufacturer are used for the intended purpose as declared in the application. Exemption under Notification No. 21/2003-Cus., was allowed by the Tribunal while it rejected the contentions of the Revenue department that registration under the said rules has to be taken prior to import. Revenue department's case was also that the importer had mis-represented before the Central Excise Authorities by stating that they intend to import the material (in future), whereas they had already imported and cleared the material on payment of duty on merits. The Tribunal however highlighted the views of the Commissioner (Appeals) that there was nothing in the rules which cannot be done after the importation, but before the use of the goods, and which could and should have been done only before the importation.

It may however be noted that the new rules, in force since 16-3-2016, grant exemption based on submission of information by the importer rather than based on certificate from Central Excise authorities, and registration under Excise Rule 9 is called for only if the manufacturer is not registered with the authorities. Absence of this specific registration in the new rules vindicates the point that such registration was only procedural, and hence is no more relevant in this era of self-assessment. It is however to be seen whether Customs would allow benefit, under the new rules, if the exemption is not claimed at the time of import/clearance.

Refund – Assessment of B/E when deemed to be challenged

In one of the most cited cases, the Supreme Court had held that a refund claim is not an appeal proceeding, and hence unless

[1] *Commissioner v. Medreich Sterilab Ltd.* – 2015 TIOL 2228 CESTAT-MAD

the order of assessment has been reviewed under Customs Section 28 and/or modified in an appeal, a claim for refund would not be maintainable[2]. This ruling of the Supreme Court has often been distinguished by various Courts and Tribunal - be it a case of mistake in declaration by importer or mistake by the assessing officer or in case of absence of 'lis' between importer and the Department at the time of import. Recently, CESTAT has further enhanced the scope of challenge to the assessment, and held that seeking amendment of bills of entry and re-assessment amounts to challenging the assessment[3]. In this case, the importer had failed to claim the benefit of exemption notification in the bill of entry, but subsequently amendment and re-assessment of bill of entry were sought before filing refund claim.

Extra duty deposit (EDD) when not required

No conversation on valuation would be complete, without discussing EDD which the department insists in case of imports from related parties, till the final decision is reached on valuation. Madras High Court has recently held that EDD cannot be asked to be deposited by the appellate authority at the time of remand[4]. In another case, CESTAT has held that Commissioner (Appeals) cannot demand extra duty deposit more than the sanctioned 1% till the finalisation of the SVB Order[5]. In this case the first appellate authority had allowed the department's appeal and remanded the case for *de novo* consideration while also directing the department to collect extra duty deposit of 5%. Other than these, there are numerous decisions[6] wherein collection of this deposit beyond the prescribed period of 4 months (during which an investigation is supposed to come to an end), has been held to be not correct.

Now, this unnecessary deposit has been dispensed with. CBEC in its recent Circular No. 5/2016-Cus., states that for the sake of reducing transaction cost and bringing uniformity across Customs Houses, no security in the form of EDD shall be obtained from the importers. 5% EDD however remains if the importer fails to provide documents and information required for SVB inquiries, within 60 days of such requisition. Importer is now further free to choose between cash deposit and bank guarantee for the purpose of this security deposit. It may be noted that this deposit was 5% till 1998 when it was reduced to 1% by Circular No. 1/98-Cus. However, in 2011 this was enhanced to 5% in respect of cases where the importer does not furnish complete reply to the questionnaire within 30 days, of receipt of the same.

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2 *Priya Blue Industries* v. *Commissioner* - 2004 (172) ELT 145 (S.C.)

3 *Grasim Industries Ltd.* v. *Commissioner* - 2016 TIOL 406 CESTAT-DEL

4 *Terumo Penpol Limited* v. *Commissioner* – 2015 TIOL 1423 HC-MADRAS

5 *MAD Doosan Infracore India Pvt. Ltd.* v. *Commissioner* – 2015 TIOL 2475 CESTAT-MAD

6 *E.I. Dupont India Pvt. Ltd.* v. *Union of India* - 2014 (309) ELT 225 (Bom.); *Beckhoff Automation Pvt. Ltd.* v. *Commissioner* - 2015 (323) ELT 404 (Tri. - Mumbai)

Seizure – Bank account when cannot be frozen under Customs Section 110

The Allahabad High Court has held that power under Customs Section 110 cannot be exercised for passing an order prohibiting an individual from withdrawing from bank account unless the individual is charged with illegally transacting in the currency by way of import or export[7]. The Court relied on the decisions of the Gujarat High Court in *Am Overseas* and that of Karnataka High Court in *Multitek Engineers* [2013 (287) E.L.T. 44]. It was also held that for the same reason, no conditions can be imposed on an individual pursuant to Section 110A to allow the operation of the bank account pending an order of the adjudicating authority.

Here it will not be out of context to state that it is still not very clear as to whether the department under Customs Section 110(3), which provides for seizure of 'any documents or things', can freeze bank accounts of the importer/exporter. The Gujarat High Court[8] in the above mentioned case has held that department cannot issue any direction to prevent the assessee (exporter) from operating his accounts. The Court rejected the contention of the department that use of the term 'things' would include currency. It was observed that provisions were part of statute dealing with 'goods' and that the term 'currency' is also used only in the context of import or export of currency. Calcutta High Court has however held that 'things' include money lying in the bank account[9].

Penal provisions like arrest, seizure, etc., under Customs law have always acted as effective deterrent against different kinds of offences. But these powers in the hands of enforcement authorities can also be misused so as to harass law abiding citizens, but also to cause embarrassment to the government. Hence there is a need to build adequate safeguards into these provisions themselves so as to avoid any mis-adventure while exercising such powers.

Epilogue

India has come a long way from the times of normal value and strict appraisal based assessment in the era of transaction value and self-assessment. Much work has been done recently in order to ease doing business in India – implementation of Integrated Declaration under Indian Customs single window, extension of 24x7 customs clearance facility to 19 sea ports and 17 Air Cargo Complexes, implementation of electronic delivery order system, dispensation of SDF Form, etc., are some of the steps in the right direction by the authorities. However, much needs to done in order to bring more clarity in certain provisions.

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[7] *M.Z. Handicrafts* v. *Union of India* – 2015 TIOL 1446 HC-ALL
[8] *Am Overseas* v. *Union of India* - 2006 (194) ELT 267 (Guj.)
[9] *Rohit Kumar* v. *Union of India* - 2002 (141) ELT 27 (Cal.)

Refund – No recovery through SCN without review of refund order

By **Sweta Giridar**

The Madras High Court in the case of *Eveready Industries India Ltd.* v. *CESTAT, Chennai* [2016-TIOL-676-Mad-CX] has held that refund granted by an authority cannot be denied by way of issuance of Show Cause Notice (SCN) in cases where the order has not been subject to review.

In this case, the assessee was clearing goods on payment of duty after paying duty on provisional basis. While finalizing the provisional assessment, the original authority disallowed the abatement on cash discount. On appeal to Commissioner (Appeals), the abatement on cash discount was allowed and the Order-in-Original was set aside. Consequent to the order of Commissioner (Appeals), the assessee filed a refund claim which was sanctioned to them by the Assistant Commissioner. There was no appeal filed by the Department against the order of the Commissioner (Appeals) allowing abatements as well as against the order of the Assistant Commissioner granting refund. In this background, an SCN was issued to recover the erroneous refund on the ground of unjust enrichment, by the same Assistant Commissioner who granted refund.

Assessee's contention

The assessee argued that once refund has been granted by way of an order and when the same has attained finality, it is not open to the Department to issue SCN proposing to deny the same, when the order has not been reviewed by a superior authority.

Power to issue SCN and power to review an order are two independent powers?

It was argued by the Department that the power to issue SCN and the power to review an order are two independent powers which are invoked for different purposes and therefore, there is no requirement to take recourse to review for issuance of SCN. In this regard, the Department placed reliance on the decision of the Hon'ble Supreme Court in *Union of India* v. *Jain Shudh Vanaspathi Ltd.* [1996 (86) ELT 460 (SC)].

No power to revoke refund suo motu

Relying on *Jain Shudh Vanaspathi (supra)* the Tribunal confirmed the findings in the Order-in-Original on the ground that a show cause notice can be issued even in cases where the order has not been reviewed by a superior authority.

The Madras High Court however set aside the order of the Tribunal holding that once refund has been granted in accordance with law by the adjudicating authority, there is no power under the Act to revoke the refund *suo motu*. Further, the High Court held that the same authority can issue SCN only when there is direction by a superior authority by exercising the power of review. The High Court also held that once an application of refund is allowed under Section 11B of the Central

Excise Act, an SCN for recovery of 'erroneous refund' cannot be issued unless the refund has been held to be 'erroneous' by another authority. The High Court also distinguished the decision of the Supreme Court in *Jain Shudh Vanaspati* on facts, stating that in those proceedings, the assessee had indulged in fraud and the Supreme Court held that fraud 'vitiates all'.

Impact of the above judgment

This decision sets out the correct position of law and has also distinguished the decision of the Supreme Court in *Jain Shudh Vanaspati* which was rendered in completely different set of facts and circumstances and has been time and again relied upon by the Department. The judgment further gives a significant finding that when an authority exercises a power under a section, it must be presumed that it has been done in accordance with law and therefore, another authority in a parallel proceeding cannot act upon it on the premise that it is erroneous, unless a superior authority holds so.

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CENTRAL EXCISE

Circular

Micronutrients, Multi-micronutrients, Plant Growth Regulators and Fertilizers – Classification of: CBEC has issued clarification with respect to classification of 'Micronutrients, Multi-micronutrients, Plant Growth Regulators and Fertilizers' after receiving opinion from Indian Agricultural Research Institute (IARI) and considering entries of Central Excise Tariff Act, 1985, explanatory notes of HSN, nature, and usage of the products. Circular No. 1022/10/2016-CX, dated 6-4-2016 issued in this regard states that,

- **Micronutrients** are essential nutrients, required in small quantities for the normal growth and development of plants. These are sold in market as 'micronutrient fertilizers' but not classifiable under Chapter 31 of Excise Tariff, since they do not contain Nitrogen (N), Phosphorus (P) or Potassium (K). They are classifiable under Chapter 28 or 29, if they contain separate chemically defined compound.
- **Plant Growth Regulators (PGRs)** are organic compounds different from the nutrients and has the ability to promote, inhibit or modify growth and development of plants. They are classifiable under Heading 3808 of Excise Tariff.
- **Fertilizers** are substances having N/P/K as an essential constituent and are classifiable under Chapter 31. If essential constituent is other than N/P/K, then the product is not classifiable under Chapter 31. It is stated that notifications issued under Fertilizer Control Order are not relevant for the purpose of excise classification.

Ratio Decidendi

Valuation – Includibility of value of containers for supply of gases: In a dispute involving includibility of value of containers provided by the assessee while clearing industrial gases and allied products, noting the difference of opinion in judgments delivered by two 3 Judge Benches of the Supreme Court, another 3 Judge Bench of the Apex Court has held that the issue should be considered by Larger Bench. The Court in this regard noted that two Coordinate Benches, in the cases of *Bombay Tyre International Ltd*. and *Acer Ltd.*, had taken contrary views with regard to purport and effect and the interconnection between Sections 3 and 4 of the Central Excise Act, 1944. [*Commissioner* v. *Grasim Industries Ltd.* - 2016-TIOL-38-SC-CX-LB]

Valuation – Cost of process carried out at job-worker's premises after clearance when not includible: The Supreme Court has held that cost relating to bullet proofing of jeeps, undertaken outside the factory by job-workers after clearance of the not-yet bullet-proofed jeeps, is not to be included in the value of jeeps for the purpose of levy of Central Excise duty. Affirming the Order of the CESTAT, the Apex Court in this regard noted that in the normal course, the jeeps are manufactured by the assessee without any such bullet proofing and it was only on a specific request by the Police department, jeeps were supplied after getting the bullet-proofing done from outside. [*Commissioner* v. *Mahindra & Mahindra Ltd.* - 2016-TIOL-29-SC-CX]

Cenvat credit on inputs - Word 'includes' in statutory definition generally used to enlarge meaning of preceding words: Larger Bench of the Supreme Court (3 Judges Bench) has upheld the view that the use of word 'includes' in the definition of input in Cenvat Credit Rules, 2002 enlarges the meaning of the preceding words and it is by way of extension and not with restriction. The Division Bench of the Supreme Court in the case of *Ramala Sahkari Chini Mills Ltd.* [2010 (260) ELT 321 (SC)] had referred the matter to the Larger Bench and doubted the observation made by the Bench of equal strength in the case of *Maruti Suzuki Ltd.* [2009 (240) E.L.T. 641 (S.C.)] that *'all the three parts i.e. specific part, inclusive part and place of use of the definition of input are required to be satisfied before an input becomes an eligible input'*. The decision of the Larger Bench reinforces the legal position that the use of the word 'includes' in the statutory definition enlarges the scope. [*Ramala Sahkari Chini Mills Ltd.* v. *Commissioner* - 2016 (334) ELT 3 (SC)]

Cenvat credit lying in balance does not lapse on conversion of DTA unit to EOU unit: Upon conversion of DTA unit into EOU, the assessee carried over the balance amount of Cenvat credit. Said credit was subsequently utilized for payment of duty on the goods cleared from the EOU to DTA. The Department objected to such carry forward and relied upon Rule 11(3) of the Cenvat Credit Rules, 2004 and Circular No. 77/99-Cus., dated 18-11-1999

in this regard. CESTAT Mumbai however has held that Rule 11(3) is only applicable when the final product has become fully exempt from duty. Noting that in the present case the final products exported out of India were exempted and the very same final products cleared to DTA were dutiable, the Tribunal allowed the appeal of the assessee. It was held that provisions of Rule 11(3) are not attracted and hence the credit lying unutilised at the time of conversion of DTA unit to EOU does not lapse. [*John Deere (I) Pvt. Ltd.* v. *Commissioner* - 2016 (333) ELT 440 (Tri-Mumbai)]

Cenvat credit not to be denied on short receipt of coal due to washing: CESTAT Delhi has allowed Cenvat credit on coal received in lesser quantity than declared on the invoice, due to loss of some quantity of coal in the process of washing, which was done in order to remove impurities present in the coal. Relying on Certificate issued by Central Institute of Mining & Fuel Research and opinion of IEA Clean Coal Centre of International Energy Agency, it was held that credit was to be allowed. [*Real Ispat and Power Ltd.* v. *Commissioner* - 2016-TIOL-805-CESTAT-DEL]

Exemption admissible on goods procured duty free for packing of export goods but such goods used for packing not exported: CESTAT Delhi has allowed benefit of Notification No. 43/2001-C.E. (N.T.) to PP bags which were procured duty free under said notification for packing of export goods. Demand of duty, since the bags were discarded at the port of export while the goods were exported in bulk, was set aside by the Tribunal in the dispute. Department's contention that the duty free bags were not exported and hence duty needs to be recovered, was rejected by CESTAT observing that the bags were used for manufacture/processing of the export goods. [*Ambika Solvex Ltd.* v. *Commissioner* - Final Order No. 50891/2016, dated 22-2-2016, CESTAT Delhi]

Remission of duty in case of defective output: CESTAT Chennai has upheld the order of the Commissioner (Appeals) allowing remission of duty in view of contingency that gave rise to the defective output which arose in the process of manufacture. The Commissioner had noted that the goods before reaching the final stage were defective for no reason attributable to the respondent. [*Commissioner* v. *Emerson Process Management Ltd.* - 2016-TIOL-757-CESTAT-MAD]

Appeal – Authorisation by Committee of Commissioners mandatory: Provisions for authorisation by Committee of Commissioners cannot be said to be merely directory. Orissa High Court has held that the word "may" in Section 35B(2) of the Central Excise Act, 1944 cannot be said to be discretionary or directory, but it is a mandatory provision and should be read as 'shall'. The Court took note of the fact that fiscal statute requires strict interpretation and adopted purposive construction. [*Commissioner* v. *Ballarpur Industries* - OTAPL No. 8 of 2012, decided on 4-3-2016, Orissa High Court]

Tetmosol soap – Classification of: Reversing the decision of the Tribunal, the Supreme Court of India has held that Tetmosol soap

which is primarily used for the treatment of a skin disease called scabies, would be classifiable under sub-heading 3401.11 of the Central Excise Tariff. The Department was of the view that since the wrapper in which the soap is packed mentions that it can be used as toilet soap, it would be classifiable under sub-heading 3401.19. [*VVF Ltd.* v. *Commissioner* - 2016-TIOL-27-SC-CX]

Chyawanprash classifiable as ayurvedic medicament and not as health supplement: CESTAT Kolkata has held that Dabur Chyawanprash (Awaleha Special & Awaleha with Ashtawarg) prepared from ingredients mentioned in Ayurvedic texts and recognized as ayurvedic medicine under Drug Control Licence are to be classified under Heading 3003 as 'Ayurvedic Medicaments' and not under Heading 2107/2108 as health supplements/ tonics. The Department contended that in addition to the ingredients mentioned in the ayurvedic texts, the said Chyawanprash also contained other ingredients and the same was being sold to the customers as health supplement/ tonic. The Tribunal however held that the main constituent of any Chyawanprash is amla which has medicinal as well as tonic capabilities and the same product was being classified by the Department across India as ayurvedic medicament. [*Dabur India Ltd.* v. *Commissioner* - 2016-TIOL-822-CESTAT-KOL]

Writ Court when can interfere at SCN stage: The Madras High Court has held that where a show cause notice is issued either without jurisdiction or in an abuse of process of law, and it is so *prima facie* established, the Writ Court can interfere even at the stage of issuance of show cause notice. The Court hence set aside the SCN issued beyond the period of five (5) years. Department's contention that the SCN was issued for violation of conditions of bond and that the said bond was valid at the time of issuance of said SCN, was rejected by the Court observing that the demand of excise duty shall be governed by the period of limitation provided in the Central Excise Act, 1944. [*Madura Coats Ltd.* v. *Commissioner* - 2016-TIOL-690-HC-MAD-CX]

CUSTOMS

Circulars

Demand – Conclusion of proceedings for co-noticee where duty and interest paid by noticee: The scope and interpretation of words 'other persons' in Section 28(2) and Section 28(6)(i) of the Customs Act, 1962 have been clarified to imply person(s) to whom no demand of duty is envisaged with notice served under Section 28(1) and Section 28(4) of the Customs Act, 1962. CBEC Circular No. 11/2016-Cus., dated 15-3-2016 issued in this regard also states that co-noticees would be benefited by deemed closure of cases where the main notices has complied with the provisions of said sections, i.e. paid duty along with interest. The Circular also directs the authorities to issue an order to such effect in all cases where proceedings reach closure stage under above mentioned provisions. Further, it is also clarified that cases

involving seizure of goods under Section 110, or cases where confiscation provisions under Sections 111, 113, 115, 118, 119, 120 and 121 of the Customs Act, 1962 are invoked, would be out of purview of this Circular.

'Integrated Declaration' under the Indian Customs Single Window project: In furtherance to the Indian Customs Single Window project, wherein online permissions are being obtained from various govt. agencies, the CBEC has developed 'Integrated Declaration', under which all information required for import clearance by the concerned government agencies has been incorporated in the electronic format of bill of entry. The customs broker or importer shall submit the "Integrated Declaration" electronically to a single entry point, i.e. the Customs Gateway (ICEGATE). Upon filing of the declaration, the bill of entry will automatically be referred to concerned agency, if required, based on risk. Bill of Entry (Electronic Declaration) Regulations, 2011 have also been amended in this regard.

According to Circular No. 10/2016-Cus., dated 15-3-2016, the new Integrated Declaration will include different types of undertakings, declarations, and letters of guarantee that are presently required to be submitted on company letter heads. The new declaration would gather data/information for implementation of a system of selective inspection and testing by all Partner Government Agencies, which is crucial for promoting "Ease of Doing Business".

Further, according to Customs Instruction dated 31st March, 2016 the government has, with effect from 1-4-2016, replaced the 'Bill of Entry' with an "Integrated Declaration' to be filed by the importers. Some of the key changes introduced in the bill of entry are:

- The Authorised Dealer Code of the bank that will be making outward remittance of foreign exchange in connection with the imported goods will have to be submitted by the importer.
- As per RBI guidelines, a third party payment should be made only to FATF (Financial Action Task Force) compliant country. To monitor the same, the Address field is provided to capture Country code to verify compliance to said guidelines.
- To cater for other types of INCOTERMS, such as ex-works (EXW), a new field "TERMS place" has been added.
- To allow importers to declare AEOs in the Bills of Entry, a set of fields have been added.
- A flag has been added with regard to the relationship between buyer and seller. If the importer answers 'Y', he has to fill-in the SVB Registration Number.
- 'End use of the item' was a free text field in Bill of Entry. This has been converted into a dropdown list, because, purpose of import/ Intended end-use is a key data field for Participating Government Agencies.

- For receiving a proper declaration in relation to RSP applicability, the current field is modified so that the importer makes a clear declaration in respect of every item.
- In order to avail exemption of Additional duty of Customs using Customs Notification, the importer should declare the flag "C" to indicate that the declared Notification Number refers to Customs Notification and not a Central Excise one.
- Necessary changes have been introduced into the Bill of Entry format to capture Central Excise Registration Number. Similarly, the system has been made ready to capture the GSTIN number by setting the appropriate flag. This will be enabled as and when Goods & Services Tax (GST) is introduced.

Wireless Microphone Sets classifiable under Tariff Item 8518 10 00: Till 29-2-2016, Wireless Microphones were specifically covered under Tariff Item 8525 50 50 of Customs Tariff, whereas as per HSN, Wireless Microphones were specifically included under Tariff Item 8518 10 00. To remove such inconsistency, Tariff Entry 8525 50 50 was recently omitted by the Finance Bill 2016. CBEC has now by Circular No. 9/2016-Cus., dated 11-3-2016, clarified that consequent to such amendment, all microphones including Wireless Microphone Sets / systems consisting of one or more wireless microphones and a wireless receiver are classifiable under TI 8518 10 00.

Ratio Decidendi

Refund cannot be rejected for not challenging assessment when error on account of EDI system: CESTAT Mumbai has held that refund claim could not be rejected merely on the ground that the assessment was not challenged, especially when eligibility to the exemption notification was not in dispute and the error was due to non-upgradation of the EDI system. Revenue department's contention that refund was not to be allowed according to the Supreme Court decision in the case of *Priya Blue Industries Ltd.*, was hence rejected by the Tribunal. The Tribunal in this regard noted that there was no dispute on the eligibility of exemption notifications. [*Commissioner* v. *Steel Authority of India Ltd.* – Order dated 25-1-2016 in Appeal No. C/643/09-Mum]

Valuation - Redetermination of RSP when not justified: In the absence of any material evidence that RSP declared in respect of the mobile phones is tampered, altered or any flow back has been received from the customers, RSP cannot be redetermined based on contemporaneous RSP of imported goods. CESTAT Chennai while holding so has observed that such re-determination would be not in conformity with Section 4A of Central Excise Act read with Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules 2008 and the Standards of Weights and Measures Act. The Tribunal in this regard also observed that method of valuation of enhancing the import price based contemporaneous

imports is not applicable to RSP and there is no concept of contemporaneous RSP under Section 4A. [*Bluemax Impex (India) Pvt. Ltd.* v. *Commissioner* - Final Order No. 41788-41789/2014, dated 18-12-2015]

Project imports - Conditions notified after import cannot be pressed for denying benefits: CESTAT Mumbai has held that benefit of Project Import Regulations cannot be denied on the ground of non-compliance of the conditions which were introduced in the regulations after import of goods and their installation. In this case, the dispute pertained to conditions prescribed in Regulation 7 of the Project Import Regulations. [*Kores India Ltd.* v. *Commissioner* - 2016-TIOL-664-CESTAT-MUM]

Exemption - Production of essentiality certificates merely a procedural infirmity: CESTAT Mumbai has held that the claim for an exemption notification cannot be denied on the ground that essentiality certificate was not produced at the time of clearance. Observing that the assessee cannot be blamed for inherent delays of government system, the Tribunal was of the view that production of such certificate is merely a procedural formality and that the same could be produced at a later stage. [*Frontier Aban Drilling (India) Ltd.* v. *Commissioner* – Order dated 8-1-2016 in Appeal No. C/289/05]

Appeal to CESTAT - Memorandum of Appeal to be filed in respect of each Bill of Entry: With emphasis on strict adherence to procedure, the Tribunal held that where the Order-in–Appeal has been passed in respect of more than one Order-in-Original, the Memoranda of Appeal shall be equal to the Orders-in-Original to which the case relates. The assessee had filed one appeal in respect of 530 Bills of Entry self-assessed by it and the CESTAT had issued a defect memo asking the appellant to file separate appeal in respect of each Bill of Entry and also pay court fee. The Tribunal held that each Bill of Entry has to be deemed to be an assessment order i.e. Order-in-Original and therefore, the appellant has to file appeal in respect of each Bill of Entry. It, however, agreed with the assessee on the aspect of court fee stating that since there was no demand of customs duty, interest or penalty, registration fee is not payable. [*Richemont India P. Ltd.* v. *Commissioner* - 2016 (42) S.T.R. (Tri.-Del)]

Interest on finalization of provisional assessment and penalty under Section 114A: Relying on *Sterlite Industries* [2008 (223) ELT 633 (Tri -Chennai)] and *Goyal Traders,* [2014 (302) ELT 529 (Gujarat)], CESTAT Delhi has held that in case of demand arising out of finalization of provisional assessment in terms of Section 18 of the Customs Act, 1962, no interest is recoverable on finalization of provisional assessments made prior to 13-7-2006 (when the provision for interest liability was introduced in Section 18) even if the finalization of assessment took place after 13-7-2006. It was also held that interest under Section 28AB is chargeable only when the demand has been confirmed under provisions of Section 28 of the Customs Act. Further, relying on *Care Foundation* [2014 (302) ELT 181 (Delhi)], the Tribunal was of the view that

penalty under Section 114A of the Customs Act, 1962 is attracted when liability to pay duty or interest is determined under Section 28 of the Customs Act, 1962. It was also held that penalty under Section 112 is not imposable when the said section has not been invoked. [*Escorts Heart Institutes and Research Centre* v. *Commissioner* - 2016-TIOL-761-CESTAT-DEL]

Penalty - Simultaneous penalty on partner and partnership firm, under Customs Section 112(a) can be imposed: Larger Bench of Bombay High Court has held that simultaneous penalty on the partner of the firm and the partnership firm itself can be imposed under Section 112(a) of the Customs Act. It was however held that if the Department seeks to impose penalty on the partner, then the notice must make out a case of knowledge on the part of the partner in his individual capacity so as to make it a case of abetment by the partner in respect of the acts and/or omission of the partnership firm. It was also observed that in all cases (other than abetment) falling under Section 112(a) of the Act, unlike Section 112(b) of the Act, *mens rea* is not *sina qua non* for imposition of penalty. [*Amritlakshmi Machine Works* v. *Commissioner* – Customs Appeal Nos. 100-103 of 2012, decided on 29-1-2016, Bombay High Court]

Rate of duty – Customs Section 15 not applicable to goods cleared after expiry of warehousing period: The Tribunal has held that once the goods are cleared after expiry of the warehousing/ bond period, Section 15 of the Customs Act will not be applicable for determination of rate of duty on the date of such clearance. The duty liability at the prevailing rate on the date of warehousing was hence upheld by the Tribunal. [*Standard Industries Ltd.* v. *Commissioner* - 2016-TIOL-772-CESTAT-MUM]

Order when cannot to be considered as served: The Madras High Court has held that return of the speed post letter as 'unclaimed' cannot be said to be delivered and the presumption of service cannot be made. Further, noting that order was not made known to the assessee in any other manner, the High Court set aside the order of the Tribunal which had declined to entertain the appeal on the ground of delay of 546 days in filing of appeal. [*Excel Shipping Services* v. *Commissioner* - 2016-TIOL-442-HC-MAD-CUS]

No Drawback when exporter availed benefit under Excise Rule 19(2): The Bombay High Court has held that once the assessee had availed the benefits under Rule 19(2) of the Central Excise Rules 2002, the question of availing any drawback in terms of Notification No. 26/2003-Cus. (N.T.) would not arise. Relying on Note 2(f) in the drawback notification, petitioner's contention that drawback of Customs portion would be eligible, was rejected by the Court while it observed that there was no scope of bifurcating drawback towards customs and excise allocation. [*Anandeya Zinc Oxides Pvt. Ltd.* v. *Union of India* - 2016-TIOL-506-HC-MUM-CUS]

SERVICE TAX

Notification

Reverse charge & point of taxation: Where there is a change in the liability or extent of liability of person required to pay tax as the recipient, the point of taxation will be the date of issuance of invoice in case service has been provided and invoice has been issued but payment has not been made. Notification No. 21/2016-S.T., dated 30-3-2016 issued recently provides for the same. Cases where recipient is liable to pay service tax under reverse charge or partial reverse charge mechanism would be covered by this notification which amends Point of Taxation Rules, 2011.

Ratio Decidendi

Procurement of services on behalf of group companies under cost sharing arrangement not covered under Business Support Service: The Tribunal has held that when services are procured for use by several group companies, Valuation Rules do not stipulate any condition as to one on one identification of service recipient and service provider in order to fall within the ambit of 'Pure Agent'. In the instant case, the assessee procured various services for use by group companies as part of cost sharing agreement. The assessee had no function other than to act as trustee or manager of the group companies and did not avail any services by itself. The cost incurred by the assessee was reimbursed on actuals by the participating group companies. It was held that activity of incurring cost towards procurement of services and reimbursement therefor was not in the nature of outsourced activity as per the definition of Business Support Service as it stood during relevant period and therefore, the appellant was not liable to service tax. It took note of the fact that the appellant did not provide any service but only procured services for use by group companies. [*Reliance ADA group P Ltd* v. *CST* - Appeal No. ST/86341/15, decided on 22-2-2016, CESTAT, Mumbai]

Financial services availed by HO registered as ISD – Branch office can avail Cenvat credit: The issue for consideration was whether the appellant's head office who has taken registration as an ISD was eligible to avail and distribute Cenvat credit in respect of service tax paid for receipt of services relating to advice on raising finance for expansion of business. Such advice included raising of finance by pledging of the shares, divestment of stake, acquisition of shares in a company, etc. It was held by the Tribunal that the aforesaid services fell within the ambit of definition of input service under financing activities as such services had been availed for generating funds for financing the expansion of business of the appellant. It was further held that in the absence of any doubt raised as to the eligibility to avail the Cenvat credit at their Head Office, the recipient unit, cannot be asked to explain the nexus of such credit to the output service provided by them. [*Hinduja Global Solutions Ltd* v. *CCE* - 2016-TIOL-728-CESTAT-BANG]

TDS borne by service recipient when tax paid under RCM, not liable to service tax: The Department sought to collect service tax on Tax Deducted at Source (TDS) which was borne by the assessee. The assessee had availed service of a foreign architect and discharged service tax under reverse charge mechanism, on the consideration paid. Finding that service tax liability had been discharged on the invoice amount and that there was material to hold that the TDS had been paid for services availed from the service provider, the Tribunal agreed with the assessee. Thus, the amount of TDS borne by the assessee in India over and above the amount paid to foreign architect was held as not liable to be taxed under reverse charge mechanism. [*Magarpatta Township Development & Construction Co. Ltd.* v. *CCE*, Appeal No. ST/322/12-Mum, Order dated 24-2-2016, CESTAT Mumbai]

Construction service under joint development agreement, prior to sale – Service to self: The assessee had entered into a joint development agreement wherein he was given ownership of 50% of the total construction area as consideration towards construction of the entire area. The department demanded service tax in respect of the 50% of the construction assigned to land owners. However, it was urged by the assessee relying on the interpretation of Circular dated 29-1-2009 issued by CBEC that being in nature of agreement to sell, till the sale deed was registered, the construction service was in the nature of service to self. Agreeing with the contention of the assessee that, there is no relationship of service provider and recipient relationship before transfer of constructed building to the possession of land owner, the Tribunal held that the amount would not be exigible to service tax. [*Bairathi Developers Pvt. Ltd.* v. *CCE* - Final Order No. 51003/2016 dated 4-3-2016, CESTAT Delhi]

Pre-deposit whether required for appeal pending prior to 6-8-2014: The appellant urged that CESTAT could not order pre-deposit under Section 35F of the Central Excise Act, 1944 in respect of the appeals filed and pending prior to 6-8-2014 the date from which the provision regarding mandatory pre-deposit was made effective, since there was no savings clause when the relevant amendment was made. Placing reliance on the decision of the Supreme Court in *Kolhapur Canesugar Works Ltd* v. *UOI* [2000 (119) ELT 257 (S.C.)], the Delhi High Court directed CESTAT to proceed with hearing of the appeal without insisting on pre-deposit. [*Airef Engineers P Ltd* v. *CST* - 2016 (42) S.T.R. 4 (Del.)]

Unjust enrichment - Adjustment by debit/credit notes can be sufficient proof: Referring to various precedents, the Tribunal held that the bar of unjust enrichment will not operate even if transactions are by debit and credit notes. In the instant case, the assessee had paid excess consideration and tax to another entity in the group, which was later reversed by exchanging debit and credit notes. The department denied refund citing unjust enrichment and that sufficient proof was not provided to claim that duty burden had not been passed on. However, noting that

debit/credit notes are an acceptable mode of settlement for commercial transactions between enterprises, re-negotiation of initial payments did not weaken the case and that the transaction chain had not extended beyond the group entities, the Tribunal held that the assessee was eligible for refund on tax paid in excess. [*Piramal Enterprises Ltd* v. *CST* - 2016 (42) S.T.R. 17 (Tri.- Mumbai)]

Advances in the nature of current liabilities – Service tax when not liable: At issue was the demand of service tax on the advances received by the assessee for the period April 2006 to March 2011. The department argued that since the advance was adjusted towards invoices raised, the amount was relatable to taxable service while the assessee contended that the advances were in nature of current liabilities and were not 'gross amount' received for services. Holding in favour of the assessee the Tribunal agreed that service tax was not required to be paid on advances, particularly when the same was adjusted proportionately in the invoice and service tax had been paid thereon. [*Thermax Instrumentation Ltd* v. *CCE*, 2016 (42) S.T.R. 19 (Tri.-Mumbai)]

VALUE ADDED TAX (VAT)

Notifications

Bihar VAT – Residuary rate increased: The residuary rate of tax prescribed under Section 14(1)(d) of the Bihar Value Added Tax Act, 2005 has been increased from 13.5% to 14.5% by Notification No. L.G.-01-01/2016/57-Leg, dated 4-4-2016. The Bihar Value Added Tax Ordinance, 2016 has been repealed by the said notification.

Chhattisgarh VAT – Residuary rate increased: The residuary rate of tax under the Chhattisgarh Value Added Tax Act, 2005 has been increased from 14% to 14.5% by Act No. 12 of 2016, dated 1-4-2016.

Tamil Nadu VAT – Restriction for availing Input Tax Credit: By Tamil Nadu Value Added Tax (Amendment) Act, 2016, a new sub-section (21) has been inserted under Section 19 (ITC) of the TN VAT Act, with retrospective effect from 1-1-2007. It states that, when intra-State purchase of goods are made from a registered dealer, who has availed any fiscal incentive in the form of refund of gross or net output tax as Industrial Investment Promotion subsidy or soft loan sanctioned by the State Government, purchasing registered dealer shall avail ITC only to the extent of aggregate of output tax paid by him on re-sale of such goods and sale of goods manufactured out of such goods, either within the State or in the course of inter-State trade or commerce.

Karnataka VAT – Multimedia speakers: Notification No. FD 116 CSL 2006 (16), dated 6-4-2006, included "Multimedia Speakers with price not exceeding Rs. 1000/-per set" at Entry No. 11, chargeable to tax at the rate of 5.5%. The said entry has now been amended to read as "multimedia speakers" (chargeable to tax at the rate of 5.5%) by Notification No.

FD 34 CSL 2016 (VII), dated 31-3-2016. The said amendment is effective from 1-4-2016.

Ratio Decidendi

Power to extend period for passing assessment order to be exercised within limitation period: Supreme Court of India has held that when the normal period of limitation for passing assessment order by the Assessing Officer was three years, as per the provisions, the power to extend the period could be exercised within the said period of three years and not after the expiry of this limitation period. The dispute involved provisions of Punjab General Sales Tax Act, 1948 and the Court was of the view that power under sub-section (10) of Section 11 of the said Act could not be exercised on the expiry of the period of three years. Karnataka High Court's judgment in the case of *Bharat Heavy Electricals*, as relied in the impugned order of the Punjab & Haryana High Court was approved by the Apex Court while it held that once the period of limitation expires, the immunity against being subject to assessment sets in and the right to make assessment gets extinguished. It was held that therefore, there would be no question of extending the time for assessment when the assessment has already become time barred. [*State of Punjab* v. *Shreyans Industries Ltd.* - Civil Appeal Nos. 2506-2511 of 2016 and Ors., decided on 4-3-2016, Supreme Court]

TFT/LCD/LED Monitors – Classification of: The petitioner was engaged in import, export, trading and stock transfer of various electronic goods, refrigerating goods, mobile phones and accessories. The issue before the High Court was whether the TFT/LCD/LED monitors sold by the petitioner fall within the entry 'Monitors' in terms of Item 3 under Entry 41A of the Third Schedule or are covered under the residuary entry of Delhi VAT Act. Reiterating the well settled principle that if in a matter of classification of goods two views were possible, the one favouring the assessee has to be preferred, the High Court observed that if the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, it has to adduce proper evidence and discharge the burden of proof.

Supreme Court Order in the case of *Bharat Forge and Press Industries (P) Ltd.* wherein the Apex Court had held that only such goods as cannot be brought under the various specific entries in the tariff should be attempted to be brought under the residuary entry, was also relied upon by the Court. In light of the above observations, the Court quashed the impugned orders as the Department was not able to convince the Court that LCD/LED/TFT monitors sold by the petitioner during the period under consideration were not classifiable as 'Monitors' under Item 3 below Entry 41A of the Third Schedule to the DVAT Act. [*Samsung India Electronics Private Limited* v. *Government of NCT of Delhi* - 2016-VIL-173-DEL]

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