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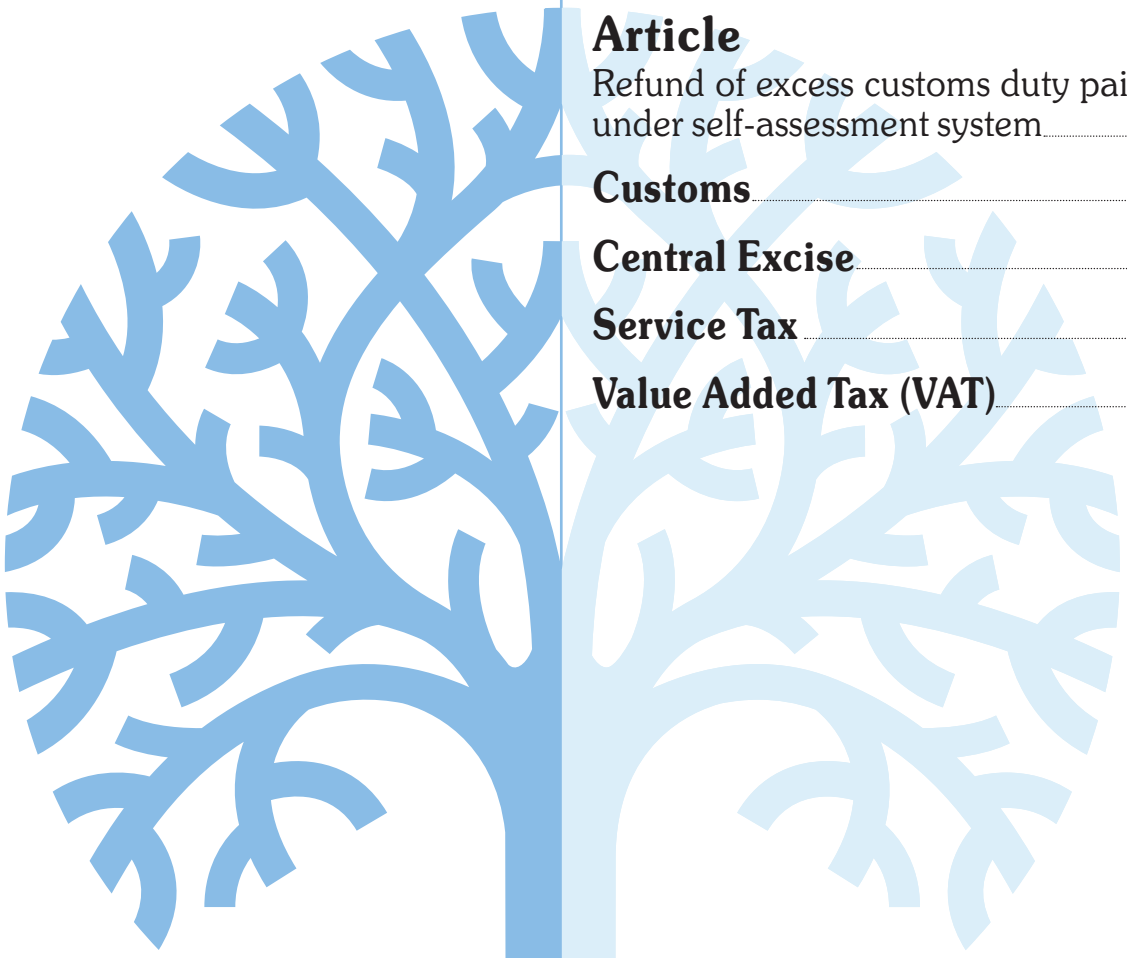
Contents



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Article

Refund of excess customs duty paid under self-assessment system

By **Atish Laddha**

Introduction

The Central Excise law provided for physical control for all commodities except a few in the past. However, subsequently self-assessment mechanism was introduced in Central Excise in which the revenue authorities' role at the time of clearance of goods has become almost nil. However, the Central Government has taken more than a decade to introduce the same self-assessment mechanism under the Customs provisions.

On considering the recommendations of TARC report, self-assessment mechanism was introduced from 8-4-2011 under Customs considering the time consumed in assessing each and every bill of entry and the delay caused to the importer in clearance of the consignments. Accordingly, the importer of the goods can file a bill of entry under Section 17(1) of the Customs Act, 1962 based on self-assessment without any intervention of the proper officer of customs.

While introducing such self-assessment mechanism, the provisions of Section 17 have underwent an amendment though no corresponding amendment was carried out under Section 47 of the Customs Act, 1962. Therefore, even today an importer under the self-assessment mechanism has to obtain an out-of-charge order from a proper officer of customs under Section 47 of Customs Act, 1962 as it was required during the earlier era. Therefore, a question arises as to whether the self-assessment mechanism under Customs is really a self-assessment in complete sense or is it an assessment made by the customs authorities under the disguise of self assessment?

In this regard, one can argue that the order passed under Section 47 is merely a clerical/administrative order as the proper officer is merely ensuring that the duty is paid properly as per the assessment of bill of entry and prohibited goods are not cleared by the importers. Hence, the proper officer giving out of charge for the imported goods is not validating the assessment done by the importer under Section 17(1). Hence the said bill of entry is not an assessment order passed by a proper officer of customs which can be challenged as order of assessment.

In this regard, the High Court of Madras in case of *Best & Crompton Engineering* [1997 (93) ELT 21 (Mad)] has held that the order passed under Section 47 is not merely a clerical/administrative order but is a quasi-judicial order which can be appealed against. Further the said view of High Court was further agreed by the High Court of Kerala in case of *Arvind Export (P) Ltd.* [2010 (253) ELT A81 (Ker)].

Therefore, as per the provisions of Section 17(1) read with Section 47 of Customs Act, 1962, a self-assessed bill of entry becomes

an order of proper officer which can be appealed against before appropriate appellate authorities.

Obtaining refund of excess duty paid under self assessment era

As discussed above, even under self-assessment system, the self-assessed bill of entry would amount to order passed by a proper officer of customs. Hence the refund of erroneous duty paid would be available only upon setting aside the said assessment order of proper officer by an appropriate appellate authority as held by Supreme Court in case of *Priya Blue Industries Ltd.* [2004 (172) ELT 145 SC].

However, recently it is learnt that an appeal filed by an importer against an erroneous self-assessed bill of entry filed under amended Section 17(1) has been rejected by the Commissioner (Appeals) only on the ground that the self-assessed bill of entry filed under Section 17(1) is not an order passed by a proper officer of customs. Therefore, an importer has option to file an application for amendment under Section 149 of the Customs Act, 1962 to rectify any mistake in the bill of entry based on the documents available at the time of importation. Further Section 149 does not prescribe any time limit within which the importer has to file an application for amendment.

However, it is observed that the applications of the importer for seeking amendment in the bill of entry under Section 149 are not entertained by the officer of customs in timely manner as lot of time is taken to pass an order either allowing or rejecting the application of the importer. Based on the outcome of the order of the customs officer under Section 149 the importer can file a refund claim in case the application is allowed. Further in case of an order under Section 149 is passed rejecting the application, the importer will have to pursue the appellate remedy as prescribed under the Customs law against the said rejection order.

Further, assuming that no appeal is maintainable against the self-assessed bill of entry, the importer can directly file a refund claim of excess duties paid on account of erroneous bill of entry without challenging the self-assessed bill of entry. In such cases, the refund claim may be allowed by the customs officer in light of the decision of Delhi High Court in the case of *Aman Medical Products Ltd.* [2010 (250) ELT 30 (Del)].

Conclusion

In view of the above, following three alternatives can be availed for obtaining refund under self-assessment system:

- Appeal against self-assessed BOE;
- Filing application for amendment of self assessed BOE; or
- Filing refund claim under Section 27 of the Customs Act, 1962.

However, there is no clarity as to which is the most appropriate and expeditious method to obtain refund of excess customs duties paid by the importer erroneously.

[The author is a Senior Associate, Lakshmikumaran & Sridharan, Pune]

CUSTOMS

Notifications, Circulars & Notices

MEIS – Amendments made in Appendix 3B: Various amendments have been made in Table 1 of Appendix 3B under the MEIS Schedule, which provides for the list of countries. Also a catena of additions, amendments and deletions have been made in Table 2 of the said Appendix, which provides the list of products eligible for MEIS benefit. DGFT Public Notices No. 27/2015-2020, dated 14-7-2015 & No. 28/2015-2020, dated 15-7-2015 have been issued for this purpose.

Anti-tuberculosis drugs, diagnostics and equipments – Exemption extended till 31-3-2016 and new drugs added to exemption list: The Central Government has extended the exemption from payment of BCD, CVD and SAD to the anti-tuberculosis drugs, diagnostics and equipments specified in the Table to the Notification No. 49/2013-Cus., till 31-3-2016. Notification No. 41/2015-Cus., dated 30-7-2015 issued for the purpose further adds certain drugs as eligible for this exemption.

Cut and polished diamonds - Exemption on import for grading or certification and re-export: Exemption has been granted to cut and polished diamond, falling under Chapter 71 of Customs Tariff, from payment of BCD when imported into India by laboratories and agencies listed therein and notified in the FTP for grading or certification and re-export out of India. The said exemption under Notification No. 40/2015-Cus., dated 21-7-2015 is subject to fulfillment of certain conditions specified in the notification.

Import policy of 'controlled substances' under NDPS Act, amended: A 'No objection certificate (NOC)' from 'Narcotics Commissioner of India, Gwalior' is required to be obtained for import of various controlled substances listed in the notification, which fall under Chapters 28 and 29 of the ITC(HS), according to DGFT Notification No. 15 /2015-2020, dated 21-7-2015.

Ratio decidendi

Computation of Customs duties, and levy of interest and penalty in case of non-fulfillment of export obligation: The Supreme Court of India has set aside penalty for non-fulfillment of export obligation taking note of the fact of difficult market conditions. Interest was also set aside noting absence of same in the bond executed while making imports. In respect of Customs duties, it has been held that anti-dumping duty is not includible for computation of SCD and SAD for the period during June 1998 to August 1998. Interest was further found to be not payable as there was no provision for such interest even in the Customs Act, 1962, as made applicable to the anti-dumping provisions, for the period under dispute. [*Jaswal Neco Ltd.* v. *Commissioner* – C.A. No. 7189 of 2005, decided on 4-8-2015]

Project Imports – 1 MW power generation plant for captive consumption cannot be considered as 'Power Project': The Supreme Court of India, while upholding the decision of the Tribunal, has held that 1 MW power generation

plant which was to be used exclusively for the sister concern of the appellant and not for consumption of the general public cannot be held to be a 'power generation project' under the project import scheme. The appellant-importer herein had filed an application for registration of contract under Heading 98.01 of the Customs Tariff. [*Venkataraya Power Ltd* v. *Commissioner* - 2015-TIOL-168-SC-CUS]

Business satellite receivers are classifiable under sub-heading 8525.20: The Supreme Court has held that Business Satellite Receivers which are capable of both receiving as well as transmitting signals are to be classified under sub-heading 8525.20 of the Customs Tariff Act, 1975. Upholding the decision of the CESTAT, the Court held that the said goods shall not be classified under Heading 8528 which covers only reception apparatus. Rejecting the departmental appeal, the Court in this regard noted that when a particular apparatus has transmission function as well, it would be excluded from Heading 8528. [*Commissioner* v. *Multi Screen Media Pvt. Ltd.* - 2015-TIOL-169-SC-CUS]

Customs notification issued to give effect to FTP provisions to be interpreted strictly: The Supreme Court of India has held that Customs notification issued to grant exemption under the Advance Authorization Scheme of the FTP must be interpreted strictly. Noticing that under Notification No. 30/97-Cus., it is necessary to make export of the product manufactured from that very raw material which was imported, and that said condition was not fulfilled inasmuch as export was of the product manufactured from other material, that too through third party, the Court held that mandate of the said notification was not fulfilled in strict sense.

Further, relying on decision in the case of *Sheshank Sea Foods Pvt. Ltd.*, it was held that an Order passed by the DGFT confirming fulfillment of EO would not be binding on the Customs Authorities. The Court however observed that the Government should make appropriate provision dealing with such situations as exemption notification was issued to implement and effect the EXIM Policy provisions. Finally, rate of interest was reduced and the penalty waived as the DGFT had taken the view that export obligation was fulfilled. [*Commissioner* v. *Pennar Industries Limited* - 2015-TIOL-162-SC-CUS]

Vessel used for carrying persons/cargo as well as for towing operations classifiable under CTH 8901: Mumbai Bench of CESTAT has held that correct classification of an offshore supply vessel used for carrying persons/ cargo, as well as having facility for undertaking towing operations, is under Heading 8901 of the Customs Tariff Act, 1975 as "vessels for transport of persons or goods" instead of under Heading 8904 as "tug". Reliance in this regard was placed by the Tribunal on certificate given by Registrar of Indian Ships as well as Rule 3(a) of the General Rules of Interpretation. It was observed that merely having a winch would not lead to conclusion that the vessel is a tug as primary purpose for which the vessel is designed, is important. [*Raj Shipping Agencies Ltd.* v. *Commissioner* - 2015-TIOL-1405-CESTAT-MUM]

Penalty under Customs Section 114A to be equal to either the differential duty confirmed or interest confirmed, and not both: Relying on the decision of *Bharathi Airtel Ltd.* [2012-TIOL-746-CESTAT-BANG], the CESTAT has held that Section 114A of the Customs Act, 1962 covers two separate situations - one where there is a short-levy/non-levy/erroneous refund of duty and one where only interest has not been charged/not paid/part-paid or erroneously refunded. In the first situation the person liable to duty would be liable to penalty equal to duty determined. Similarly, in the second situation the person liable to interest *only* would be liable to penalty equal to the interest determined. It was observed that the expression used in Section 114A is "or", which is disjunctive between duty or interest. [*Commissioner* v. *B.Suresh Vasudev Baliga* - 2015-TIOL-1461-CESTAT-BANG].

Rectification of Mistake (ROM) application against order disposing ROM application is not maintainable: CESTAT Mumbai has held that a ROM application against the Order of the Tribunal deciding a ROM application is not maintainable as there is no provision for filing ROM application against such an order. Provisions of Section 129B(2) of the Customs Act, 1962 were noted by the Tribunal in this regard. [*Krishna Trading Co.* v. *Commissioner* - 2015-TIOL-1594-CESTAT-MUM].

CVD assessment - Higher of the price to be adopted where RSP is lower than the actual sale price: CESTAT Mumbai has held that Section 4A of the Central Excise Act requires an importer to assess CVD on the basis of true and correct RSP affixed on the goods. It was held that if an importer sells the goods at a price higher than the RSP declared at the time of import, the higher price shall be adopted for computation of CVD. It was also held that provisions of Section 3(2) of the Customs Tariff Act will not become ineffective in the absence of Section 4A(4) of the Central Excise Act, 1944 for the imports made prior to 14-5-2003. [*Nicto Tiles Limited* v. *Commissioner* - 2015-TIOL-1544-CESTAT-Mumbai]

CENTRAL EXCISE

Ratio decidendi

Cenvat credit utilization during suspension of facility for fortnightly payment: The Supreme Court of India has held that payment of duty through Cenvat account is as good as payment through account current even during period of forfeiture of facility for payment of duty in installments (fortnightly payment). Relying on earlier judgement of the Court in the case of *Dai Ichi Karkaria Limited*, which had held that credit under the Modvat scheme is "as good as tax paid", the Apex Court here held that insofar as manner of duty payment is concerned, it can be either through account current or through Cenvat credit. It was held that even during the period when fortnightly facility was not available, the only obligation for the assessee was to pay the duty on each clearance and not on deferred basis. The Court in this regard also noted that 'manner of payment' and 'mode of payment' are different. [*Jayaswal*

Neco Ltd. v. *Commissioner* – C.A. No. 1468 of 2004 with C.A. No. 7386 of 2005, decided on 6-8-2015]

CESTAT has power to extend stay beyond 365 days: Three Judge Bench of the Delhi High Court has held that CESTAT has power to grant or extend stay of recovery of demand beyond 365 days from the date the stay order was initially passed, notwithstanding that the delay in disposal of the appeal was not attributable to an assessee. The Court in this regard noted that words "even if the delay in disposing of the appeal is not attributable to the assessee" are missing and not incorporated in Central Excise Act, 1944 and thus the bar and prohibition created by enactment of the Finance Act, 2008 to the third proviso to Section 254(2A) of the Income Tax Act, 1961, would not be applicable to appeals preferred under Section 35C(2A) of the Central Excise Act before CESTAT. [*Commissioner* v. *Brew Force Machine Pvt. Ltd.* - CEAC 27/2015, decided on 31-7-2015, Delhi High Court]

Valuation – 'Related person' clarified: The Supreme Court of India has held that for companies to be 'related', mutuality of interest in business of each other is necessary. Considering the definition of 'related person' in Section 4, the Supreme Court, in the dispute relating to the period from 1-3-1997 to 16-4-1998, held that it was necessary to prove mutuality of interest and such interest should be both ways, i.e., of the two promoter companies in the assessee as well as of the assessee in the said two companies. The Apex Court in this regard was of the view that the expression 'in the business of each other', in the said definition, clearly denoted that interest of the two persons had to be mutual, i.e., in each other, in order to treat them as related persons. It was observed that loan by the promoters to the assessee was only one way traffic, whereas the requirement was that of two way traffic. [*Commissioner* v. *Goodyear South Asia Tyres P.L.* – C.A. No. 1947-1950/2003 and 4370/2003, decided on 22-7-2015]

Waste gunny bags/jute waste not covered under 'rags': Supreme Court has held that pulp made from waste gunny bags/jute waste is not to be treated as pulp made from the material 'rags' as mentioned in Notification No. 22/94-C.E. Referring to the history of the present notification, the Court noted that expression 'rags' is to be construed considering attendant circumstances, context in which it is used, and purpose of the term in the notification. It was also observed that objective of the notification is also to be considered, thereby giving purposive interpretation. Transformation from the 'positive list' of items, as prescribed in the earlier notification, to the list prescribing items whose use disentitles benefit of present notification, was considered by the Court in this regard, while it noted that the earlier 'positive list' included jute/gunny bags waste. Exemption under the said notification was not available to pulp manufactured from rags. [*Coastal Paper Ltd.* v. *Commissioner* – C.A. No. 4908 of 2005, decided on 21-7-2015]

Manufacture – Mounting of Water Purification and Filtration System on a base frame: Supreme Court has held that the job of

assembling filter housing cartridges, U.V. units, timer, mounting plate & screws and tubings & fittings, on a base plate would amount to manufacture. The Court in this regard noted that the process brings into existence a new and commercially different commodity known as Water Purification & Filtration System. The Apex Court hence concurred with the view of all the authorities/ below that the activity amounts to "manufacture" within the meaning of Section 2(f) of the Central Excise Act, 1944. The appellant had pleaded that interconnection done by them merely facilitated use of filtration system by the customers, otherwise, WPFS retained the same characteristics as that of various items. [*Poonam Spark (P) Ltd.* v. *Commissioner* – Civil Appeal Nos. 6692/2004 and 2684/2012, decided on 29-7-2015, Supreme Court]

Close-up whitening dental cleaner is not toothpaste: Supreme Court has held that Close-Up whitening dental cleaner is not classifiable as 'toothpaste' and, therefore will have to be classified under sub-heading 3306.90 of the Central Excise Tariff Act, 1985. The Court in this regard upheld the Tribunal Order observing that the dental cleaner, in addition, has two more ingredients, which play an active role as abrasive, and that the manufacturing processes of other toothpastes and the dental cleaner in question were different. It was also noted that even the Food and Drug Authorities had not registered the product as toothpaste. The Court also upheld the finding of the Tribunal that when entries in the HSN and the Indian Tariff are different, aid should not be taken of HSN notes. [*Commissioner* v. *Global Health Care Products Partnership Firm* – Civil Appeal Nos. 5902-5909/2005 and 3569/2006, decided on 28-7-2015, Supreme Court]

Valuation – MRP based valuation when additional quantity cleared in bonus or promo packs: CESTAT Kolkata has held that value of additional quantity cleared in bonus or promo packs is not includible as promotional expense, since goods were covered under MRP based valuation. The Tribunal in this regard observed that there was no dispute about fixation of MRP on bonus/promo pack and there was no objection about compliance of provisions of weights and measures. It was noted that when MRP is fixed correctly, it is not open to Department to dissect the same to examine contents considering the fact that there was no extra amount collected from customers and there was no simultaneous clearance of normal packs and bonus packs affixed with same MRP, in the same area. Period involved in the dispute was from 1-4-1998 to 31-3-2008. [*Castrol India Ltd.* v. *Commissioner* - Order No. FO/A/75381/2015, dated 26-3-2015, CESTAT, Kolkata]

Manufacture – Conversion of raw tamarind to tamarind paste is not 'manufacture': New Delhi Bench of CESTAT has held that subjecting raw tamarind/imli to the process of boiling, washing, filtering, squeezing, concentrating and finally packing of the produce processed *imli* paste would not amount to 'manufacture' as defined under Section 2(f) of the Central Excise Act, 1944. The Tribunal in this regard noted that the process undertaken had

not resulted in tamarind losing its natural character, intended purpose of use and that it is also not a new product of different category. It was noticed that the raw tamarind could very well be put into the same use as tamarind paste/ concentrate except that the latter was more refined. It was also noted that there was no chemical change and that the product at the starting point and at the end remained same. Further the paste/concentrate was held to be classifiable under Chapter 20 and not Chapter 13 of the Central Excise Tariff as the process of production of concentrate was more of pulp preparation rather than extraction. [*Commissioner* v. *Dabur India Ltd.* - Final Order No. 52332-52338/2015, dated 22-7-2015, CESTAT, Delhi]

Cenvat credit on capital goods installed in adjacent premises incorporated subsequently: CESTAT, Mumbai has allowed Cenvat credit on capital goods installed in adjacent premises, which was incorporated only subsequently. The credit was held admissible from date of installation and use of the capital goods. The Tribunal in this regard observed that the capital goods were used in the manufacture of final product for which excise duty is paid and that incorporation of the said premises is merely a procedure requirement. Order in the case of *Mangal Electricals Industries,* as relied by the Department, was distinguished by the Tribunal. [*Mileen Engineers* v. *Commissioner* - Appeal No. E/464/10, decided on 26-5-2015, CESTAT, Mumbai]

SERVICE TAX

Ratio decidendi

Cenvat credit on debit note admissible if it contains all prescribed details: Granting relief to the assessee, the CESTAT has held that debit note not being a prescribed document under the Cenvat Credit Rules or document being nomenclatured as debit note-cum-bill is not a ground to deny Cenvat credit availed on the basis of such document. The impugned documents contained all particulars mentioned in invoices and the Tribunal held that a debit note having all the prescribed details could be treated as an invoice. [*Commissioner* v. *Nav Bharat Metallic Oxide Industries*, Order No. A/11020 / 2015 dated 16-7-2015, CESTAT, Ahmedabad]

Centralised registration - Letter requesting for the same treatable as application: Opining that (duly acknowledged) letter to the Department requesting for centralized registration was to be treated as application for the same the Tribunal has held that not applying in the proper format could not be a reason to deny the benefit which flows from centralized registration. The Department sought to deny credit of input services received at the centralized accounting office arguing that the assessee had not been grated centralized registration. [*Ketan Motors Ltd.* v. *Commissioner*, Order dated 22-4-2015 in Appeal No. ST/85395/14, CESTAT, Mumbai]

Refund – Quantum not to be reduced on export of lesser quantity: Aggrieved by sanction of refund, the Department argued that since the assessee had exported lesser quantity of goods than shown in the shipping bills, proportionate credit is to be denied and refund under Notificaton No.17/2009 dated 7-7-2009 cannot be sanctioned for the entire amount. Holding that there is no provision as regards service tax paid on services availed in respect of goods not exported, the CESTAT refused to interfere with the order of refund. [*Commissioner* v. *Bagadiya Brother* - 2015 (39) S.T.R. 325 (Tri.-Del.)]

Nexus not relevant for rebate claim: The only thing to be considered for rebate of service tax paid at the time of exports is whether tax had been paid. Agreeing with the assessee and the order of the Department for the next assessment period, the CESTAT held that the ground of nexus between input service and output service cannot be advanced to deny rebate. [*Textron India* v. *Commissioner* - 2015 (39) S.T.R. 468 (Tri.-Bang.)]

Construction services for dormitories in factory premises – Cenvat credit admissible: Taking note of the fact that Uttar Pradesh Factories Act 1948 requires provision of shelter, rest room, lunch room, etc., to employees within the factory, CESTAT has held that Cenvat credit on construction services used for residential quarters in factory premises would be admissible. The assessee had contended that the said quarters were dormitories required for factory workers and others undertaking repair and maintenance and that the factory was located in remote area and therefore, construction of such quarters was integral part of manufacturing activity. [*Bajaj Hindustan Sugar Ltd.* v. *Commissioner*, Final Order No. 52000/2015-ST (SM) dated 17-6-2015, CESTAT, Delhi]

Promotional activity benefitting trading and service activity – Cenvat credit admissible: Cenvat credit of service tax paid on decor and entertainment services by the assessee who was a dealer of cars and also ran an authorized service station was sought to be denied. According to the Department, the promotional activity through entertainment shows was for trading activity of selling cars while the assessee contended that the show was organized to attract customers for servicing of their vehicles. Reasoning that sales of cars also depends upon after sale service and it cannot be said that promotional activity did not benefit the authorised service station, the CESTAT held that Cenvat credit of service tax cannot be denied. It also observed that under the wide definition applicable to the relevant period, event management and entertainment services would be input service. [*Ajmer Auto Agencies* v. *Commissioner*, Final Order No. 52074/2015 dated 2-7-2015, CESTAT, Delhi]

Refund - Date of actual payment and not advances relevant for limitation: Holding that the period of one year within which refund is to be applied for will run from date of payment of service tax and not date of payment of advance amount, the Tribunal did not agree with the contention of the Department that the application for refund was not filed within

the prescribed time limit. It thus upheld that order of Commissioner (Appeals) holding that the claimant was entitled to refund of service tax on the final bill (after adjustment of advance) on which service tax had been paid. The refund in this case was claimed by SEZ developer under Notification No. 40/2012-ST. [*Indiabulls Realtech Ltd.* v. *Commissioner*, Order No. A/2190/91/15/SMB dated 16-7-2015, CESTAT, Mumbai]

Rent on storage premises not within factory – Cenvat credit admissible: The assessee argued that for taking Cenvat credit of service tax on rent, the rental premises need not be included in the registered premises of the factory and it was sufficient if the premises were used in activity related to manufacture. The Department sought to deny credit contending that the said storage premises did not form part of the manufacturing premises. However, the CESTAT held that scope of services is not limited to four corners of the factory and since the services were used for manufacturing activity, credit would be admissible. [*Vako Seals* v. *Commissioner*, Order dated 15-5-2015 in Appeal No. E/263/11-MUM, CESTAT, Mumbai]

Cenvat credit admissible based on courier bill of entry: Observing that the Cenvat Credit Rules, 2004 (CCR) do not provide any classification of bills of entry, the CESTAT has held that Courier Bill of Entry is a specified document as per CCR and the assessee could take credit of service tax paid on the strength of such courier bill of entry. The Department argued that such bill of entry was not a proper document to avail credit. [*Commissioner* v. *Interface Microsystem* - 2015 (39) S.T.R. 313 (Tri.-Del.)]

VALUE ADDED TAX (VAT)

Ordinance and Notification

Haryana Value Added Tax Rules, 2003 – Amendments: Rule 25 of the Haryana Value Added Tax Rules, 2003 has been amended vide Notification No.19/ST-1/H.A.6/2003/S.60/2015, dated 23-7-2015. The amendments, effective retrospectively from 17-5-2010, appear to have been brought to remove the ambiguity persisting presently in the context of valuation mechanism for the developers in Haryana. The major amendments are:

A. Taxable turnover in case of works contract and job work (Ref: Rule 25(2))

In case of works contract or job work, 'taxable turnover' shall be the total consideration paid or payable to the dealer under the contract as reduced by the following amounts:

- the charges towards labour, services and other like charges; and
- the charges towards *cost of land*,
- other charges relatable to land, if any, paid to the Government or its agency.

The method for determining the cost of land is prescribed in the notification. In case of percentage deduction method with respect to civil works like construction of building, the deduction towards labour, services and other like charges shall be allowed after excluding the cost of transferred land.

B. Collaboration/Joint Venture (Ref : Rule 25(4))

In case of works contract carried out by the contractor for the land owner where the contractor constructs the building/units for land owner in pursuance of collaboration or joint development agreement and consideration for the construction is given by the land owner in the form of share in the land with or without additional money exchange, the rule prescribes the method for arriving at the value of works contact carried out by the contractor.

C. Specific provisions pertaining to developers (Ref: Rule 25(7))

- Where an agreement is executed by the developer with the intended purchaser after commencement but before completion of construction, the taxable turnover of sale shall be the total value of agreement, as reduced by cost of land and pro-rata amount of labour, services and like charges.
- Tax shall be payable at the time of an amount receivable or actually received, whichever is earlier.
- The developer shall be eligible to deduct labour, services and other like charges in the tax period when output tax becomes payable.

Haryana VAT Act amended: The Haryana Value Added Tax (Second Amendment) Ordinance, 2015 has been notified vide Notification No. Leg. 9/2015, dated 3-8-2015. Certain major amendments made in the Haryana Value Added Tax Act, 2003 are as under:

A. Time limit for assessment, reassessment and revision, altered

Provisional Assessment (Section 15A): Section 15A of the HVAT Act has been substituted to provide that if an assessing authority has reason to believe on the basis of documentary evidence available with him that a dealer has evaded or avoided payment of tax under the HVAT Act, he may after giving the dealer a reasonable opportunity of being heard, determine for any period of the current financial year and any time *within a period of six months from the date of detection*, the taxable turnover of the dealer on provisional basis to the best of his judgment and assess him to tax accordingly.

Assessment of unregistered dealer liable to tax (Section 16): The time limit for assessment of unregistered dealers liable to tax prescribed under Section 16 has been increased from three years to *six years*.

Reassessment of tax (Section 17): The time limit for reassessment of tax has been increased from five years to *eight years* following the close of the year or within *three years* (earlier two years) from the date of the final assessment order, whichever is later.

Revision (Section 34): The time limit for revision has been increased from three years to *six years* from the date of supply of the copy of the order (i.e. order being revised) to the assessee.

B. Input tax credit: Section 2(1)(w) has been amended to define "input tax" to mean the amount of tax *actually* paid to the State in

respect of goods sold to a VAT dealer, which such dealer is allowed to take credit of as *actual* payment of tax by him, calculated in accordance with Section 8. Section 8 of the HVAT Act has also been amended on similar lines. Further, the amended Section 8(3) provides that in no case the amount of input tax on purchase of any goods in the State shall exceed the amount of tax in respect of the same goods, *actually paid* under the HVAT Act into the Government treasury.

C. Electronic Governance: Section 2(1)(oo) has been inserted to define "electronic governance" to mean the use of electronic medium for, *inter alia*, filing of any form, return, annexure, application, declaration, certificate, memorandum of appeal, communication, intimation or any other document. It also includes statutory declaration form, order, notice, communication, intimation or certificate and receipt of tax, interest and penalty.

Ratio decidendi

Sale in course of imports: Imports made were cleared for warehousing and while the goods were in the bonded warehouse, purchase order subject to delivery of goods at Bombay port was received. The issue before the Tribunal was whether the said sale of goods was in course of import under Section 5(2) second limb of the Central Sales Tax Act, 1956.

The Tribunal observed that the bill of lading is primary evidence of transfer of document of title in the goods and that the essential requirement of sale in the course of import into the territory of India under Section 5(2) is that the document of title of goods should be transferred to the purchaser before crossing the customs frontier of India. The said document was not produced and shown as transferred to the purchaser. It was also noted that ownership and possession in law remained with appellant till the goods were taken to Victoria Docks under supervision of Preventive Officer of Customs for effecting delivery thereof and till delivery to the purchaser. It was held that therefore the sale of diving helium would not be sale in the course of import under Section 5(2) as the transfer of property in goods and delivery is completed within the territory of Maharashtra. It would be local sale chargeable to sales tax in Maharashtra. [*Industrial Oxygen Co. Ltd.* v. *State of Maharashtra* - 2015-VIL-19-MSTT]

Sale of packing material in course of exports: Sale of packing material was made to various exporters and exemption under Section 5(3) of the Central Sales Tax Act, 1956 was claimed. The sales were supported by Form H declarations. The issue before the Court was whether the sale of packing materials to the exporters would qualify as sale in the course of export and entitle the appellant to claim exemption under Section 5(3) of the CST Act.

The Court relied on the Constitution Bench judgment of the Supreme Court in *State of Karnataka* v. *Azad Coach Builders Pvt. Ltd.* [(2011) 19 KTR 73 SC] and observed that there must be an intention on the part of the buyer and the seller to export. It was also noted that according to Section 5(3) of the

CST Act the goods purchased and the goods exported should be the same. Contention of the assessee that the orders of the foreign buyers had indicated that the goods should be sent as packed goods, was rejected by the Court observing that exemption under Section 5(3) is in relation to the "goods purchased" and that it should precede the sale or purchase occasioning the export of those goods. The Court in this regard held that it cannot be said that the purchase of packing materials gets the colour of 'goods' which were "exported". Taking note that the goods, in the instant case were cashew kernels, marine products, food products, etc., the court was of the view that the cartons supplied by the assessee will not get the character of "goods exported". The sale of packing materials was hence held not a sale in the course of export and therefore, the provisions of Section 5(3) were found to be not applicable. [*Super Packaging Industries* v. *Sales Tax Officer* - 2015-VIL-304-Ker]

Deemed sale price - Explanation 2 to Section 2(1)(zd) of Delhi VAT Act, not constitutionally valid: The issue before the Court was whether *Explanation 2* inserted by the Delhi Value Added Tax (Fourth Amendment) Act, 2012 to Section 2(1)(zd) of the Delhi Value Added Tax Act, 2004 is constitutionally valid. The said explanation stated that *"The amount received or receivable by oil marketing companies for the sale of diesel and petrol shall be deemed to be equivalent to the price on which the retail outlets will sell these commodities to the consumer."* This explanation sought to levy VAT on a 'deemed sale price' i.e. different from the actual price at which petrol and diesel is sold by the oil companies to the dealers.

Observing that addition of *Explanation 2* to Section 2(1)(zd) of the DVAT Act would permit levy of VAT on the sale price of a transaction which is yet to take place, the Court held that such levy cannot be sustained in law because it is not on the price of the actual completed sale but the price of a sale which is yet to take place i.e. from the dealer to the ultimate customer. It was further held that the expression 'sale' within the meaning of Section 3 of the Delhi Value Added Tax Act, 2004 is confined to the actual sale that has taken place, and it is only the price of that sale that can legitimately constitute the measure for the levy of tax. *Explanation 2* to Section 2(1)(zd) of the DVAT Act was therefore struck down being *ultra vires* the Constitution. It was held that the price of the completed sale cannot be transplanted by the price likely to be charged for the subsequent sale and hence the devise adopted is beyond the legislative competence of the legislature with reference to Entry 48 in List II of the Seventh Schedule to the Constitution. Consequently, the omission in Form DVAT-16 of the relevant column to enable dealer to claim input tax credit was also declared to be unsustainable in law. [*Delhi Petrol Pump Dealers Association* v. *Government of NCT of Delhi* - 2015-VIL-317-DEL]

NEW DELHI
5 Link Road,
Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014

B-6/10, Safdarjung Enclave
New Delhi - 110 029
Phone : +91-11-4129 9811
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing,
Cnergy IT Park,
Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025.
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden,
2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Ph: +91(80) 49331800
Fax:+91(80) 49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church, Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail : lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road,
Camp, Pune – 411 001. Maharashtra
Phone : +91-20-6680 1900
E-mail : lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building
41, Chowringhee Road, Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59, Sector 26,
Chandigarh - 160026
Phone : +91-172-4921700
E-mail : lschd@lakshmisri.com

GURGAON
OS2 & OS3, 5th floor,
Corporate Office Tower,
AMBIENCE Island, Sector 25-A,
Gurgaon- 122001
Phone: +91- 0124 – 477 1300
Email: lsgurgaon@lakshmisri.com

EUROPE
Lakshmikumaran & Sridharan SARL
35-37, Avenue Giuseppe Motta, 1202 Geneva
Phone : +41-22-919-04-30
Fax: +41-22-919-04-31
E-mail : lsgeneva@lakshmisri.com