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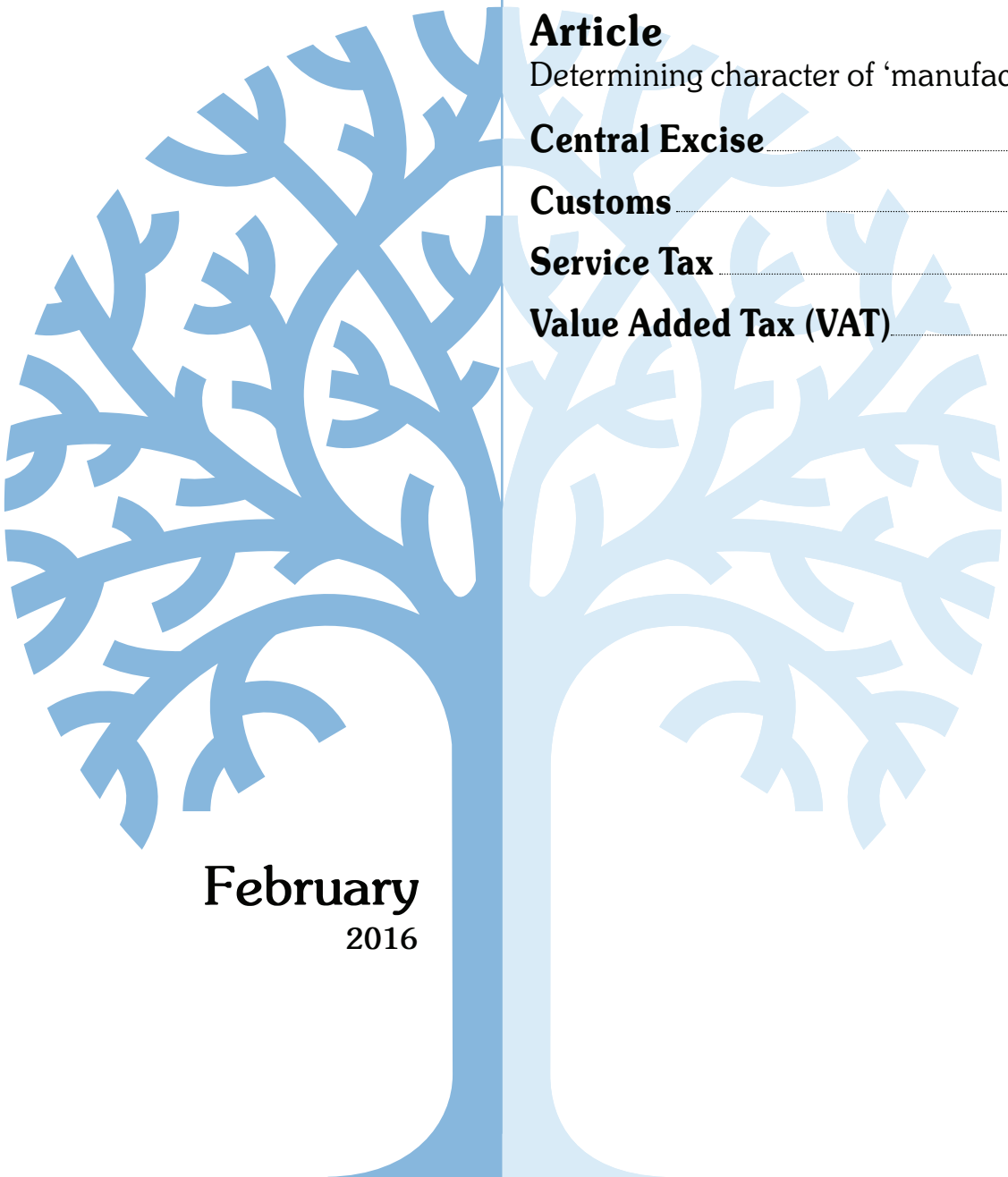

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Article

Determining character of 'manufacture'

By **Shashwat** & **G. Gokul Kishore**

Budget 2016 is just around the corner and despite the fact that the 'seamless' tax regime of GST passes through political rough weather, the government is intent on implementing it from next fiscal. But the age old excise concepts like those on taxable event of manufacture continue to evolve even at this hour with new light being thrown on certain grey areas by the judiciary when confronted with new set of facts having the potential to upset the settled principles to determine as to what amounts to manufacture or to put it broadly, what is that activity which will trigger tax or duty liability. Given the significance of 'taxable event' per se, this article attempts to highlight the concept or test of manufacture in the light of recent key decisions of the Supreme Court and give an overview of the possible outcomes consequently.

Definition of manufacture vis-à-vis-marketability

The definition of manufacture provided under Section 2(f) of the Central Excise Act, 1944 is an inclusive one. It includes any process, incidental or ancillary to the completion of a manufactured product and also those activities specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act as amounting to manufacture. This definition further covers those goods specified in the Third Schedule on which certain activities are undertaken like packing or repacking of such goods in a unit container or labelling or re-labelling of containers including declaration or alteration of retail sale price or adoption of any other treatment on the goods to render them marketable to the consumer.

The above definition apart, it is the landmark case of *UOI* v. *Delhi Cloth and General Mills Co. Ltd.* [1977 (1) E.L.T. (J 199) (S.C.)] that chartered the course of excise jurisprudence in great measure for decades to come. In this case while determining the excisability of an intermediate product, the Apex Court held manufacture as 'bringing into existence of a new substance known to the market' and that merely applying a process to a substance would not amount to manufacture if there was nothing new and marketable created. The definition was further refined in later decisions to clarify that excisable goods are required to be capable of being bought and sold and actual sale in market is not necessary. Further, even if there is a tariff entry provided under the Central Excise Tariff Act, 1985, it would first need to pass test of manufacture. The second test on marketability became the indivisible criterion to attract excise duty liability.

Essential Character test & Two-fold test

In the case of *UOI* v. *JG Glass* [1998 (97) E.L.T. 5 (S.C.)], while determining whether printing of brand names and logos on bottles amounts to manufacture, the Supreme Court

propounded a two-fold test for cases where only a process was applied to an existing item. The Court said that two aspects need to be checked, i.e., first, whether by the said process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist; secondly, whether, the commodity which was already in existence will serve no purpose but for the said process. Applying the test, the Court found that the plain bottles are themselves commercial commodities and can be sold and used as such.

Recently, answering the issue of whether preparing mixtures of substances can amount to manufacture, the Supreme Court relied on the essential character test in the case of *Satnam Overseas* v. *CCE, New Delhi* [2015 (318) E.L.T. 538 (S.C.)] where a mixture of dried rice, dehydrated vegetables and spices was being sold. It was held that the said product in its primary and essential character was sold in the market as rice only, despite the addition of dehydrated vegetables and certain spices. Further, the rice remained in raw form and in order to make it edible it had to be cooked like any other cereal.

Landmark ruling in Servo-Med case

The Supreme Court was again called upon to decide on the question of manufacture in the recent case of *ServoMed Industries Pvt Ltd* v. *CCE, Mumbai* [2015 (319) E.L.T. 578 (S.C.)]. In this case, the appellant was purchasing excise duty paid syringes and needles in bulk from the open market and such syringes and needles were sterilized and then one syringe and one needle in an unassembled form were put in a printed plastic pouch. The Department contended that sterilization brings about a change in the character of the product, as the resultant product becomes disposable syringes and needles. Therefore, a new commodity having a different character has come into existence and excise duty is payable.

If the second limb of two-fold test of *JG Glass* was to be strictly applied here then the non-sterilized syringes not being usable but for sterilization could have led to yet another judgment without the distinction being a landmark one. From the point of view of medical professional, it is only after sterilization that such goods are considered fit for use by a person thus a new commercial commodity coming into existence. In fact one can even stretch the argument to say that once sterilized, the identity of an ordinary syringe and needle ceases to exist.

However, Supreme Court felt it was necessary to write a fresh chapter in excise jurisprudence and thus laid down four categories to ascertain as to what amounts to manufacture. These are:

- Where the goods remain exactly the same even after a particular process, which only remove foreign matter from goods complete in themselves and/or processes which clean goods that are complete in themselves.
- Where the goods remain essentially the same after the particular process and the original article continues as such despite

the said process and the changes brought about.

- Where the goods are transformed into something different and/or new after a particular process, but the said goods are not marketable.
- Where the goods are transformed into goods which are different and/or new after a particular process, such goods being marketable as such.

Out of the 4 categories the Apex Court concluded that it is only when the activity falls under the last category, the same would amount to manufacture and invite excise duty liability. The Court took note of the decision in *JG Glass* however it found in the present case as falling under the first category and held that it would not matter the goods in question are only used after sterilization as all medical items must of necessity first be sterilized. What triggered the Supreme Court to rule in favour of the assesse was the fact that if sterilization would amount to manufacture, then if an item is sterilized five times in a day by a doctor, then the same item would be chargeable to excise duty again and again and such a scenario would lead to an absurdity and 'fly in the face of common sense'. Thus, *Servo-Med* has expanded and refined *JG Glass* ratio by emphasizing on quantum of change or transformation brought about before one proceeds to fasten excise duty liability.

Keeping the debate open

In the case of *CCE, Mumbai-IV* v. *Fitrite Packers* [2015 (324) E.L.T. 625 (S.C.)], the Supreme Court seems to have deviated from the established position as evolved through its rulings. In the said case, the assesse was purchasing blank GI paper and printing brand names and logos of customers as per the specifications. The Court took note of *JG Glass* which was specific to scenarios of printing logos and brand, a decision on which the lower authority had already relied on to order in favour of the assessee.

However, the Supreme Court chose to instead rely on the 4 tests in the decision of *Servo-Med* to hold that the paper was meant for wrapping and this end use remained the same even after printing. But the product in question was no more an ordinary paper but a 'special paper' that could only be used by the assessee and for packing specific goods and therefore the end use became restricted. Thus the Court seems to be of opinion that it is not sufficient that the end use largely remains the same but it should be vis-à-vis the person or the user for whom such activity is undertaken. Further the said decision has re-opened the settled position of *JG Glass* and now whether printing of logo would amount to manufacture would indeed depend on factors like the extent of embellishment and the product in question on which logo is printed.

Value addition not necessarily means manufacture

In another recent case [*Maruti Suzuki India* v. *CCE, New Delhi* - 2015 (318) E.L.T. 353 (S.C.)], while answering the issue of whether ED coating on bumpers and grills to increase

their shelf life would amount to manufacture, the Supreme Court took note of its rulings in the cases of *DCM* and *JG Glass* and held that the bumpers and grills were already of commercial use whether the ED coating is put or not. Further value addition was not a sufficient criterion if there was no change in the character of the goods.

Conclusion

The above write-up leads us to the conclusion that however rounded the language of statute be, the discussion on 'taxable event' always remains a factual question. Whenever a new set of facts arise, it tends to upset the settled position and it is for this reason that the issue of excisability has been scrutinized over and over again in innumerable decisions till date. Similar debates will arise when GST is implemented as the taxable event of 'manufacture' would be replaced by 'supply' and various shades of interpretation that will be placed on the definition of supply will be interesting to watch.

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CENTRAL EXCISE

Notification

Annual Information Return to be furnished by RBI and State Electricity Board: Central Board of Excise and Customs (CBEC) has notified new Rules, namely, Service Tax and Central Excise (Furnishing of Annual Information Return) Rules, 2016. These Rules effectively bring into force provisions of Section 15A of the Central Excise Act, 1944, providing for obligation on certain authorities, maintaining certain records, to furnish information return to Directorate General of Systems and Data Management under CBEC. The Rules require officer of the Reserve Bank of India and officer of a State Electricity Board or an electricity distribution or transmission licensee under the Electricity Act 2003, to furnish annual returns in respect of specified transactions. The Return shall be filed on or before the 31st of December of the year following the financial year to which it pertains. Transactions from 1-4-2015 are sought to be covered under the new rules.

While the officer of RBI is required to furnish details of foreign remittances for receipt of specified services, by entities whose value of remittances aggregates to more than Rs. 50 lakhs in a financial year, officer of State Electricity Board would be required to furnish information in respect of electricity consumed by manufacturers, using an induction furnace or rolling mill to manufacture specified goods. Such manufacturers will be identified and intimated to the officer by the Principal Chief Commissioner or the Chief Commissioner of Central Excise and Service Tax in-charge of the Zone, by the 30th June of the subsequent financial year.

Area based exemption to units in J&K – Sunset clause introduced: Exemption to units in Jammu & Kashmir is available to new units

setup on or after 14-6-2002 or to units existing prior to 14-6-2002 which have undertaken substantial expansion in the specified manner. Now Notification No. 3/2016-C.E., dated 22-1-2016 has introduced a cut off date of 31-3-2016 for setting up a new unit or for undertaking substantial expansion. Thus, the units set up after the cut off date or undertaking substantial expansion after the cut off date shall not be eligible for exemption. Further, after the amendment by the above notification, the exemption under Notification Nos. 56/2012-C.E. and 57/2002-C.E. shall not be available to goods which have been subjected to only one or more of the following processes, namely, preservation during storage, cleaning operations, packing or repacking of such goods in a unit container or labelling or re-labelling of containers, sorting, declaration or alteration of retail sale price and have not been subjected to any other process or processes amounting to manufacture in the State of J&K.

Ratio Decidendi

Valuation - Rule 8 not applicable when goods not utilized for further manufacture: The assessee in this case manufactured cars and cleared them for use by the officials of the company. Duty was paid under Section 4 of the Central Excise Act, 1944, on the assessable value in respect of such cars cleared to other customers. The Department was of the view that the assessable value of cars cleared for own use should have been arrived at 115% of the cost of production under Rule 8 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. The Tribunal however held that the Rule 8 was not directly applicable in the present case, since the cleared cars were not utilized for further manufacture of goods but were used by the officials of the assesse-company in connection with the business. It was further held that the duty payable by the assessee should be determined under Rule 11 read with Rule 4 and that the assessee had paid the duty correctly. Reliance in this regard was placed on the Tribunal Larger Bench decision in the case of *Ispat Industries Ltd.* - 2007 (209) ELT 185 [*Skoda Auto (India) Ltd* v. *Commissioner* - 2016-VIL-67-CESTAT-MUM-CE]

Cenvat credit – Cascades used for transportation of CNG and compressors for recompression, are not 'capital goods': CESTAT Mumbai has held that cascades which are used for transportation of CNG from mother station to Daughter Booster Stations (DBS) and compressors which are installed at DBS for compression of the CNG, do not qualify as 'capital goods'. The Tribunal in this regard observed that the cascades were only transporting CNG which had already come into existence as manufactured/marketable commodity. It was also held that the activity of recompression of the CNG at DBS was neither incidental nor ancillary to manufacture of CNG at DBS. Chapter Note 5 to Chapter 27 of the Central Excise Tariff was also distinguished by the Tribunal observing that compression of the gas took place at the mother station and that recompression at DBS did not bring any

distinct product into existence. [*Mahanagar Gas Ltd.* v. *Commissioner* - Final Order No. A/85166-85167/16/EB, dated 6-1-2016, CESTAT Mumbai]

Suo motu credit of Cenvat credit reversed earlier: The assessee debited the credit relating to furnace oil in RG 23A register, on being objected by the audit officials. However, later realising that the credit was available, suo motu re-credit was taken by reversal of earlier entry, which was objected by the Department. The Allahabad High Court has held that the assessee was not required to apply for refund or take permission from the Departmental authorities for availing credit on the basis of reversal of an entry in the books relating to Cenvat Credit. The High Court in this regard also observed that the list of invoices provided by the assessee qualified as proper documents for availment of credit. [*Krishnav Engineering Ltd.* v. *CESTAT* 2016 (331) ELT 391 (All.)]

No penalty imposable under Excise Rules for non-payment of Automobile Cess: Jharkhand High Court has held that penalty cannot be imposed without there being specific provision for such penalty. Penalty imposed under Rule 173Q of the Central Excise Rules, 1944 for non-payment of Automobile Cess, was hence found to be not valid by the Court. Contention of the Revenue department that since provisions of Central Excise Act, 1944 and the rules made thereunder have been made applicable to levy and collection of such cess as per Rule 3 of the Automobile Rules, 1984, the provisions relating to penalty under the Central Excise Act/Rules would be automatically applicable, was hence rejected by the High Court. Relying on precedents it was observed that penalty was neither incidental nor consequent to the assessment, but was an addition to the tax and liability, and hence provision was required for the same. [*Commissioner* v. *Tata Motors* – Tax Appeal Nos. 62 to 68/2007, decided on 26-11-2015, Jharkhand High Court]

Valuation - Cosmetic products for use in salons to be assessed under Section 4A: Cosmetic professional technical products sold through dealers and wholesalers to salons and beauty parlours for their consumption are to be assessed under Section 4A of the Central Excise Act, 1944 i.e. under MRP based assessment. CESTAT Mumbai while relying on number of precedents, rejected the appeal of the Revenue department, further observing that all the products which do not fall within the purview of Rule 2A of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 would automatically fall in the category of retail products to which Section 4A applies. The Tribunal upheld the finding of the adjudicating authority that it was not relevant as to who consumed the product and that since these products are sold through dealers for consumption by the salons they would not fall under the category of use by institutional consumers or industrial consumers. [*Commissioner* v. *L'Oreal India Pvt. Ltd.* - Appeal No. E/1068/10, decided on 8-1-2016, Mumbai CESTAT]

Cash refund of pre-deposit when credit in Cenvat account is futile: Division Bench of the Delhi High Court has held that the assessee is

eligible for cash refund of the amount paid as pre-deposit in the appeal, in which the assessee had ultimately succeeded. The Court in this regard noted that the assessee had shifted its unit to Baddi and was availing area based exemption, and hence no useful purpose would be served in crediting the amount in the Cenvat account. The Tribunal had in the order impugned before the High Court observed that it is the discretion of the authorities to allow the refund in cash under certain circumstances. [*Commissioner* v. *Birla Textile Mills* - 2015 (325) ELT 651 (Del.)]

Payment of duty using wrong assessee code not invalid: Gujarat High Court has held that merely mentioning wrong assessee code while making payment of Central Excise duty, cannot result into such harsh consequence so as to treat the entire payment as not valid. The Court in this regard noted that there was no dispute of payment of duty and that the petitioner had singular duty liability for which the actual payment was also made. It was held that whatever be the accounting difficulty, incurring further liability of repayment of the basic duty with interest and penalties was uncalled for. [*Devang Paper Mills Pvt. Ltd.* v. *Union of India* - 2016-TIOL-37-HC-AHM-CX]

Exemption to goods meant for use in mega power project: CESTAT Chennai has allowed exemption under Notification No. 6/2006-C.E. (Sl. No. 91) to goods cleared to the international competitive bidder for use in the mega power project. The Tribunal in this regard noted that the notification granted exemption to goods meant for use in mega power project and not to any particular person. Revenue department's contention that exemption was not available as the assessee only provided support to the bidder and was not a bidder himself, was hence rejected by the Tribunal. The decision of the Madras High Curt in case of *Caterpillar India Pvt Ltd*. [2013-TIOL-562-HC-MAD-CX] was relied by the Tribunal in this regard. [*Alstom T&D (India) Ltd.* v. *Commissioner* - Final Order No. 40052-40057/2016, dated 12-1-2016, CESTAT Chennai]

Exemption not deniable for non-compliance of Cenvat Rule 11(3): CESTAT Ahmedabad has held that exemption under Notification No. 30/2004-C.E. cannot be denied in case the assessee had not expunged excess credit they had in their account when sub-rule (3) of Rule 11 of Cenvat Credit Rules, 2004 was introduced on a subsequent date. The Tribunal in this regard noted that the assessee had met with the conditions of notification on the date of opting for the notification. It was held that any violation of Rule 11(3) of the Cenvat Credit Rules, 2004 should invite necessary action under Cenvat Rules 14 and 15 only and cannot be extended to the extent of denying the benefit of notification. [*Sunflag Filaments Industries* v. *Commissioner* - 2016-TIOL-308-CESTAT-AHM]

Base frames for pumps not classifiable as part of pump: Noting that base frames were not sold in composite prices of the pump but

separately as different item in the invoice, CESTAT Mumbai has held that such frame is not an integral part of the pump but is an accessory which helps in efficient functioning of the pump. Further, noting that the item was not listed as parts under Heading 8413 of the Central Excise Tariff, the goods were held as not classifiable under said Heading. Base frames were instead found to be classifiable under Heading 8485 which covered certain parts which are used in variety of machines but are not included by specific names. The Tribunal in this regard noted that the latter heading covered base plates and that base plates by very nature would also include base frame. [*KSB Pumps Ltd.* v. *Commissioner* - 2016-TIOL-228-CESTAT-MUM]

CUSTOMS

Notification & Circular

All Industry Rates of Drawback revised: Central Board of Excise & Customs (CBEC) has revised the All Industry Rates of duty drawback provided by the government in case of exports of goods. While drawback rates have been increased for certain leather items, sewing thread, man-made fabrics, steel tanks, tractors, drawback caps have been raised for certain carpets and certain parts/components of Chapter 84-85. According to Circular No. 6/2016-Cus., separate tariff entries with AIRs (including caps) have been created for yarns of cotton blended with man-made fabrics; man-made fabrics blended with wool; jackets/blazers of cotton containing 1% or more by weight of elastane; blankets of MMF; flat-rolled products of stainless steel of thickness of 0.25 mm or less; hollow drill bars and rods of non-alloy steel; and cages. Notification No. 22/2016-Cus. (N.T.), dated 8-2-2016 amends basic Notification No. 110/2015-Cus. (N.T.), with effect from 11-2-2016 in this regard.

Ratio Decidendi

Valuation – Reliance on foreign documents, entries in journals and contemporaneous imports: Relying on Apex Court Order in the case of *East Punjab Traders,* CESTAT Mumbai has held that the copies of foreign documents, in order to be admissible as evidence, are required to be tested and signed by the foreign customs authorities and that the documents must bear the signature of the officers making the enquiries and be certified as true copies. It was held that unauthenticated and unsigned documents cannot be used even though they are forwarded by authorities through the official channels. Further, relying on the decision of the Apex Court in *Orient Enterprises*, 1997 (92) ELT A 69 (SC) as well as various other judicial pronouncements, it was held that insurance documents or entries from Comtrade, UK public ledger and other journals cannot be used to doubt or reject the transaction value. The Tribunal has also held that the value of contemporaneous imports

which were accepted by the department should have been used for the purpose of comparing the same with the value of the consignments in question. [*Ajay Exports* v. *Commissioner* - 2016-TIOL-264-CESTAT-MUM]

Valuation – Second time enhancement of value: CESTAT Mumbai has held that if the value of imported goods is enhanced once applying contemporaneous value, further enhancement is permissible only if it is established that there is undervaluation and the actual value has been suppressed. Considering that the value of goods was enhanced by applying the contemporaneous value, it was held that no further enhancement is permissible. Relying on *Milton Plastics Limited* [2006 (204) ELT 497], it was held that demand for extended period cannot be made when the enhancement of price is made on the basis of price of contemporaneous import. Further, relying on number of precedents, the Tribunal was of the view that statements not bearing signatures of any gazette officer do not satisfy the requirements of Section 108 of the Customs Act, 1962 and are not admissible as evidence. It was also held that authenticated copies of the foreign documents should be produced by the Customs for the presumption under Customs Section 139 to apply. [*Rico Gems Corporation* v. *Commissioner* - 2016-TIOL-23-CESTAT-MUM]

SAD refund cannot be rejected for want of jurisdiction: The Madras High Court has set aside the order for rejection of refund under Notification No. 102/2007-Cus., on the ground of want of jurisdiction. Referring to the case of *Drive India Enterprise Solutions Ltd*. [2012-TIOL-1667-CESTAT-MAD], the Court gave directions for transfer of the refund application to the jurisdictional authority. [*Textile Dyechem Pvt. Ltd*. v. *Commissioner* - 2016-TIOL-73-HC-MAD-CUS]

Officers of DRI have jurisdiction to issue SCN under Customs Section 28: Relying on the decision of the Bombay High Court in the case of *Sunil Gupta* [2014-TIOL-1949-HC-MUM-CUS], the Tribunal has held that Section 28(11) of the Customs Act, gives officers of DRI authorization to issue show cause notices and validates past notices issued. The Tribunal refused to wait for the decision of the Delhi High Court wherein the constitutional validity of Section 28(11) has been challenged. [*Bhagwati Components Mfg. Co.* v. *Commissioner* - 2016-TIOL-178-CESTAT-DEL]

Addendum to SCN cannot be issued after receipt of reply thereto: CESTAT Mumbai has held that it was erroneous on the part of the Commissioner in issuing addendum to show cause notice after receipt of the reply to the same. The addendum issued later had relied upon results of testing which stated that the samples were of rice other than Basmati. The CESTAT however noted that there was no reference in the show cause notice of any samples being forwarded for tests. It was further found that the test report was also vitiated as the prescribed parameters of tests were not considered in the report. [*Chawla Trading Co*. v. *Commissioner* - 2016-TIOL-95-CESTAT-MUM]

Valuation - Relevancy of documents retrieved from CD, for enhancing value: CESTAT Bangalore has held that mere documents (neither signed nor certified) retrieved from the CD found in premises of appellant, are not sufficient to enhance the value of chairs imported in the absence of evidence of contemporaneous imports. The Tribunal in this regard noted that the documents related to the transaction between the manufacturer and the supplier and hence had no relevance as the assessee-importer had imported the goods from the supplier. It was also observed that the burden of proving under-valuation is on the department, and that there was no evidence of any extra payment to supplier. Further, contract sale document was also not contended by the department as bogus. [*Ozurt Systems Pvt. Ltd.* v. *Commissioner* - 2016-TIOL-158-CESTAT-BANG]

Refund - Unjust enrichment - CA certificate is a good evidence: Relying on the majority Order of the Tribunal in the case of *Business Overseas Corporation* [2015 (317) ELT 637 (Tri. Del.)] as well as certain other judicial pronouncements, CESTAT Bangalore has held that the Chartered Accountant certificate is a good evidence to show that the disputed duty amounts have not been collected from the customers. It was held that such certificate cannot be sidelined lightly without production of any other evidence to show that the said certificate is a wrong certificate. Further, it was also held that mere absence of addresses in the sales invoices cannot be adopted as a reason to reject the said evidence. [*Tirumala Bearings (P) Ltd.* v. *Commissioner* - 2016-TIOL-97-CESTAT-BANG]

Penalty - Simultaneous penalty on partner and partnership firm, when imposable: Larger Bench of the Bombay High Court has held that simultaneous penalty on partner and the partnership firm registered under the Indian Partnership Act, 1932, can be imposed under Section 112(a) of the Customs Act, 1962, under certain circumstances. The Court in this regard noted that penalty under said section is not restricted to importer but includes in its scope any person who does or omits to do any act which renders goods liable to confiscation. It was however held that if the Revenue seeks to impose simultaneous penalty on partner, 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. It was observed that breach on the part of the partner is independent of the breach committed by the firm. The Larger Bench further held that where the allegation on the firm is of abetment and/or mens rea, then Section 135(1)(a) read with Section 140 is applicable and hence simultaneous penalty is imposable. [*Amritlakshmi Machines Works* v. *Commissioner* – 2016-TIOL-186-HC-Mum-Cus-LB]

Classification of Ilmenite – Beneficiation by physical processes: CESTAT Chennai has held ilmenite in the present case as classifiable

under tariff item 26140020 of Customs Tariff as 'Ilmenite upgraded (beneficiated ilmenite including ilmenite ground)' and not under tariff item 26140010 as 'Ilmenite unprocessed'. The Tribunal in this regard rejected the contentions of the department that since the ore had not undergone the process of roasting and acid treatment, the same cannot be considered as beneficiated or upgraded. Relying on definition of beneficiation in Rule 3(d) of the Mineral Conservation and Development Rules, 1988, the Tribunal was of the view that the physical and mechanical processes carried by the assessee lead to upgradation of the ore. [*V.V. Minerals* v. *Commissioner* - 2016-TIOL-141-CESTAT-MAD]

SERVICE TAX

Notifications

Rebate of service tax paid on services used for export – Amendment: Notification No. 1/2016-ST dated 3-2-2016 has been issued amending Notification No. 41/2012-S.T. dated 29-6-2012. As per the amendments, definition of 'place of removal' has been omitted and taxable services used beyond factory of production or any other premises of manufacture have been specified as services for which rebate by way of refund will be admissible. Prior to this amendment, specified services in the case of excisable goods was defined as taxable services that have been used beyond the place of removal, for the export of said goods. Also, vide the Notification, the rate at which the rebate is calculated has been increased in certain cases.

Sales promotion as input service and Cenvat credit of SBC - Amendment in Cenvat Credit Rules: Sales promotion includes services by way of sale of dutiable goods on commission basis. Explanation to definition of input service under Rule 2(l) of Credit Rules has been inserted by way of Notification No. 2/2016-CE(N.T.) dated 3-2-2016 in this regard. The notification also inserts a new proviso in Rule 3 (4) of the Cenvat Credit Rules providing that Cenvat credit cannot be utilised for payment of Swachh Bharat Cess.

Exemption from Swachh Bharat Cess leviable on the services received by an SEZ Unit or developer of SEZ: Notification No. 2/2016-ST dated 3-2-2016, extends the exemption from the Swachh Bharat Cess to services received by a SEZ Unit or developer of SEZ. The amendment seeks to grant refund of SBC paid on the specified services received by a unit of SEZ or developer of SEZ, SCB paid on specified services used exclusively for the authorised operations in SEZ and proportionate amount of SCB paid on the specified services used commonly for the authorised operations in SEZ and in operation in domestic tariff area to the extent attributable to the authorised operations in SEZ.

Ratio decidendi

Service rendered as intermediary to postal department - Revenue neutrality principle applicable: At issue was the demand of service tax on services provided by the assessee to the postal department for delivery of speed post, etc. It was argued that the postal department paid service tax on the services provided by it and the assesse - an intermediary was not required to pay tax. Also, since the postal department would avail credit of tax paid on this input service, the argument of revenue neutrality would hold good. Without going into the issue of taxability, the Tribunal accepted the argument that the situation being revenue neutral, demand for service tax would not arise. [*Dinesh M Kotian* v. *CCE* 2016 TIOL 262 CESTAT Mumbai]

Cenvat credit admissible on services used before registration: Deciding a host of issues regarding rejection of refund and denial of Cenvat credit, the Tribunal held that refund cannot be denied on the ground that Cenvat credit on certain inputs services had been availed prior to obtaining Service tax registration. It observed that there was no provision in the law that Cenvat credit can be allowed only after registration. As regards denial of credit and refund on banking and financial services, it held that a bank statement could also be a proper document to avail credit. It accepted the assessee's argument that so long as the document contained information required under the Service Tax Rules, even if it was not serially numbered or did not carry address of the recipients, it was a valid tax paying document. [*Prudential Process Management Services India P Ltd* v. *CST*, 2016 TIOL 287 CESTAT Mumbai]

GTA service – Liability on provider when rate inclusive of taxes is quoted: The liability to pay service tax may have been on the contractee as per statute but when the contractor quotes a rate which is inclusive of taxes clearly stating that taxes will be borne by him, then contractee can deduct the same from the contractual amount. Holding thus, the High Court of Tripura dismissed the writ petition by the contractor. It was argued that in respect of GTA service availed by the Food Corporation of India, it was liable to pay service tax (as recipient under reverse charge mechanism) and could not deduct the same from amount due to the contractor. However, the High Court held that as per the agreement, the rate quoted was inclusive of taxes and hence, action of the contractor in deducting the same from the amount due to the provider of GTA service was not incorrect. [*Ashish Kumar Dey* v. *Food Corporation of India*, 2016 (41) S.T.R. 403 (Tripura)]

Laying of pipelines not taxable under Erection Commissioning prior to 2005: Deciding on a writ petition against the Order-in-Original which upheld demand of service on laying of pipelines under 'Erection, Commissioning and Installation', the High Court of Madras held that prior to the amendment to Section 69 (39a) introduced in 2005, laying of pipelines was not covered under the impugned service. It did not accept the arguments that pipelines for carrying liquefied LNG should be treated

as plant as the contract was for fabrication and upto hydro-testing of the piping. [*Addl. CCE v. Strategic Engg. P Ltd*, 2016 (41) S.T.R. 373 (Mad.)]

Use of logo under a joint venture contract – Not necessarily franchise service: The department contended that permitting use of its logo of AMT (Aurangabad Municipal Transport) on city buses which were operated by another entity under an agreement, was taxable under Franchise service. However, the Tribunal agreed with the order of the lower appellate authority that in terms of the joint venture agreement to run buses, there was no relationship of franchisor and franchisee and since use of logo had been decided by both parties, royalty received is not exigible to service tax. [*CCE v. Aurangabad Municipal Corporation*, 2016 (41) S.T.R. 443 (Tri.-Mumbai)]

Maintenance of own equipment during BOOT period not exigible to service tax: Agreeing with the view taken by the lower authorities, the Tribunal held that maintenance of micro-processor based energy saving devices as part of the BOOT contract wherein the savings in energy are shared by the parties is not exigible to tax under 'Management, Maintenance and Repair' services. The assessee supplied the energy saving device, operated and maintained the same. It received a portion of the savings in energy costs. The department contended that once the supply and installation had commenced, the assessee's role was limited to maintenance and repairs and earnings from energy saved was exigible to service tax. However, the Tribunal held that since ownership of the goods was with the assessee maintaining the same to optimize usefulness was service to self and therefor service tax was not payable. [*CCE v. Sahastronics Controls P Ltd*, 2016 (41) S.T.R. (Tri.-Mumbai)]

Place where foreign exchange is realized does not decide jurisdiction for refund claim: The question before the Tribunal was whether the assessee could file refund claim in Coimbatore where service was provided (exported) or in Mumbai where the foreign exchange was realized. The department did not entertain the refund claim filed by the assessee. The Tribunal held that where foreign exchange is realized does not make any difference and the revenue authority of Coimbatore should entertain the application for refund. [*CCE v. CBAY systems (India) P Ltd*, 2016 (41) S.T.R. 488 (Tri.- Chennai)]

VALUE ADDED TAX (VAT)

Notifications & Ordinance

Madhya Pradesh VAT Act amended: Section 9-AA, which was introduced by an Ordinance dated 2-11-2015, has been formally inserted in the Madhya Pradesh Value Added Tax Act, 2002 by Madhya Pradesh VAT (Second amendment) Act, 2015, with effect from 14-1-2016. Section 9-AA of the MP-VAT Act provides for levy of additional tax based on

weight, volume, measurement or unit, on the sale of such goods specified in Schedule II appended to MP-VAT Act, other than declared goods, at, such rate as may be notified by the State Government.

Madhya Pradesh VAT – Declarations: Notification No. F-A-3-195-2005-1-V (25), dated 31-3-2006 has been amended by Notification No. F-A-3-02-2016-1-V(10), dated 22-1-2016. The current Notification has added certain new commodities (serial numbers 35 to 65) in respect of which a declaration in the prescribed form needs to be carried by the transporter with effect from 22-1-2016.

Rajasthan VAT – Rate of tax increased for specified goods: The Rajasthan State government has, vide Notification No. F. 12(42)FD/Tax/2010-123, dated 1-2-2016, increased the rate of tax from 5% to 5.5% on goods falling under Schedule IV (including Part A – IT products and Part B – industrial inputs) appended to the Rajasthan Value Added Tax Act, 2003. The said notification is effective from 2-2-2016.

Haryana Value Added Tax Act, 2003 amended: The Governor of Haryana has promulgated an Ordinance (Notification No. Leg 1/2016), which has substituted Section 59A of the Haryana Value Added Tax Act, 2003 which deals with Amnesty Scheme. The substituted section enables the Government to notify an Amnesty Scheme covering payment of tax, interest, penalty or any other dues under HVAT Act, for the period prior to 1st April 2015. The Government may specify conditions and restrictions with respect to tax, rates of tax, period of limitation, interest, penalty or any other dues payable by a class or classes of dealers. It is pertinent to note that prior to this amendment, Section 59A of the HVAT Act only covered payment of old arrears of taxes due prior to 1st April, 2014. The substituted section enables the Government to notify an Amnesty Scheme, not just for payment of tax, but also interest, penalty or any other dues under the HVAT Act, for the period prior to 1st April 2015.

Ratio Decidendi

Pure labour contract not to be covered under Works Contract: In this case, the assessee was engaged in the business of executing pure labour contracts, wherein he supplied skilled and unskilled labour for excavation work. The assessee also executed contracts which involved transfer of property in goods, exigible to tax under the provisions of the Delhi Sales Tax on Works Contract Act, 1999 ('Act'). The assessee had opted for composition scheme under Section 6 of the Act for such contracts involving transfer of property. The assessing authority was of the view that once the dealer had availed the benefit of composition and offered to be taxed on the lump sum payment, such dealer also had to pay tax under the Act for pure labour contracts. The Delhi High Court however held that the Act did not intend to bring to tax anything other than the value of the goods transferred whether as goods or in some other form in the execution of a works contract and the value of labour and

services and other like charges were kept out of its ambit. The Court held that the legislative intention was not to bring pure labour contracts within the purview of the Act. [*HS Power Projects Pvt. Ltd.* v. *Commissioner of Trade & Taxes, Delhi* - 2016 (1) TMI 873 Delhi HC]

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