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Article

'Place of removal' – The debate continues

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Central Excise law, after six decades of its existence, is expected to yield its place to the Goods & Service Tax (GST) shortly but it continues to evolve even today. Determination of 'place of removal' for the purpose of inclusion of freight and insurance charges in assessable value, under Central Excise Law is one such issue which keeps evolving and at the same time baffles not just the assessee but also the Department, Tribunal and Courts. This article attempts to trace the legislative and judicial journey of 'place of removal' with a view to seek a better place in the statute book for this concept.

The origin

'Place of removal' was first introduced in the Central Excise Act, 1944 vide the Central Excises and Salt (Amendment) Act, 1973, which came into force on 1-10-1975 and which brought about an amendment in Section 4 of the 1944 Act. Prior to the amendment, Section 4 provided for determination of value as the price for which an 'like' article is sold or capable of being sold at the time of removal from the factory or any other premises of manufacturer, for delivery at the place of manufacture or production. By the said amendment, the concept of 'normal price' was introduced, whereby the value was deemed to be the price at which goods are ordinarily sold to a buyer in the course of wholesale trade for delivery at the time and place of removal, provided certain conditions are fulfilled. 'Place of removal' was defined to mean factory, or any other premises of production or manufacture of the excisable goods; or a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from where such goods are removed.

The Supreme Court in *Union of India* v. *Bombay Tyre International Ltd.*[1] and *Collector of Central Excise* v. *T I Millers Ltd.*[2], while deliberating upon valuation in the case of related persons, was of the view that two kinds of transactions fall within the scope of Section 4 i.e. where the sale is effected at the factory gate and secondly those where the sale in the course of wholesale trade is effected by the assessee through its sales organisation at a place or places outside the factory gate. Even in *J.K. Spinning and Weaving Mills Ltd.* v. *Union of India*[3], the Supreme Court observed that the 'place of removal' may be a factory or any other place or premises of production or manufacture of excisable goods, etc.

Extending the place of removal

With effect from 28-9-1996, by Finance Act, 1996, another category i.e. depot, premises of a consignment agent or any other place

1 1983 (14) ELT 1896 (SC)

2 1988 (35) ELT 8 (SC)

3 1987 (32) ELT 234 (SC)

or premises from where the excisable goods are to be sold after their clearance from the factory, was added to the definition of 'place of removal'. In respect of the said amendment, Department issued Circular No. 251/85/96-Cx dated 14-10-1996, to clarify that sale price at any of these "places of removal" will be the normal price for levy of excise duty and there can be different assessable values for the same excisable goods depending upon the place of removal and that a sale price at any place of removal other than factory gate has to take into account all the expenses incurred towards transport including freight, insurance, etc. and thus all these expenses will form part of the sale price for determination of assessable value. Further, in case of inter-depot transfer it was clarified that duty may be initially charged with reference to place of removal from where the goods are actually removed/intended to be sold and by charging differential duty, if any, on the basis of assessable value prevalent at the actual "place of removal" i.e. the storage depot, etc., from where the goods are finally sold.

Escorts & other rulings

Even though the aforementioned judgments are not in respect of inclusion of freight and insurance charges in the assessable value, the aforesaid obiter(s) cannot be ignored. The issue of inclusion of freight and insurance charges in the assessable value, was first discussed in detail by the Supreme Court in *Escorts JCB Ltd.* v. *CCE, Delhi - II*[4]. The issue before the Apex Court, pertained to the periods, both prior and post, 1996 amendment. The Supreme Court, after considering various terms of the agreement i.e. transaction of sale, payment of price, handing over possession of goods and arranging transit insurance, was of the view that the 'place of removal' is the factory premises and that freight and transit insurance were not to be included in the normal value of the goods. The Court relied on the fact that the transaction was full and complete and nothing was required to be done after the goods leave the factory premises.

Prior to *Escorts JCB (Supra)*, the Supreme Court in *Commissioner* v. *Frexton Cables (India)*[5], had dismissed the appeal filed by the Department against the Tribunal decision, relying on similar reasoning. The Supreme Court in several subsequent cases[6] relied on the same. These decisions dealt with similar position of law, as it existed at the time of *Escorts JCB (Supra)*. Even in the case of *CCE, Noida* v. *Accurate Meters*[7], the Supreme Court held that any place from where excisable goods are sold can be a place of removal.

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4 2002 (146) ELT 31 (SC)

5 2002 (146) ELT A102 (SC)

6 *Commissioner* v. *Purisons Engineers (P) Ltd.* 2003 (152) ELT A265; *Commissioner* v. *Ravi Cable Industries*, 2003 (152) ELT A266; *Hindustan Wires Ltd.* v. *Commissioner*, 2003 (157) ELT A44; *CCE, Shillong* v. *India Carbon Ltd.*, 2011 (269) ELT 6 (SC)

7 2009 (235) ELT 581 (SC)

Certain statutory & clarificatory dressings

However, Section 4 was substituted by Finance Act, 2000 and the third category as brought in by the above said 1996 amendment was omitted from the definition of 'place of removal'. However, CBEC issued Circular No. 59/1/2003-CX., dated 3-3-2003, to clarify that Rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 covered the omitted category. The aforesaid Circular also clarified that it would be relevant to determine point of 'sale' in case of removal of excisable goods. With effect from 14-5-2003, by amendments made through Finance Act, 2003, the omitted third category was re-introduced in the definition of 'place of removal'.

In 2004, Cenvat Credit Rules were brought in and it was stated that credit of 'input services' would be admissible upto the place of removal. Department in Circular No. 97/8/2007 dated 23-8-2007 clarified that Cenvat credit of service tax paid on transportation up to the place of sale would be admissible if the sale and the transfer of property in goods occurred at the such place. Also, Circular No. 988/12/2014-CX., dated 20-1-2014 reiterated the same and further stated that payment of transport, inclusion of transport charges in value, payment of insurance or who bears the risk are not the relevant considerations to ascertain the place of removal but one has to go by the provisions of Sale of Goods Act, 1930.

Recent judgements

As it is obvious from the above said judgments of the Supreme Court and the circulars issued by the Department, till 2014 both the Department and the Courts shared the view that the determination of 'place of removal' is purely dependent on 'point of sale' and factors such as freight, insurance, possession, ownership, etc., may be relevant but not the determinative factors to ascertain the said 'point of sale'. Also, if the terms of an agreement or conditions of a transaction would imply that the buyer's place is the 'point of sale', there was nothing contained in Central Excise Act, 1944, Valuation Rules, 2000 or Cenvat Credit Rules, 2004 that would bar it. The Supreme Court summarized the same in *Commissioner* v. *Roofit Industries Ltd.*[8] in the following words and also in the facts of case, held the buyer's premise to be the 'point of sale':

> *"The principle of law, thus, is crystal clear. It is to be seen as to whether as to at what point of time sale is effected namely whether it is on factory gate or at a later point of time, i.e., when the delivery of the goods is effected to the buyer at his premises. This aspect is to be seen in the light of provisions of the Sale of Goods Act by applying the same to the facts of each case to determine as to when the ownership in the goods is transferred from the seller to the buyer…"*

[8] 2015 (319) ELT 221 (SC)

Can buyer's premises be place of removal post Ispat ruling?

The aforesaid legal position was re-iterated by the Hon'ble Supreme Court in *CCE, Mumbai – III* v. *Emco Ltd.*[9].In this while remanding the case for fresh decision, the Court held thus:

> *19. The consequence of the aforesaid discussion would be to set aside the order of the Tribunal and remit the case to it for fresh consideration after looking into the facts of the present case, namely, the terms and conditions of the sale with the buyer and determination on that basis as to which was the place of removal, that is whether it was the factory gate of the assessee or the place of delivery.*

However, it was in *Commissioner* v. *Ispat Industries Ltd.*[10], that the Supreme Court departed from the jurisprudence it had developed over a period of 30 years. The Apex Court, in the Ispat case, upholds the principle laid down in *Escorts JCB (Supra)* to the extent that the 'place of removal' is required to be determined with reference to 'point of sale'. However, at the same time, it restricts such determination, by stating that under no circumstances, buyer's premise can be the place of removal for the purpose of Section 4. Further, while discussing *Roofit Industries (Supra),* a judgment delivered by the same bench, the Court has distinguished the facts of the case but did not explicitly over-rule the judgment on the legal principles applied. This judgment can be a double-edged sword. While the Department will never be able to include freight charges upto buyer's premises on the ground that the same constituted place of removal, assessees will be compelled to mount insurmountable defence to claim Cenvat credit on outward freight.

In a nutshell, the existing legal position, appears to be that there can be exceptions, depending upon the facts of the case, to the thumb rule laid down by the Supreme Court that buyer's premises cannot be a 'place of removal' under Section 4. But to benefit from such exception, one has to establish that the sale is not ex-works (unlike *Escorts* or *Ispat* cases) but one of FOR destination sale (like *Emco* and *Roofit* cases) with ownership, risk in transit, etc., remaining with the seller till they are accepted by buyer on delivery and till such time of delivery, seller alone (not even carrier) remains the owner retaining right of disposal.

Concluding note

To conclude, it would not be incorrect to state that even a cursory analysis of the judgments is sufficient to indicate that the issue as to what is place of removal is far from being settled. The Department despite amending the law for the past 4 decades and issuing circulars till 2015, relying upon various Supreme Court judgments, is yet to come up with assessee-

[9] 2015 (322) ELT 394 (SC)

[10] 2015-TIOL-238-SC-CX

friendly solution to provide certainty to the issue if not an outright benefit. The far-reaching effect of this uncertainty will be seismic and would give rise to litigation in coming months and years, not just in respect of valuation but also on other issues like Cenvat credit on outward freight. Budget 2016 is just a month away and it is right time that the government extends an olive branch to the industry by appropriately amending the provisions besides clarifying the attendant issues.

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CENTRAL EXCISE

Circular

E-payment of refund/rebate – Guidelines prescribed: Central Board of Excise & Customs has prescribed guidelines detailing the procedure to be followed for e-payment of refund or rebate. According to Circular No. 1013/1/2016-CX, dated 12-1-2016 issued in this regard, refund/rebate claimants opting for this facility shall provide one time authorization duly certified by the beneficiary bank in a prescribed format, annexed to the Circular. It may be noted that the instructions of the Board are to be put in place by the field formations by 10-2-2016.

Ratio Decidendi

Rebate on goods supplied to SEZ – No appeal lies to Appellate Tribunal: Larger Bench of the CESTAT has held that appeals against orders relating to rebate on goods supplied from DTA to SEZ, will not lie to the Appellate Tribunal.According to the Tribunal, though proviso (b) to Section 35B(1) of the Central Excise Act specifically speaks only of exports out of India, the government did not intend to segregate rebate matters into two categories for appeal purposes - one category in respect of exports to a place outside India and another category in respect of so called deemed exports from DTA to a SEZ. Relying on various Court decisions, the Tribunal was of the view that reading proviso (b) to Section 35B to mean that it includes cases relating to goods supplied from DTA to SEZ is only an inevitable corollary to holding that such supplies may be treated as export. [*Sai Wardha Power Ltd.* v. *Commissioner* – Order dated 17-12-2015 in Appeal Nos. E/89802/2013, E/89952 to 89954/2013 & E/89963 to 89966/2014, CESTAT LB]

Valuation – 50L pack of lubricating oil to be assessed based on MRP: Taking note of the fact that 50 Ltrs package of lubricating oil is sold in the market through distributors and consumed by the truck owners, who are the ultimate customers, CESTAT Mumbai has upheld the contention of the Revenue Department that these should be valued on basis of MRP. Exemption under Rule 34 of the Standards of Weights and Measures Rules, was hence declined by the Tribunal observing that goods in question were not sold to industry and were not used as raw material by any industry.

Contention of the assessee that as per Legal Metrology Act, MRP was not required to be affixed on the package of 50 Ltrs as the same was bulk pack and not for retail sale, was hence rejected by the Tribunal while it distinguished CBEC Circular Nos. 411/44/98-CX and 625/16/2002-CX. [*LSR Specility Oils Pvt. Ltd.* v. *Commissioner* – Order No. A/85178-85181/16/EB, dated 5-1-2016, CESTAT Mumbai]

Valuation – Entry Tax not includible in value of goods cleared from warehouses: CESTAT Bench at New Delhi has held that Entry Tax, when the goods are received from outside the State, is not includible, for the purpose of payment of Central Excise duty, in the value of the goods cleared later within the State. The Tribunal in this regard rejected the contention of the Revenue Department that since the tax is on entry of goods the same is to be part of assessable value for clearance from warehouse later. It was noted that though Entry tax is on the entry of goods into the State, the same can be collected and paid on the basis of prevalent market value of goods at the time of sale. [*Indian Oil Corporation Ltd.* v. *Commissioner* - Final Order No.53668/2015, dated 26-11-2015, CESTAT Delhi]

Personal penalty when not imposable in case of dummy companies: Personal penalty under Central Excise Rules is not imposable in the case of dummy companies where the transactions are only book entries, according to Delhi Bench of CESTAT. The dispute involved imposition of personal penalty under Rule 209A of the erstwhile Central Excise Rules, 1944 on the person alleged to be involved in the financial fraud by acting as a proprietor of one of the dummy units which was purported to have supplied machinery to the main party. Allowing the appeal, the Tribunal was of the view that role of the concerned person, in excise duty evasion, was not explained/evidenced in the impugned order. [*Kedia Castle Dellon Industries Ltd.* v. *Commissioner* - Final Order No.53503-53504/2015, dated 23-11-2015, CESTAT Delhi]

No duty payable on waste and scrap of packing material: CESTAT Mumbai has set aside demand of Central Excise duty on waste and scrap of packing material, generated during manufacture of other goods. Assessee's appeal was allowed by the Tribunal observing that there was no 'manufacture' of waste and scrap. [*Great Oasis Enterprises Pvt. Ltd.* v. *Commissioner* – 2016 VIL 28 CESTAT Mum]

Similarly, the demand on waste and scrap of packing material generated during manufacture of cigarettes was also set aside by the Tribunal. The Tribunal in this case however relied upon earlier order in the case of *International Tobacco Co. Ltd.*, and upheld the submissions of the assessee that no process of manufacture has been undertaken by them so as to attract the Central Excise duty on such waste of the paper arising during the course of manufacture of the cigarettes. [*Godfrey Philips India Ltd.* v. *Commissioner* – Order No. 85238/16/EB, dated 22-12-2015, CESTAT Mumbai]

Refund – Unjust enrichment does not arise when scrap sold by job worker and principal

does not have direct interaction with buyer: In this case, duty on scrap cleared by job worker from his premises, which was otherwise not payable,was debited from the Cenvat account by the principal and there was no direct interaction of the principal-assessee with the buyer of scrap. CESTAT Mumbai allowed the appeal of the assessee on the question of unjust enrichment besides noting that debit in Cenvat account was made much after actual clearance of scrap from the job workers premises. [*V.E. Commercial Vehicles Ltd.* v. *Commissioner* – Order No. A/85224/16/SMB, dated 7-1-2016, CESTAT Mumbai]

Exemption to non-conventional energy devices/systems cleared in knocked down condition: CESTAT Chennai has allowed the benefit of Notification No. 6/2002-C.E. (Sl. No. 237, list 9) to agro based fired steam generator cleared in knocked down condition. The Tribunal rejected the contention of the Revenue Department that exemption was not available to parts so cleared. It was noted that it was difficult to presume that the goods cleared by them in such condition could not be brought under the broad description in Sl. No. 16 of List 9 of the notification and that it was not the case of the Department that the goods supplied by the appellant even in knocked down condition did not contribute for conversion of the waste into energy. [*Shree Venkateswara Engg. Corporation* v. *Commissioner* - Final Order No. 40048/2016, dated 7-1-2016, CESTAT Chennai]

Intra Venous Cannula (IVC) and Central Venous Catheters (CVC) – Exemption: CESTAT Delhi has allowed the exemption under Notification No. 6/2003-C.E. read with Notification No.21/2002-Cus. (List 37, Sl.No.34) to Intra Venous Cannula, while denying the benefit to Central Venous Catheters. Interpreting the entry "*disposable and non-disposable Cannula for aorta, vena cavae and similar veins and blood vessels and cannula for intra-corporal spaces*", the Tribunal rejected the contention of the department that only cannula used in those arteries or veins which are directly connected to the heart and which are similar to aorta or vena cavae are eligible for exemption. Relying on earlier decision of the Tribunal in the case of *Becton Dickinson*, CESTAT was of the view that since a second 'and' was used before the word 'blood vessels', term 'blood vessels' is to be taken independently. Exemption to catheters was however denied observing that catheters are different from cannula in structure and function. [*Eastern Medikit Limited* v. *Commissioner* - Final Orders No. 52655-52665/2015, dated 12-8-2015, CESTAT Delhi]

Cenvat credit on moulds not brought back from job workers premises: Noting that there was no condition under Rule 4(5)(b) of the Cenvat Credit Rules, 2004 regarding receiving moulds back within 180 days, CESTAT Kolkata has allowed the appeal of the assessee. The Tribunal saw merit in the contention that mould may not be brought back if it has exhausted its production capability. Reliance was also placed on earlier order in the case of *Guala Closures (I) Pvt. Ltd.* Department's contention that moulds were further not received in

the factory initially, was also rejected by the Tribunal observing that bringing the moulds first to the factory premises and then clearing the same to a job worker may not serve any purpose except for incurring some additional transportation cost to the appellant. [*Abdos Oil (P) Ltd.* v. *Commissioner* - Order No. FO/A/75723/15, dated 30-11-2015, CESTAT Kolkata]

Valuation – Cost of additional documentation charges not includible: CESTAT Mumbai has held that cost of additional copies of drawings given to the customers on specific request cannot form a part of the assessable value as these cost are post manufacturing and clearance. The Tribunal in this regard noted that one set of drawing was given along with the transformer to the customer free of cost. Further, relying on Tribunal's order in the case of *Shree Pipes Ltd.* which was upheld by the Apex Court, the Tribunal also held that cost of additional testing was not includible in the value of goods cleared by the assessee. [*Bharat Bijlee Ltd.* v. *Commissioner* – Order dated 4-12-2015 in Appeal No. E/858/07, CESTAT Mumbai]

CUSTOMS

Notification & Circular

Withdrawal of cases by department where Supreme Court has decided on an identical matter: CBEC has instructed the Committee of Principal Chief/ Chief Commissioners to review all pending appeals before CESTAT, High Court and Supreme Court and withdraw those appeals which are covered by a Supreme Court decision and accepted by the Department. Customs Instruction F.No. 390/Misc/67/2014-JC, dated 18-12-2015 specifies two exceptions to such withdrawal - (i) where the Supreme Court has only decided one among several issues in an appeal; and (ii) where there is no decision by the Supreme Court on substantial questions of law.

Pharmaceuticals and drugs exports – Implementation of the track and trace system postponed: DGFT has postponed the dates for implementation of track and trace system for export of drug formulations along with maintaining the parent-child relationship in packaging. According to Public Notice No. 52/2015-20, dated 5-1-2016, the new dates would be 1-4-2016 for non-SSI manufactured drugs and 1-4-2017 for SSI manufactured drugs.

MEIS - Deletion of Panama from Country Group-C: DGFT had by Public Notice No.2/2015-20, dated 1-4-2015 notified rates of duty credit scripts applicable under MEIS scheme while categorizing exports made to various countriesunder groups A, B and C. The country "Panama Republic" was listed in the country Group-B at Serial No. 95 and as "Panama" in country Group-C at Serial No. 50. This anomaly has now been corrected by deleting the later entry w.e.f. 1-4-2015. DGFT Public Notice No. 51/2015-20, dated 28-12-2015 has been issued in this regard.

Ratio Decidendi

Order denying provisional release of seized goods appealable before Tribunal: Section 110 of the Customs Act empowers a proper officer to seize goods while Section 110A allows an adjudicating authority to provisionally release seized goods pending the order of the adjudicating authority. Five Member Larger Bench of the Tribunal has now held that since an order under Section 110A of the Customs Act can be passed only by an adjudicating authority, such an order must therefore be construed as an 'adjudication order', and hence appealable before Tribunal.

Additionally, the Bench in this regard observed that any order by an adjudicating authority specifically affecting the rights of the owner of the goods cannot be considered as an administrative order. Further noting that an order for provisional release is a stand-alone order irrespective of the final outcome of investigation or adjudication, the Larger Bench held that an order in respect of provisional release is appealable before the Tribunal under Section 129A of the Customs Act. [*Gaurav Pharma Limited* v. *Commissioner* - 2015-TIOL-2541-CESTAT-DEL-LB]

No extra duty deposit beyond the sanctioned 1% till finalisation of SVB Order: In this case relating to addition of royalty in a SVB case, the Commissioner (Appeals) allowed Department's appeal and remanded the case to the review authority for *de novo* consideration while also directing the department to collect extra duty deposit of 5%. The Tribunal however held that Commissioner (Appeals) cannot demand extra duty deposit more than the sanctioned 1% till the finalisation of the SVB Order. It was observed that such demand was beyond the conditions laid under CBEC Circular No. 11/2001-Cus., dated 23-2-2001 allowing extra duty deposit of 5% in a situation when the importer fails to submit complete reply to the questionnaire. It was noted that appellants were importing from their related overseas suppliers since long and that the department had consistently accepted the transaction value earlier. [*MAD Doosan Infracore India Pvt Ltd* v. *Commissioner* - 2015-TIOL-2475-CESTAT-MAD]

SAD exemption when item deleted from Notification No. 20/2006-Cus.: CESTAT Delhi has held that once an item is removed from the 1st Schedule, the benefit of exemption from payment of SAD under Notification No.20/2006-Cus., will no longer be available to the importer despite the fact that the said goods are exempt from sales tax/ VAT. The Tribunal in this regard highlighted that Section 3(5) of the Customs Tariff Act, 1975 allows the Central Government to levy SAD not just to countervail sales tax/VAT but also other taxes/charges. [*Sparkle International* v. *Commissioner* - 2015-TIOL-2501-CESTAT-DEL]

Customs duty on electrical energy produced in SEZ and supplied in DTA: The Supreme Court has dismissed the petition filed by the Revenue Department against the judgement of Gujarat High Court in the case *Adani Power Limited* v. *UOI*. The High Court had quashed Notification

No. 25/2010-Cus., and Notification No. 21/2002-Cus. as amended by Clause 60 of the Finance Bill, 2010 (Second Schedule thereto) as being *ultra vires* Entry 83 of List I of Seventh Schedule of the Constitution of India, Section 12 of Customs Act, 1962 and Section 30 of SEZ Act, 2005 as well as Articles 14 and 265 of the Constitution.

The notifications exempted Customs duty in excess of 16% *ad valorem* on electrical energy produced in SEZ and supplied in DTA. The High Court however observed that Section 12 of the Customs Act read with Entry 83 provides for levy of Customs duty on goods 'imported' into India. Considering the definitions of 'import' in the Customs Act and SEZ Act read with Entry 83, it was held that the goods cleared from SEZ to DTA cannot be considered to be 'imported' into India. It was held that since there was no levy under Section 12 of the Customs Act, the question of exempting duty beyond 16% by a subordinate legislation issued under Section 25 of the Customs Act does not arise and therefore the impugned notifications were *ultra vires* Section 12 and Entry 83. The notifications were also found to be beyond Section 30 of the SEZ Act and in violation of Article 14 of the Constitution as they continued to exempt Customs duty on electricity imported into India but made such Electricity chargeable to duty when cleared from SEZ to DTA. [*UOI* v. *Adani Power Ltd.* - 2015-TIOL-281-SC-CUS-LB]

Supervision charges, being statutory in nature, cannot be collected if not due: CESTAT Mumbai has held that supervision charges, being statutory in nature, cannot be collected if they are not due and that such charges are not like an ordinary service where a liability arises as a result of availment of service. Based on the above reasoning, the Tribunal set aside the impugned order and allowed the assessee to seek refund of such supervision charges even though he had asked for supervision and the same was then provided. [*Vikram Ispat* v. *Commissioner* - 2015-TIOL-2419-CESTAT-MUM]

Term 'required for purposes of off-shore oil exploration' not to mean that goods actually used for such purposes: Relying on *Clough Engineering Ltd* v. *Commissioner of Customs*, [2006-TIOL-102-CESTAT-MUM], CESTAT Ahmedabad has held that interpreting the term 'required for manufacture' as 'used in the manufacture of goods' is not proper. Based on the above reasoning, it was concluded that when an assessee complies with all the conditions provided in Notification No. 21/2002-Cus., including the condition that 'the goods are required for the purpose of off-shore oil exploration or exploitation' clearance of any surplus material, originally intended for use at such project, cannot be treated as unauthorized diversion. [*Swiber Construction Pvt. Ltd.* v. *Commissioner* - 2015-TIOL-2421-CESTAT-AHM]

Limitation for refund claim when question of law under test beforeHigh Court: CESTAT Chennai has upheld the bar of limitation prescribed by law relating to refund and stated that the assesse should have kept the refund claim alive before the adjudicating authority

as and when the shipment was made till such time when the High Court decided in assessee's favour. It was, therefore, concluded that the assesse was not entitled to claim refund against the shipping bills as the same was barred by limitation. [*Devi Marine Food Exports Ltd.*v. *Commissioner* - 2015-TIOL-2412-CESTAT-MAD]

EOU - Date of debonding to be date when Development Commissioner approves debonding and assessee completes Central Excise formalities: Considering the date of debonding as the date when the Development Commissioner approves debonding and the assessee completes central excise formalities, CESTAT Chennai has held that assessee is not liable for interest and penalty. The Tribunal in this regard noted that there is no question of demand of interest and imposition of penalty as there was no removal of capital goods till the same unit became a DTA unit.[*Shree KaderiAmbal Mills Ltd.* v. *Commissioner* - 2015-TIOL-2392-CESTAT-MAD]

Provisional clearance before actual issue of EPCG licence not adverse: The High Court of Madras has held that provisional clearance of goods due to bureaucratic delay in actual issuance of EPCG license, intended to be imported under EPCG scheme will not make an assessee ineligible to claim the benefit of concessional rate of duty. The Court in this regard noted that Condition No.6 in the Annexure to the licence required only that the licensee should not have cleared the goods and should not have paid Customs duty. [*Super Spinning Mills Ltd.* v. *Commissioner* - 2015-TIOL-2621-HC-MAD-CUS]

EGM cannot be filed after sailing/departure of vessel: CESTAT Kolkata has held that an export general manifest cannot be filed within seven days of date of departure, as stipulated in the Export Manifest (Vessel) Regulations, 1976. Noting that the concerned provision (Section 41 of the Customs Act) itself no longer permits it, and that provisions contained in a statute will prevail over the texts of a Regulation, the Tribunal allowed the appeal filed by the Revenue Department. [*Commissioner* v. *PIL India Pvt. Ltd.* - 2015-TIOL-2563-CESTAT-KOL]

Confiscation under Section 113 when movement of goods restricted under any other law: The Tribunal has held that any other law imposing prohibition/restriction on the movement of any category of goods within India, cannot be made the ground for confiscation of such goods under the Customs Act, 1962. Setting aside the confiscation of agarwood, the Tribunal was of the view that Section 113(d) of the Customs Act on confiscation is not invokable when there was no "attempt" made to export the goods, contrary to any prohibition mentioned in the Customs Act. It was also held that the prohibition under the Export Policy would come into operation when the goods are brought within the Customs area. [*MD Raju Hussain* v. *Commissioner* - 2015-TIOL-2539-CESTAT-KOL]

Value not to be enhanced only on the basis of statement of indenters: CESTAT Delhi has held that merely on the basis of the statements of the indenters who spoke about value of the

said goods in another country cannot be the basis for enhancement of value. Tribunal in this regard observed that such enhancement in the absence of any inculpatory statement of the assessee-appellant and without the support of value of any contemporaneous imports of identical/ similar goods, is totally unsustainable. [*Goversons Sanjeev Grover* v. *Commissioner* - 2015-TIOL-2457-CESTAT-DEL]

SERVICE TAX

Ratio decidendi

Input services received at unregistered premises- Cenvat credit admissible: Refund of service tax paid on input services was denied to assessee- an exporter of IT services on the ground that the input services had been received at premises not registered with the Department. However, finding that there was no dispute as to receipt of the input services, and that the premises had been registered subsequently, the Tribunal held that the assessee was eligible for refund of unutilized credit. [*Exfo electro-optical Engineering (I) P Ltd* v. *CCE*, 2016 (41) S.T.R. 65 (Tri.- Mumbai)]

Planting of trees is not garden maintenance - Cenvat credit admissible: Observing that the Department had not recorded material facts properly, and denied credit of service tax paid to contractor engaged for planting trees (as per statutory requirement), the Tribunal held that credit would be admissible. The Department had recorded the activity as maintenance of garden and denied credit. The assesse - a cement manufacturer was required to plant trees as per the direction of the Pollution Control Board. [*CCE & ST* v. *Grasim Industries Ltd.*, 2016 (41) S.T.R. 73 (Tri.-Chennai)]

Sale involving incidental free service when not exigible to service tax: Deciding on the taxability of services - erection, commission and installation of a limestone crushing plant, the Tribunal held that where services (supervision in this case) had been rendered free of cost and contract was one of sale only, no service tax can be levied. Further, it held that service tax liability did not arise in the case before it because the assessee had not availed Cenvat credit in respect of the goods and therefore, even as per Notification No. 12/2003-ST., value of the goods supplied cannot be included. [*Larsen & Toubro Ltd.* v. *CCE,* 2016 (41) S.T.R. 95(Tri.-Del.)]

Address of person receiving taxable service need not be registered premises: Granting relief to the assessee, the Tribunal held that when there is no statutory provision that the invoice should be in the name of the recipient's registered premises, the Department cannot deny Cenvat credit on this ground. There was no dispute about receipt of services and service tax liability had been discharged by the head office. The defect in invoice was a curable defect and the Department could not deny credit of tax paid on input services. [*Allspheres Entertainment Pvt. Ltd.* v. *Commissioner,* 2016 (41) S.T.R. 104 (Tri.-Del.)

Failure by assessee to register new activity –

Penalty not imposable: The Tribunal held that once an assessee was registered, he cannot be said to be an unregistered assessee and no penalty could be imposed for non-registration in respect of new service. The assessee had also discharged service tax liability. The Department argued that the assessee was in default for failing to register the new activity. [*SRF* v. *CCE*, 2016 (41) S.T.R. 123 (Tri.-Chennai)]

Service tax not payable on 'salary' paid to deputed personnel: The Authority for Advance Rulings ruled that service tax is not payable on salary paid by the Indian company to personnel deputed by overseas group company since there is relationship of employee- employer in respect of such personnel and the Indian company. In this case, social security costs were borne by the foreign parent and hence the Department argued that employer-employee relationship cannot be said to exist between the Indian company and the personnel. For the period upto 1-7-2012, the assessee had paid tax under Manpower Recruitment or Supply service. However, for the period after 1-7-2012, the AAR agreed with the contention of the assessee that no service tax was payable on salary paid as per the terms of the agreement to utilize the services of the personnel who is on the permanent rolls of the foreign parent. [In Re: *Northern American Coal Corporation*, 2016 (41) S.T.R. 330 (A.A.R.)]

Conducting business in owner's premises –Not BSS: Deciding against the Department's argument to hold 'conducting fees' received by the assessee for conducting the business of the owner of the distillery as consideration for services, the Bombay High Court upheld the order of the Tribunal that the service did not fall under Business Support Services. As per the agreement with the owner, the assessee was paid a sum of money to conduct the entire business, bearing the loss/profit. The assessee had paid the sum for use of the premises. The Department argued that in terms of the definition contained in relevant provisions during the impugned period, managing and distribution logistics, operational and administrative services had been provided. However, the High Court held that since no consideration had been paid to the assessee for services in relation to business, the amount was not exigible to tax under BSS. [*CCE & ST* v. *Karan Agencies*,2016 (41) S.T.R. 161 (Bom.)]

Health care service for factory workers – Cenvat credit admissible: Agreeing with the stand of the assessee that maintenance of health of factory workers is an essentiality both under the statute as well as requirement of the conditions of employment, the Tribunal held that healthcare service was an eligible input service. It also observed that law need not codify each and every item of input used in or relation to manufacture. Thus, Cenvat credit would be admissible on respect of health care services provided to factory workers. [*ITC Ltd.* v. *CCE*, Final Order No. 40007/2016 dated 1-1-2016, CESTAT Chennai]

Personal group insurance of employees - Cenvat credit admissible: Observing that expenditure on personal group insurance

of employees is indispensable, the Tribunal upheld admissibility of Cenvat credit on the same. Also, since the group insurance did not relate to any persons other than employees, the Tribunal was of the view that it could not be disallowed. [*India Nippon Electricals Ltd* v. *CCE*, Final Order No. 40003-40004/2016 dated 1-1-2016, CESTAT Chennai]

Effluent treatment plant services - Cenvat credit admissible: The dispute revolved around admissibility of Cenvat credit in respect of transportation of sludge generated during manufacture of dutiable goods. The Tribunal opined that treatment of effluent is to be considered an integral part of the process of manufacture. Noting that a statutory obligation cannot be said to be not in relation to manufacture of finished goods, the Tribunal did not find force in the Department's argument that 'activity relating to business' had been deleted from the definition of input service, to deny credit. [*CCE & ST v. Kanoria Chemicals & Industries Limited*, Order No. A/11047/2015 dated 21-7-2015, CESTAT Ahmedabad]

Commission received in INR, when deemed to be in foreign exchange for export of services: The assessee argued that commission, for procuring order for foreign supplier, received from Indian buyer would qualify as having been received in foreign exchange. The Tribunal held that payment of commission made by Indian buyer on behalf of foreign supplier could deemed to be paid in foreign exchange and that the process had only been made simpler. It was noted that buyer would effect payment and then the supplier would pay the commission agent, instead, the buyer had paid the commission directly to the agent and as such it was to be deemed to have been made in foreign exchange. [*National Engineering Industries Limited* v. *CCE*, Final Order No. 53813 /2015 dated 6-11-2105, CESTAT Delhi]

VALUE ADDED TAX (VAT)

Notifications

Residuary rate under Odisha VAT Act increased: Rate of tax on unspecified items covered under Schedule B- Part III appended to the Odisha Value Added Tax Act, 2004 (residuary rate of tax) has been increased from 13.5% to 14.5%. Notification No. 80-FIN-CT1-TAX-0020-2015, dated 1-1-2016 issued in this regard, makes these changes effective from 1-1-2016.

Ratio Decidendi

Meal Vouchers are not "goods" within the Municipal Act and therefore not liable for either Octroi or LBT: The assessee was in the business of providing pre-printed meal vouchers, known as "Sodexo Meal Vouchers". These vouchers were issued to establishments/ companies to enable them to provide food/ meals and other items to their employees up to a certain amount. For utilisation of these vouchers by such employees, the assessee had made arrangements with various restaurants, departmental stores, shops, etc. From these affiliates, the employees who were issued the

vouchers could procure the food and other items on presentation of the said vouchers. The affiliates, after receiving the vouchers, presented the same to the assessee and got reimbursed for the face value of those vouchers after deduction of service charge payable by the affiliates to the appellant as per their mutual arrangement.

The issue before the Supreme Court was whether the vouchers could be treated as "goods" for the purpose of levy of Octroi or Local Body Tax under Maharashtra Municipal Corporation Act, 1949 or whether the activity only amounted to rendering of service by the assessee. The Supreme Court negated the view of the Bombay High Court that the vouchers were 'goods', observing that the assessee only took service charge from its customers and affiliates. It was further observed that on presentation of the voucher the goods were not delivered by the assessee but by the individual affiliates. The Court noted that the value of the free food and non-alcoholic beverage provided by an employer to an employee was treated as expenditure incurred by the employer and amenity in the hands of the employee. Noting that the vouchers were a perquisite given by the assessee's customers to its employees by adopting the methodology of vouchers and for its proper implementation, services of the assessee were utilized, the Court held that Sodexo Meal Vouchers were not "goods" within the Municipal Act and therefore not liable for either Octroi or LBT. [*Sodexo SVC India Private Limited* v. *State of Maharashtra* - 2015-VIL-137-SC]

Multifunction network printers qualify as a computer peripheral: In this case, the assessee was a dealer in computer and its accessories and was a registered dealer under the Tamil Nadu Value Added Tax Act, 2006. The issue before the High Court of Madras was whether the multifunction network printers qualifies as a computer peripheral and taxable at the rate of 4% under Entry 68 of Part B of the First Schedule or at the rate of 12.5% under Entry 69 of Part C of First Schedule.

The High Court relied on the decision in the case of *Canon India Private Limited* v. *State of Tamil Nadu* [(2015) 80 VST 483 (Mad)], wherein the Court found the Image Runner to be a 'peripheral' to a computer working in conjunction with the computer and hence held that there was no question of classifying the goods under residual entry or under Entry 14(iv) of Part D or Entry 40 of Part D of Schedule I of the TNGST Act. The High Court in the present case hence set aside the impugned orders and allowed the writ petition remanding back the matter to the assessing authority for passing appropriate orders in the light of the *Canon India* judgment. It was also noted that the impugned order was passed despite an Advance ruling in ACAAR No. 122/2013-14 dated 2-9-2014 which clarified that Digital Multifunction Devices are taxable under Entry 68 Part B of the Schedule. [*Hewlett Packard India Sales Private Limited* v. *Deputy Commissioner, (CT), LTU, Chennai* - 2015-VIL-547-MAD]

Belated claim of refund of Input Tax Credit can be condoned: Madras High Court has

held that refund of input tax credit in case of exports (zero rated sales) cannot be denied just because Form-W was filed belatedly with regard to ITC. Relying on earlier judgement of the Court in W.P. Nos. 2783 and 2784 of 2010 decided on 24-11-2011, the Court directed the tax authorities to consider the claim afresh if assessee had followed the conditions stipulated in Form W, except the time-limit. The Court in this regard noted that though the refund of Input tax credit was a concession, but that concession is extended to companies/dealers in order to encourage them to do exports by which the foreign exchange will flow into the country and give fillip to the economy of the State / country. [*First Garment MFG Co. (India) Pvt. Ltd.* v. *Assistant Commissioner* - 2015-VIL-520-MAD]

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