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An e-newsletter from
Lakshmikumaran & Sridharan, New Delhi, India

June 2015 / Issue – 48

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Article

Industrial/ Institutional Consumers – the argument continues

By **Shweta Kathuria**

The Department of Consumer Affairs (Legal Metrology Division) by notification dated 14-5-2015 amended the Legal Metrology (Packaged Commodities) Rules, 2011 ("PC Rules"). The PC Rules were framed to safeguard the interest of consumers by ensuring that the dealers cannot take undue advantage of innocence of consumers by selling a commodity in hidden packaged form. The said rules covered retail packages as well as wholesale packages which were meant for consumption by the customer. As per the present amendments, changes have been made in Chapter II of the PC Rules which deal with packages intended for retail sale i.e. retail packages.

Apart from making a few changes in the rules relating to declarations required to be made on packages, major amendment has been made in the definitions of "industrial customers" and "institutional consumers". Before we analyse the changes relating to these definitions, let us see the other changes made.

Earlier, the provision relating to mention of the contact details of the person who could be contacted in case of consumer complaints made it optional to provide the email address of such person. However, from 1-1-2016, it would be mandatory to declare the email address of the person who can be contacted in case of consumer complaints. Another amendment relating to the information that needs to be declared has been made with respect to the complete address. From 1-1-2016, the address at which the firm or company is registered would need to be declared on the package in place of the factory where the goods are manufactured. The second part of the unamended rule continues to remain the same i.e. in any other case, premises of manufacturer/packer, where the business is carried on.

A perusal of the newly amended provision shows that the first portion of the amended rule relates to a company or a firm and the second part relates to other assessees. However, what needs further clarification from the department is whether the registered office is the one which has been registered for the purpose of PC Rules or it refers to the premises which has been declared as the registered premises for that company or firm. Further, it should also be noted that even though the address of registered office is required to be declared on the retail package, the registration certificate would continue to have the details relating to the actual manufacturing location.

Apart from the above, an amendment has also been made with respect to retail packages which are put in another package. This amendment has come into effect immediately. Earlier, if the outer cover was not transparent and the declarations were made on the outer package, then in terms of the proviso to Rule 9(3), the assessees used to avoid making declarations on the inner package. The said proviso has now been omitted. Consequently,

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if a retail package is packed in an outer cover which is not transparent, in terms of the amended Rule 9(3) of the PC Rules, it would be necessary that both the outer package and inner package have all the declarations.

Let us now move to the controversial amendment which has maximum tax impact i.e. the amendment relating to the definitions of "industrial consumer" and "institutional consumer". A US author, Arthur Bloch once wrote that "every clarification breeds new questions". This would be the most appropriate statement when it comes to the amendments that have been made over a period of time in the definition of institutional consumers.

A brief background of the relevant provisions will be helpful here. Rule 3 under Chapter II of the PC Rules specifies the list of packaged commodities to which provisions of Chapter II do not apply. There has been a consistent dispute with regard to applicability/ non-applicability of Rule 3 to various packaged commodities. To overcome such disputes, the Central Government issued Notification No. GSR 359(E) dated 6-6-2013 for making amendment in the placement and definition of "industrial consumer" and "institutional consumer" earlier given under Rule 3 of the PC Rules.

Prior to amendment dated 6-6-2013, "institutional consumer" was defined to mean institutional consumers like transportation, airways, railways, hotels, hospitals or *any other service institutions* who buy packaged commodities directly from the manufacturer for use by that institution. Thus, earlier, *all the service institutions* including transportation, airways, railways, hotels, hospitals, etc., who bought packaged commodities directly from the manufacturer for their use were included in the definition of institutional consumer. Further, all packaged commodities bought by such institutions fell under Rule 3 of the PC Rules and were not subjected to provisions of Chapter II of the PC Rules.

After amendment, "institutional consumer" was defined to mean any institution which hires or avails of the facilities or service in connection with *transport, hotels, hospitals or such other service institutions* which buy packaged commodities directly from the manufacturer for use by that institution.

The literal interpretation of the amended definition of institutional consumer led to confusion as to whether the definition of institutional consumers referred to three parties i.e. the institution, the intermediary service providers viz. the transporters, hotels, hospitals and such other service institutions; and the manufacturer selling goods directly to the intermediary service providers. This view led to confusion as to the service institutions that would be covered under the term "intermediary service providers".

In order to seek clarification relating to the aforesaid amendment, an assessee filed an RTI application. The reply to the said RTI application said that there is no change in the position that was there till June, 2013 and the period thereafter. The Department of Consumer Affairs, Legal Metrology Division also had to issue a clarification dated 9-5-2014. In the said clarification, it was mentioned that the exemption to industrial/ institutional

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consumers is given considering that they are not retail consumers and they buy the commodities directly from the manufacturers on a negotiated price. Thus, there is no need to declare MRP on the goods sold to these customers." This letter also clarified that the intention and meaning of the term "institutional consumer" post 6-6-2013 was the same as it was before the amendment under the Explanation of Rule 3 and it was only shifted from the Explanation Part of Rule 3 to the definition part of Rule 2.

In order to bring clarity and to bring the definition of institutional consumer at par with the normal understanding that a consumer who does not further sell the goods but consumes the same for use by self, the definition of the said term has been amended as "the institution who hires or avails of the facilities or services in connection with transport, hotel, hospital or other organisation which buy packaged commodities directly from the manufacturer or from an importer or from wholesale dealer for use by that institution, and the package shall have declaration 'not for retail sale".

As can be seen from the above definition, sales made by importer to industrial/ institutional consumers have also been recognized. This change is in the context of the decisions in the cases of *Henkel CAC Pvt. Ltd.* v. *CCE* - 2012 (282) ELT 566 (Tri-Mum) and *CC* v. *Nitco Tiles Limited* – 2011-TIOL-737-Tribunal-Mumbai.

Apart from the above, the amended definitions of "industrial" and "institutional" consumer has made it mandatory to have a declaration on the package itself stating that the package is "not meant for retail sale". This change would ensure that the retail package meant for industrial or institutional consumer is identified and separated from the rest of the lot of retail packages at the initial point itself. However, what needs to be seen are the implications that will follow if the goods bearing a declaration "not for retail sale" enter the retail market.

It will also need to be seen as to how a manufacturer keeps a check when a consignment cleared by it has both the packages meant for retail sale and the ones meant for industrial/ institutional consumer.

Another major amendment made in the definition is that sales made to wholesale dealers have also been considered for the purpose of exemption available to industrial/ institutional consumers. A wholesale dealer is the dealer who sells directly to industrial/institutional consumer and has no intermediaries. A perusal of the aforesaid rule implies that even if there is a chain of wholesale dealers, the exemption shall continue to be applicable. However, it would now be practically difficult for a manufacturer to keep a check that at no point of time, any wholesale dealer sells an industrial pack in the retail line.

As can be seen from the above, the Central Government intended to overcome the disputes by making the aforesaid amendments. However, the aforementioned changes have opened a Pandora's box of practical difficulties. How the Legal Metrology Department and manufacturers actually implement them, will have to be seen in the time to come.

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CUSTOMS

Notifications, Circulars & Notices

Foreign Trade Policy, 2015-20 corrected / amended: Following amendments have been made in the Foreign Trade Policy, 2015-20 by Notification No. 8/2015 dated 4-6-2015. It may be noted that these amendments have come into force from 1-4-2015.

a) Paragraph 2.06 has been amended to include Lorry Receipt/ Railway Receipt/ Postal Receipt as eligible mandatory documents required for export / import of goods from or into India;

b) Paragraph 2.46 (II)(d) has been amended to provide that goods imported on payment in freely convertible currency and subsequently re-exported shall not be eligible for any export benefit under the FTP, even if the payment is received in freely convertible currency on such re-export;

c) Paragraph 3.02 has been amended to clarify that Duty Credit Scrips under MEIS and SEIS can be used even for payment of customs duties on import of capital goods, as per notification issued by Department of Revenue;

d) Paragraph 3.06 has been amended to provide that benefit of MEIS shall not be available on export of items, which are prohibited for export;

e) Paragraph 3.09(2)(e) has been amended to exclude service exports from SEZ units from the ineligible categories under SEIS. Therefore, service exporter in SEZ would be eligible for duty credit scrips under SEIS with effect from 1-4-2015;

f) Paragraph 9.51 (ii) has been amended to correct the scope of Mode 2 (Consumption Abroad) in the definition of 'Service Provider'. Henceforth, the same shall include supply of service by a person in India to consumer(s) of any other country in India.

FTP-Handbook of Procedures, 2015-20 corrected / amended: Following amendments have been made in the Handbook of Procedures, 2015-20 by DGFT Public Notice No. 16/2015-20, dated 4-6-2015. These amendments have come into force from 1-4-2015.

a) Paragraph 4.38 has been amended to disallow clubbing of authorizations issued on or before 31-3-2009 and authorizations having different value addition criteria. Changes have also been made in the provision providing acceptable difference in the date of issuance of the authorizations sought to be clubbed, and provision relating to payment of composition fee for accounting or calculation of exports made beyond the export obligation period of the earlier authorization;

b) Paragraph 4.42 has been amended to clarify that only two (2) extensions of six months each shall be allowed by the concerned regional authority and extension beyond twelve (12) months shall not be allowed;

c) Paragraph 9.10 has been amended to specify that applications for obtaining benefit of Chapter 3 of the FTP would be disposed of in three days by the DGFT office. Further, time limit for disposal of application for acceptance of BG/LUT has been reduced to 3 days from 15 days.

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Manual filing of specified applications allowed temporarily: Exporters have been allowed to file specified applications manually until the availability of the EDI online module or 30-9-2015, whichever is earlier. DGFT Public Notice No. 17/2015-20 dated 4-6-2015 issued in this regard amends Para 1.05 of the Hand Book of Procedure, 2015-20 with effect from 1-4-2015. The specified applications are,

i. Application for Status Holder Certificate in ANF 3C;

ii. Application for bond waiver in ANF 4F; and

iii. Application for Nominated Agency Certificate in ANF 4-I.

Status Certificates issued under FTP 2009-14 – Validity extended: Paragraph 3.19 of the Handbook of Procedures, 2015-20 has been amended to extend the validity of status certificates issued under FTP 2009-14 till 30-9-2015 or till the time status certificate is issued under the new Policy, whichever is earlier. DGFT Public Notice No. 17/2015-20, dated 4-6-2015 issued in this regard also states that same is being done to facilitate transitional arrangements.

Status holder - Entitlement to exports on free of cost basis, reduced: Status holders were initially allowed to export freely exportable items for export promotion on free of cost basis upto an annual limit of Rs. 10 lakh or 2% of the average annual export realization, whichever was higher. Paragraph 3.24 of the FTP has now been amended to limit such exports to the lower of Rs. 10 lakh or 2% of the average annual export realization. Corresponding amendment has been made to Paragraph 2.84 of the HBP. DGFT Notification No. 9/2015-2020 & DGFT Public Notice No.18/2015-20, both dated 4-6-2015 have been issued in this regard.

SEIS benefit not available for clearances from DTA to SEZ units: DGFT has clarified that supply of a 'service' by units located in DTA to SEZ units is not eligible for rewards under Service Exports from India Scheme (SEIS). Policy Circular No. 1/2015-20, dated 11-6-2015 issued for this purpose relies on definition of 'service provider' provided in Para 9.51 of the FTP 2015-20, which states that 'supply' of a service to any other country only is eligible for SEIS benefits. Noting that SEZ is 'Indian Territory', the circular states that supply of a service to SEZs is not eligible for rewards under SEIS.

SDF form waived for exports through EDI ports: As a measure to facilitate export and reduce transaction costs, the Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 have been amended by the Foreign Exchange Management (Export of Goods and Services) (Amendment) Regulations, 2015 to dispense with the requirement of submission of SDF form by an exporter exporting goods through EDI ports. According to CBEC Circular No. 15/2015-Cus., dated 18-5-2015, SDF declaration has now been subsumed in the shipping bill itself in the form of a declaration clause. The Shipping Bill (Electronic Declaration) Regulations, 2011 have also been suitably amended.

HSD and LDO freely importable as a part of ships/vessels brought for breaking up: Chapter 27 in Schedule I to the ITC (HS) has been

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amended to allow 'free' import of High Speed Diesel (HSD) and Light Diesel Oil (LDO), brought on board in old ships/vessels meant for breaking up, either within the vessel's machine/engine or as a remnant fuel, and which is incidental to such ship/vessel. DGFT Notification No. 07/2015-20, dated 20-5-2015 has been issued for this purpose.

Ratio decidendi

Lending of Import Export Code (IEC) number is not an offence under Customs Act: CESTAT, New Delhi has held that lending of IEC number to import goods in the name of other firms is not an offence under Customs Act, 1962. Tribunal thus set aside the penalty imposed under Section 112 of the Customs Act also considering the fact that there was no mis-declaration, mis-representation or under valuation of the goods. It was also held that penalty for violation of Section 7 of Foreign Trade Development and Regulation Act, 1992 cannot be imposed under the Customs Act. [*Gopal Agarwal* v. *Commissioner* - 2015-TIOL-907-CESTAT-DEL]

Exemption cannot be claimed by filing refund: CESTAT Chennai has upheld the rejection of refund claim filed on the basis of preferential rate of duty given to goods imported from Sri Lanka under Notification No. 26/2000-Cus. The Tribunal in this regard relying on Apex Court judgement in the case of *Priya Blue Industires* held that since the assessment was never challenged, eligibility to notification cannot be claimed by filing of refund. It was also observed that as per the conditions of the Notification No. 26/2000-Cus. relating to imports from Sri Lanka, benefit should have been claimed before clearance of goods. [*Ramacharan Petro Oils* v. *Commissioner* - 2015-TIOL-927-CESTAT-MAD]

Madras High court has also rejected the refund claim in a different dispute. Observing that the importer had not challenged the assessment, and further cannot at a belated stage, claim refund by pressing into service another exemption notification. [*ACE Designers* v. *Commissioner* - 2015-TIOL-1249-HC-MAD-CUS]

Helicopter import - Condition of use for non-scheduled passenger services: Benefit of exemption was claimed under Notification 21/2002-Cus., on import of helicopters and undertaking given that same shall be used for non-scheduled passenger operations. The Tribunal distinguished the case of *King Rotors & Air Charter Pvt. Ltd.*-2011 (269) ELT 343, and held that the exemption should not be denied as a clarification was received from DGCA which is the licensing authority and best judge to decide the activity of the importer. It was also held that services offered (transportation of personnel and material of various companies under contract) was in the nature of non-scheduled passenger operations and hence was in line with the conditions provided in the notification and the Aircraft Rules. The Tribunal in this regard noted that offering the service to public at large included entering into agreement for providing service to a few members of the public on a regular basis over a period of time. [*Global Vectra Helicorp Ltd.* v. *Commissioner* - 2015-TIOL-968-CESTAT-MUM]

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Valuation - Fees paid under licence and basic engineering agreements, not includible: The assessee entered into three agreements with the supplier for setting up of a copper smelting plant viz. licence agreement; delivery of proprietary goods agreement and basic engineering agreement. The Supreme Court upheld the decision of the Tribunal on non-includibility of the fees paid under the licence and basic engineering agreements, in the value of the imported goods as per Rule 9(1)(c)/ 9(1)(e), Customs Valuation Rules, 1988, as they were neither related to the imports nor a condition of sale. Recent decision in the case of *Essar Steel Ltd.* [covered in Tax Amicus - May 2015 issue] was followed by the court in this regard. [*Commissioner* v. *Hindalco Industries Ltd.* - 2015-TIOL-132-SC-CUS]

Refund - Unjust enrichment not applicable to amount paid by purchaser for release of goods: Supreme Court has allowed refund of amount deposited by a *bona fide* purchaser of imported goods for securing the release of said imported goods, pursuant to an order of High Court of Bombay. Rejecting the department's plea of unjust enrichment the Court allowed the refund by holding that the principle of unjust enrichment would not apply to refund of such an amount, which was not towards payment of any customs duty. [*Commissioner* v. *Finacord Chemicals Pvt. Ltd.* - 2015-TIOL-104-SC-CUS]

Refund – Unjust enrichment not applicable for refund of fine & penalty: CESTAT Mumbai, relying upon the decision of the Bombay High Court in the case of *United Spirits Limited* [2009 (240) ELT 513 (Bombay)], has allowed refund of excess fine and penalty. It was held that the principle of unjust enrichment enshrined under Section 27(2) of the Customs Act, 1962 applies only to duty and interest and not to amounts paid towards fine and penalty. [*Para Industries Limited* v. *Commissioner* - 2015-TIOL-846-CESTAT-MUMBAI]

Testing of inputs cannot be considered as use other than that intended: Benefit of Notification No. 21/2002-Cus., was sought to be denied by the department for that portion of the raw material which was used for testing purposes, being raw material not used in the manufacture of final product. The Tribunal however allowed the benefit and held that quality control test was part of the manufacturing process and was integral to it. Noting that the raw materials cannot be issued to the manufacturing process of medicines without quality control as per the Drugs and Cosmetics Act, it was held that the goods were used for intended purposes. [*MJ Bio-pharm Pvt. Ltd.* v. *Commissioner* - 2015-TIOL-888-CESTAT-MUM]

CENTRAL EXCISE

Notification

EOUs – FTP provisions incorporated in Excise notifications: Notification Nos. 22/2003-C.E. and 23/2003-C.E. have been amended by Notification No. 28/2015-C.E., dated 15-5-2015 to reflect the new Foreign Trade Policy 2015-20 notified by the Ministry of Commerce on 1st of April. Some of the important changes are,

- EOUs have been allowed to return, without payment of duty, capital goods transferred earlier by other units.

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- Inter-unit transfer of goods and services to be permitted on case to case basis.
- De-bonding of units who have not availed any benefit to be easier.
- EOUs can set up warehousing facility outside, near ports.

Further, period for installation of capital goods and use of other goods after procurement has now been revised. The installation/ usage, according to latest amendments by Notification No. 30/2015-C.E., dated 25-6-2015, has to be within the period of validity of Letter of Permission (LoP). LoP in this regard would have the same meaning as assigned in Chapter 6 of the new FTP. It may also be noted that reference to SION is missing in the new sub-clause (ii) to the clause (a) in condition (4) provided in the opening paragraph of the notification.

Ratio decidendi

Exemption for interim period between rescinding of earlier notification and issuance of new notification, available: Excise exemption to compounded rubber granted by Notification No. 152/87-C.E. was withdrawn by Notification No. 64/94-C.E., dated 1-3-1994. The said exemption was re-introduced by Notification No. 74/94-C.E., dated 28-3-1994. The dispute related to demand of excise duty for the interim period i.e. 1-3-1994 to 27-3-1994. The Supreme Court relying on its earlier decision in the case of *W.P.I.L Ltd.*, 2005 (181) ELT 359, has upheld the contention of the assessee that withdrawal of exemption was an inadvertent error and that the new notification should be treated as clarificatory in nature and applicable retrospectively. The Court held that the assessee was entitled to exemption for the interim period also. [*Ralson (India) Ltd.* v. *Commissioner* - 2015 (319) ELT 234 (SC)]

Refund – Limitation – Relevant date for claim: In a dispute relating to limitation for refund claim, the Supreme Court has set aside the order of the CESTAT which had held the claim to be barred by limitation. The assessee had paid excess duty from July 1999 till October 2000 when the notification was issued by the department reducing the rate of Central Excise duty retrospectively from July 1999. The Court held that the period of limitation in this case has to be reckoned from the date of issuance of notification reducing the duty as that was the trigger point which entitled the assessee to claim refund. Observing that in the absence of any such notification there was no cause of action in favour of the assessee to make any refund application, the Court held the application filed on 19-6-2001 as within limitation. Order by CESTAT counting the period from July 1999 was held as wrong and erroneous in law by the Court which also allowed interest @ 9% on delayed refund. [*Sunrays Engineers Pvt. Ltd.* v. *Commissioner* - Civil Appeal No. 539/2004, dated 20-3-2015, Supreme Court]

Demand – Limitation when department doubtful of excisability: Holding the belief of the assessee, that the process of profile cutting carried out by him did not amount to manufacture, as *bona fide*, the Supreme Court of India has held that proviso to Section 11A(1)

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of the Central Excise Act, 1944 relating to invocation of extended period is not applicable in such a case. Taking note of an Order-in-Original in a different case where the Commissioner had waived the penalty after noting that the issue relating to excitability of the process of profile cutting itself was in doubt even at the higher level of the Department, the Court held that if the appellant also nurtured the belief that the process carried out by him did not amount to manufacture, same cannot be treated as contumacious or willful suppression. [*Sanjay Indl. Corpn.* v. *Commissioner* - Civil Appeal Nos. 6999-7000/2003, 7142/2003 and 4530/2006, decided on 10-3-2015, Supreme Court]

Valuation of duplicated CDs - Royalty paid by distributor not includible in CDs manufactured by job-worker of distributor: The Supreme Court has held that royalty paid by distributor/ copyright owner to the producer of music shall not be considered as additional consideration in respect of duplicate CDs manufactured by job-worker of the distributor. The Court in this regard observed that in terms of explanation to Rule 6 of the Central Excise Valuation Rules, the use of royalty must not merely be in connection with production but also be in connection with the sale of such duplicate CDs. It was noted that copyright value in the duplicate CD was not used in connection with the sale of such goods by the job-worker to the distributor/copyright owner since copyright was owned by the latter himself. [*K.R.C.D. (I) Pvt. Ltd.* v. *Commissioner* - 2015 (319) ELT 364 (SC)]

Area based exemption not deniable for inadvertent mistake in filing declaration: CESTAT New Delhi has allowed benefit of area based exemption to the assessee who had filed the declaration for availment of exemption under Notification No. 49/2003-CE to the jurisdictional Superintendent instead of jurisdictional AC/DC, and had in the declaration mentioned wrong classification of goods manufactured by it (description was, however, correctly mentioned). Tribunal in this regard held that the condition of filing declaration by assessee had been complied with by sending the declaration to the jurisdictional Superintendent as he could have passed the same to AC/ DC's office. It was also held that exemption cannot be denied on account of clerical mistake in mentioning classification in the declaration. [*Analogics Tech India Ltd.* v. *Commissioner* - 2015 (319) ELT 504 (Tri-Del)]

Cenvat Credit available to buyer even if duty wrongly paid by supplier: The Andhra Pradesh High Court has affirmed the Tribunal order holding that receiver/ buyer of inputs/ capital goods is entitled to take Cenvat credit even if duty was wrongly paid by supplier on exempted/ non-excisable goods. CESTAT in the impugned order [2015 (317) ELT 705] had noted that the Credit Rules permit credit of duty paid and not payable. It was also observed that there is no rule which puts an obligation on the receiver of goods to determine whether the inputs/capital goods received by him are liable to duty and whether duty is payable. It was held that the responsibility of the receiver

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of inputs/ capital goods is to ensure that duty has been paid and that the goods have been received by him, accounted for by him and utilized by him properly. [*Commissioner* v. *Neuland Laboratories Ltd*. - 2015 (319) ELT A181 (Andhra Pradesh)]

Cenvat credit available on the basis of extra copy/ carbon copy of invoice: CESTAT New Delhi has allowed Cenvat credit to the manufacturer on the basis of extra copy/ carbon copy of invoice relating to inputs. The Tribunal in this regard noted that there was no dispute regarding receipt of duty paid inputs under these invoices and their use in the manufacture of finished goods. It was also observed that there was no allegation that Cenvat credit on the basis of these invoices has been taken more than once. [*Cords Cable Industries Ltd*. v. *Commissioner* - 2015 (320) ELT 155 (Tri-Del.)]

EOU - FOB value for determining DTA sales eligibility to include deemed exports: The Supreme Court of India has affirmed order of the CESTAT which had held that FOB value on the basis of which EOU's entitlement to clear goods in DTA is decided would also include value of deemed exports made by such EOU. The assessee had in the case cleared goods, during August-September 2003, to other EOUs as well. CESTAT in its impugned order reported in 2015 (315) ELT 454 had allowed the appeal of the assessee relying on jurisdictional High Court order in the case of *Gandhi Fibers* as upheld by the Apex Court later. [*Commissionere* v. *Nandan Synthetics Pvt. Ltd*. - 2015 (319) ELT A119 (SC)]

Cut to size printed biri wrappers are classifiable under sub-heading 4901 90: Supreme Court has held that printing of biri wrappers would not and can never fit under the description 'transfer decalcomanies' for classification under sub-heading 4901.10. The Court in this regard noted that in the present case only simple printing was being done on plain paper which was cut to size, and that there was no use of sheet of plastic. The goods were held to be classifiable under sub-heading 4901.90 attracting nil duty also because printing was not on absorbent, lightweight papers and there was no coating of starch and gum. [*Headway Lithographic Company* v. *Commissioner* – Civil Appeal No. 8646/2003, decided on 7-4-2015, Supreme Court]

Livfit premix, Ayucal premix and Caldhan suspension classifiable as animal feed supplements: Supreme Court has upheld the classification of Livfit premix, Ayucal premix and Caldhan suspension under Heading 2302 of the Central Excise Tariff as animal feed supplement. The Court in this regard noted that department's own laboratory (CRCL) had opined that the first two products were animal feed supplements and not veterinary medicaments as contested by the department. In respect of Caldhan suspension, the Court took into consideration certificates from other experts as also opinion of Associate Professor of G.B. Pant University of Agriculture and Technology that the product can be recognized as a tonic or food supplement. Department's appeal was also dismissed by the Court observing that the printed labels of product also carried the phrase "not for medicinal use". [*Commissioner* v. *Dabur India Ltd*. – Civil Appeal No. 4483/2005, decided on 12-5-2015, Supreme Court]

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SERVICE TAX

Ratio decidendi

Providing bus transport facility not business of renting cabs: The provider of rent-a-cab service has to be in business of renting cabs and hence the appellant who was operating buses under stage carriage permit was not liable to pay service tax under this head. Emphasising on the definition of the taxable service the Tribunal held in favour of the service provider whose main activity was providing bus transport facility to citizens in Bangalore and not renting of cabs. Further, as per the agreement though charges were fixed (per kilometre) passengers were dropped off at different points and this was held by the Tribunal to be a case of stage carriage and not renting of cab. [*Bangalore Metropolitan Transport Corpn* v. *CST*, 2015(38) S.T.R. 976 (Tri.-Bang.)]

Franchise service – Coverage of authorisation to act/not act in particular manner: The assessee argued that distributors who sold its products were granted merely the right to sell and though products were identified with it, there was no representational right which was given. The Tribunal however, held that the activity was one of franchise service, since, as per the terms of the agreement, the distributors (in the direct marketing chain) were authorised to act in a particular way so as to not affect the reputation of the assessee. The Tribunal opined that there was no surplusage in the statute and the ingredient of representational service was satisfied since the distributor's action could affect the reputation of the assessee only if some representational rights, even if in limited capacity, had been granted. [*Amway Enterprises* India v. *CST*, 2015-TIOL-980-CESTAT-DEL]

Manpower supply & deputation of personnel to work as employees: Certain personnel from the foreign associate company came to India to work for the appellant who paid the salaries of such employees and reimbursed the social security amount payable for such employees to the foreign associate. It was contended by the department that foreign associate had supplied manpower to the appellant who was liable to pay service tax for the same under reverse charge mechanism. The appellant referred to various clauses of the agreement entered with the foreign associate and claimed that TDS and provident fund amounts were deducted from the salaries of the employees evidencing the fact that such employees are those of the appellant. On facts, the obligation of the foreign associate ceased on deputing the personnel, who worked under the direct control of the appellant. Thus, the Tribunal held that foreign associate had not provided any manpower supply service to the appellant and service tax was not applicable in such situation. [*Lear Automotive (I) Pvt Ltd* v. *CCE*, 2015-TIOL-851-CESTAT-MUM]

Refund claim - Limitation not applicable to deposits paid under protest: Agreeing with the contentions of the assessee the Tribunal opined that letters of protest filed by the appellant would qualify as protest since there was no provision allowing payment of service tax under protest

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and accordingly, the time limit under Section 11B of the Central Excise Act would not be applicable in such a case. The appellant, who undertook the activity of construction of flats had sought guidance from the department on taxability of the service and deposited the tax registering his protest by way of a letter. He also answered the claim of unjust enrichment, with a certificate issued by a chartered accountant where amount was shown as amount receivable in the balance sheet. Thus, the Tribunal held that the time bar would not apply to the refund claim and when refund as such was not in dispute, they were entitled to the same. [*Ind Swift Lands Ltd* v. *CCE & ST*, 2015-TIOL-826-CESTAT-DEL]

Cenvat credit on cement and steel supplied to contractor providing exempt service: The appellant claimed Cenvat credit of excise duty paid in respect of cement and steel purchased by it for construction of a jetty used for providing port services by it. The department denied the Cenvat credit on such goods on the ground that the relevant provision defining inputs specifically denied Cenvat credit on cement and steel with effect from 7-7-2009. The appellant contended that such a restriction was applicable only for manufacturers and not for service providers and that construction of jetty being exempt cannot be a ground to deny credit for inputs used by it to provide port service. The High Court held that the amendment was not clarificatory and the same was subsequent to the period under dispute and that credit was not deniable on the ground of use of said services in providing exempt service. [*Mundra Ports and SEZ Ltd* v. *CCE & C*, 2015-TIOL-1288-HC-Ahmedabad]

VALUE ADDED TAX (VAT)

Statutes & Notification

Jharkhand Value Added Tax Act, 2005 – Amendments: Jharkhand VAT Act has been amended by Jharkhand Value Added Tax (Amendment) Act, 2015 as notified by Notification No. L.G. 07/2015-25/Leg., dated 19-5-2015. Some of the major amendments brought into effect from 19-5-2015 are,

- Section 18(4)(iii) has been amended and Section 18(8)(xv) has been inserted to allow full input tax credit on the purchase of goods intended for the purpose of use as raw material, and for direct use in manufacturing or processing of goods for sale, or for direct use in mining, or for use as capital goods, intended for sale in the State of Jharkhand or in the course of interstate trade and commerce against Form C. Input tax credit is not allowed in case the goods are sold on inter-state basis without Form C.
- Proviso to Section 18(8)(ix) has been amended to allow input tax credit in excess of 5% (increased from 4%) in respect of goods consumed for manufacture of goods for inter-State transfer of stock or for sale outside Jharkhand.

Bihar Entry Tax Act – Amendments relating to e-commerce: As per Bihar Finance Act, 2015 read with Notification No.L.G.-1-8/2015/60 Leg, dated 6th May 2015, Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1993 (Bihar Entry Tax Act) has been amended. These amendments relating to e-commerce are effective from 6th

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May 2015. The definition of 'dealer' given under Section 2(1)(b) of the Bihar Entry Tax Act has been substituted and now explanation III states that the persons engaged in the business of supplying or delivering Scheduled goods to any buyer or importer within Bihar through any system of electronic commerce or otherwise shall be deemed to be a dealer for the purpose of the Bihar Entry Tax Act. Further, Section 3AA has been introduced stipulating such persons engaged in the business of supplying or delivering Scheduled goods in Bihar to buyers not registered under the Bihar Entry Tax Act through any system of electronic commerce or otherwise to:

- Recover entry tax from the buyers at the time of or before delivery of the said Scheduled goods and deposit the same to Government Treasury.
- Prepare and file monthly, quarterly and yearly returns before the prescribed authority.
- Apply and obtain registration under the Bihar Entry Tax Act.
- Maintain accounts, registers and documents and furnish the same before the prescribed authority as and when required by such authority.

Ratio decidendi

Transfer of right to use goods during provision of service – Tripura VAT: Assessee in the dispute entered into a contract with another firm whereby it agreed to provide 2D Seismic Data Acquisition and Basic Processing Services to the other firm engaged in oil exploration in the State of Tripura. The issue before the Court was whether the equipment brought in by the assessee for their own use to carry out the surveys has been transferred to the other company and whether there was any sale within the meaning of Section 2(25)(d) of the Tripura Value Added Tax Act, 2004 (TVAT Act) read with Rule 7(2) of the Tripura Value Added Tax Rules, 2005 (TVAT Rules), to make the goods exigible to tax under Section 4(2) of the TVAT Act.

The Tripura High Court has held that there was no transfer of right to use goods and the assessee-petitioner was only rendering services which are only amenable to tax by the Union of India and not by the State. The Court in this regard observed that by the contract in question assessee was to carry out seismic surveys to investigate the earth's subterranean structure and hence assist the other company in carrying out the gas exploration. From the perusal of the terms of the contract, the Court noted that there was no transfer of any property in goods, so much so that none of the machinery was to remain with the service recipient, and remained solely under the control of the assessee. It was finally held that the contract would not be treated as a works contract. [*Asian Oilfield Services* v. *State of Tripura* - 2015-VIL-215-TRI]

Transfer of right to use goods under Delhi VAT: In another dispute relating to transfer of right to use goods, a tourist operator engaged in the business of providing vehicles on rental basis, had entered into agreements with Delhi Transport Corporation (DTC) for providing buses to it. The issue before the Court was whether the agreement between the appellant

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and DTC was for transfer of right to use goods and hence liable to VAT under the Delhi Value Added Tax Act, 2004.

The Court held that the agreement was not for transfer of right to use goods as according to the terms of the contract, possession of the goods always remained with the appellants. It was noted that the custody of the goods was retained by the owner who remained responsible for keeping them fit for use in terms of the contractual obligations and remained responsible for maintenance, repairs, etc., and also to keep the DTC indemnified against any claim for loss or damage to third party or to the vehicles during the operations. The Court in this regard also observed that the rights conferred on DTC were limited to deciding the route of the hired buses and the schedule to run them, and that it did not result in the goods being delivered to DTC at any stage. Relying on the decision in the case of *International Travel House Ltd.* - 2009 (8) AD (Delhi) 13, it was held that the contract in question made it clear that the possession had always remained with the appellant and therefore, the transaction in the instant case did not fall within the ambit of transfer of right to use goods and would not attract the levy of sales tax/VAT. [*Hari Durga Travels* v. *Commissioner of Trade and Taxes, Delhi* - 2015-VIL-199-DEL]

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