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Drawback of duties debited in freely transferable scrips issued under Chapter 3 of FTP

By **Atish Laddha**

The Central Government has recently introduced the new Foreign Trade Policy 2015-20 (FTP) on with an aim to increase exports of merchandise and services from India from the current (F.Y. 2013-14) USD 465.9 billion to USD 900 billion by F.Y. 2019-20, and to raise India's share in world exports from 2% to 3.5%.

The intention of the Central Government has been to provide stable and sustainable policies in order to incentivize exports by promoting diversification of India's export basket and by helping various sectors of the Indian economy to gain global competitiveness. Trade imbalance is also sought to be reduced in this regard. Therefore, to simplify, streamline and bring uniformity, the new FTP has introduced a specific provision in Para 3.15 clarifying that apart from the Cenvat credit or duty drawback of additional duties of customs debited in the scrip, the exporter shall be entitled for duty drawback of the basic customs duty debited in the scrip. Consequently, these changes have also been reflected in the customs Notification Nos. 24/2015-Cus., and 25/2015-Cus., giving effect to the aforesaid provisions.

Position under recent FTP

In view of specific provisions referred above, it stands clarified that the goods imported utilizing the duty credit scrip are not exempted goods as the duty credit scrip is cash equivalent and is freely transferable. Further, these scrips do not carry any export obligation attached to it.

Hence, to rest the dispute between the exporter and the revenue authorities as to whether the goods imported against scrip shall be considered to be duty paid or exempted, specific provisions have been introduced in the new FTP as well as in the customs notifications referred above. However, it may be noted that, the FTP provisions as well as the notifications issued under Section 25 of Customs Act, 1962 will be in force and would cover the exports made on or after 1st April 2015.

Past dispute under erstwhile FTP, 2009-14

As discussed above, recently issued FTP will govern only the scrips issued in respect of exports made on or after 1-4-2015. However, in respect of similar scrips issued in the past, such as Focus Market Scheme, Focus Product Scheme, etc., which were also freely transferable and were without any export obligation attached to it, no clarity has been provided by either Ministry of Commerce or Ministry of Finance to this effect.

Here, it may be noted that various clarifications have been issued by CBEC in the past stating that the goods imported against freely transferable scrips such as DEPB, FMS, FPS, etc., shall not be considered as exempted clearances for the purpose of Cenvat credit under Rule 6 of Cenvat Credit Rules, 2004. Further, a similar view has also been taken by the High Court in the case of *Tanfac Industries Ltd.* [2009 (240) ELT 341 (Mad.)]

However, Para 3.17 of the erstwhile FTP as well as prevailing customs notifications issued

under Customs Section 25 in respect of earlier export promotion schemes did not state in such clear terms that drawback of basic customs duty debited through the duty credit scrip would be available. Therefore, the dispute arose as to whether the customs duty debited in the scrip shall be considered as payment of duty or that the goods shall be considered as exempted and the Cenvat credit or drawback of additional customs duties debited in the scrip shall be considered as additional incentive granted by the prevailing FTP.

In this regard, attention is also invited to the decision of Gujarat High Court in case of *Gujarat Ambuja Exports Ltd.* [2013 (289) ELT 273 (Guj.)] wherein the High Court had held that these goods imported against such duty credit scrip are exempted goods. Further, recently Commissioner (Appeals) in Pune has also passed an order rejecting the appeal of assessee seeking drawback of the basic customs duty debited in the scrip. It has been held that the goods imported against scrip are exempted only and no drawback of basic customs duty shall be available to the exporter.

However, inspite of the aforesaid decision of Gujarat High Court and that of the Commissioner (A), in view of the various clarifications issued from time to time, a view is still possible that the goods imported under the scrips are duty paid goods and hence drawback of basic custom duty debited in the scrips, is available.

Conclusion

Though specific provisions have been made under the recent FTP and the corresponding Customs notifications, there is no clarity with respect to identical transactions effected in the past. Therefore, the exporters will have to either suffer cumbersome litigation process to seek the relief before the appellate authorities or represent before Ministry of Finance to issue suitable clarification in this regard in respect of the disputes under the erstwhile FTP. In view of the specific inclusion of Para 3.15 in the current FTP, it is expected that a suitable clarification should also be issued by either Ministry of Commerce or Ministry of Finance to settle dispute for the past period and to save cost and time of exporters.

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

BUDGET 2015

Finance Act, 2015 comes into force

Finance Bill, 2015 has received President's Assent and Finance Act, 2015 is in force from 14 May, 2015. Readers may recall the amendments proposed in the Bill which were covered in *Tax Amicus – March, 2015*. Major amendments include amendment to Section 28 of the Customs Act, 1962 to provide for non-imposition of penalty if duty with interest is paid within 30 days of receipt of show cause notice. The new provisions, relevant in case of SCNs issued not invoking the extended period (i.e. within the normal limitation period), make it clear that proceedings against such person shall be deemed to be concluded after payment

of such duty and interest. Similar provisions have also been made under Central Excise Act, 1944 and Finance Act, 1994 (for Service Tax). Reduced penalties have been provided for in the amended provision in respect of all the 3 Central indirect tax statutes involving extended period for issuance of show cause notice i.e. cases involving fraud, collusion, suppression, etc, if duty/tax is paid within specified period. New Section 11AC of Central Excise Act provides for penalty upto 10% of duty in cases involving normal period of demand but no penalty is imposable if duty is paid with interest within 30 days of SCN. Significant change in service tax law relates to omission of Section 80 which provided for waiver of penalty in certain cases.

CUSTOMS

Notifications, Circulars & Notices

Exemption to various goods - Notification No. 12/2012-Cus., amended: Notification No. 12/2012-Cus., providing for exemption to various products from BCD and/or CVD has been further amended by Notification No. 28/2015-Cus., dated 30-4-2015. Effective rate of Basic Customs duty (BCD) has been reduced for boron ores and on raw silk (not thrown), while exemption has been granted to all digital still image video cameras, and their parts. Effective rate of BCD has however been increased for sugar (raw and refined) and natural rubber.

Export duty on specified iron ore and concentrates reduced: Effective rate of export duty on iron ore and concentrates (non-agglomerated) falling under tariff items 2601 11 41 and 2601 11 42 of Customs Tariff has been reduced from 30% to 10% by Notification No. 30/2015-Cus., dated 30-4-2015 which amends Notification No. 27/2011-Cus..

SEZ - Temporary removal of goods to DTA permitted on self-attestation basis: Special Economic Zone (SEZ) units are now allowed to temporarily remove goods in DTA for repair, replacement, testing, calibration, quality testing and research and development purposes on self attestation basis. For availing such facility, they need to give an intimation to the authorized officer and also an undertaking as to return of such goods. SEZ Instruction No. 84, dated 16-4-2015 has been issued in this regard by the Ministry of Commerce.

International Financial Services Units allowed to be set up in SEZ: International Financial Services Unit can now be set up as a unit in SEZ, subject to specified rules and regulations. SEZ Notification S.O. 968(E), dated 8-4-2015 issued for this purpose also mentions that such units shall conform to the provisions of SEZ Act and Rules & Regulations. SEZ Circular F. No. D.12/25/2009-SEZ, also dated 8-4-2015 lays down procedure for setting up of such units.

Power generation in SEZ – Guidelines revised: Ministry of Commerce has withdrawn power generation guidelines issued by Notification No. P.6/3/2006-SEZ dated 21-3-2012 with effect from 1-4-2015 while restoring earlier guidelines issued by Notification No. P.6/3/2006-SEZ.1, dated 27-2-2009. According to SEZ Circular dated 6-4-2015 [No. P.6/3/2006-SEZ], henceforth, developers / co-developers are

entitled to setup power plant only in non-processing area of the SEZ and operation and maintenance benefit shall not be available to such power plant. Further, existing power plants are also to be demarcated as non-processing areas.

Customs Clearance Facilitation Committee (CCFC) to be constituted: CBEC has decided to set up a Customs Clearance Facilitation Committee (CCFC) at every major Customs seaport and airport with immediate effect. This committee would be headed by the Chief Commissioner of Customs/Commissioner of Customs in charge of the seaport and airport concerned and member shall include senior-most functionary of departments and agencies, other than the customs department, which are involved in the customs clearance process. According to Circular No. 13/2015-Cus., dated 13-4-2015, this committee will identify and resolve bottlenecks, if any, in the customs clearance procedure; ensure and monitor expeditious customs clearance; resolve grievances of members of the trade and industry in regard to such process, and initiate time release studies for improvement in clearance time.

Sugar - Preferential quota sugar to EU and USA made freely exportable, subject to specified conditions: Chapter 17 in Schedule II to the ITC (HS) has been amended to allow free export of preferential quota sugar, falling under tariff item 1701 0000, to EU and USA, subject to specified conditions. Hitherto, the same could be exported only through a State Trading Enterprise. DGFT Notification No. 3/2015-20, dated 20-4-2015 has been issued in this regard.

Sugar - Benefit of Duty Free Import Authorization (DFIA) withdrawn: Para 4.25 of the new Foreign Trade Policy (FTP) has been amended by DGFT Notification No. 5/2015-20, dated 1-5-2015 to withdraw benefit of DFIA for import of raw sugar.

Urea - Industrial / Technical Grade Urea (TGU) freely importable, subject to actual user condition: Tariff item 3102 1000 of Chapter 31 in Schedule I to the ITC(HS) has been amended to allow free importation of Industrial Urea / Technical Grade Urea (TGU), which was importable only through a State Trading Enterprise. After amendment by DGFT Notification No. 4/2015-2020, dated 28-4-2015 such item is freely importable subject to actual user condition.

Ratio decidendi

Valuation – Payment for technical services for setting up plant post-importation, not includible: On analysis of the Technical Services Agreement between the respondent and the foreign technical consultant, and the purchase order, the Supreme Court has held that (i) the technical services to be provided by the consultant were post-importation and were not a condition of sale; and (ii) there was no transfer of know-how, patents, trademarks or copyrights. It was, therefore, held that Rule 9(1)(e) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, would not be attracted and payment made for supply of such services would not be taken into account for assessing the value of the imported products. The Court noted that the services were only to coordinate and advise

the assessee to successfully set up, commission and operate the plant in India; and that the assessee had become the owner of only that portion of documents, drawings, plans created by the technical consultant pursuant to the agreement, all of which were post-importation of the plant into India. [*Commissioner* v. *Essar Steel Ltd.* - 2015-TIOL-63-SC-CUS]

No duty liability if option to pay fine in lieu of confiscation not exercised: The Supreme Court of India has held that liability to pay duty would not apply automatically in a case where redemption fine has been imposed under Section 125(1) of the Customs Act, 1962. It was held that such liability will get triggered only in a situation where the option to pay fine in lieu of confiscation under Section 125(1) has been exercised by the owner of the goods or, where such owner is not known, the person from whose possession/custody such goods have been seized. The Court also observed that the show cause notice in this case was issued under Section 124 and was confined to confiscation and penalty. [*Fortis Hospital Ltd.* v. *Commissioner* - 2015-TIOL-57-SC-CUS]

Uniform addition of 1% of FOB value for loading, unloading and handling charges, not correct: The Supreme Court has held that proviso (ii) to Rule 9(2) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 [currently proviso (ii) to Rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007] providing for uniform addition of 1% of FOB value of the imported goods for loading, unloading and handling charges (landing charges), was *ultra vires* Section 14 of the Customs Act, 1962 as it went against the scheme contained in the Customs Act as well as the Valuation Rules. The Court also held that where actual costs are determinable, introducing a fiction for arriving at the purported cost of landing charges is arbitrary and thus *ulra vires* Article 14 of the Constitution of India. Noting that as per the scheme of the Customs Act and the Valuation Rules, the actual cost of the goods or the services would be the determinative factor to arrive at the valuation of the goods wherever the same is available, the Court held that the proviso has to be read down to apply only when actual landing charges are not ascertainable. [*Wipro Ltd.* v. *Asst. Collector* - 2015-TIOL-79-SC-CUS]

'Leggings' more akin to 'tights' and not classifiable as 'trousers': "Leggings" are akin to "tights" and are covered under sub-heading 6115 of the Customs Tariff. CESTAT Chennai in this regard noted that said heading does not cover inner garments only. Arguments of the department, that the goods are classifiable as 'trousers' and hence are classifiable under Heading 6104, was rejected by the Tribunal noting that while "leggings" are worn by women and girls, which are tight fitting and clinging to the body, "trouser" is a loose fitting dress. The department in this case was also of the view that 'tights' are thin, semi-transparent piece of clothing often worn under dresses, skirts or shorts and thinner as compared to leggings which are mostly opaque and not worn as an inner garment. [*Commissioner* v. *GO Fashion (I) Pvt. Ltd.* - 2015-TIOL-624-CESTAT-MAD]

Appeal to Commissioner (A) - Limitation - Time taken to pursue matter before wrong forum, excludible: There was a delay of 11 years in filing an appeal before the Commissioner (Appeals) against the order passed by the Superintendent on account of abortive appeal filed before the wrong forum. The Commissioner (Appeals) rejected the appeal due to delay. Remanding the matter back to the Commissioner (Appeals), the Supreme Court has now held that principles of Section 14 of the Limitation Act, 1963 would apply in case of quasi judicial authorities also. Therefore, time taken to pursue the matter before the wrong forum is to be excluded in calculating the limitation period under Section 128 of the Customs Act, 1962. Further, the Court was of the view that longer period of limitation (180 days) would be available to the assessee in the case as appeal was filed against the order passed in 1992 i.e. prior to amendment in Section 128 shortening the period. [*M. P. Steel Corporation* v. *Commissioner* - 2015-TIOL-89-SC-CUS]

Commissioner (Appeals) not empowered to condone delay beyond extended period of 30 days: The appeal filed by the assessee before the Commissioner (Appeals) was rejected on account of delay of 1346 days. On challenge to such order by way of writ petition, the High Court has held that the Customs Act is independent and complete in itself and hence reliance need not be placed upon Limitation Act, 1963 for the benefits contained therein. It was held that delay in filing the appeal cannot be condoned by the Commissioner (Appeals) beyond the 30 days extended period provided in the statute. [*Hindustan Apparel Industries* v. *Asst. Commissioner* - 2015-TIOL-842-HC-MAD-CUS]

Mandatory pre-deposit not required if lis arose prior to amendment in Section 129E: Kerala High Court has held that the right of appeal will be governed by the law prevailing at the date of institution of suit or proceedings or when the lis arises and not by the law that prevails at the date of its decision or at the date of filing of the appeal. Accordingly, it was held that when the lis arose before the amendment was made to Section 129E of the Customs Act, 1962, introducing provisions relating to mandatory pre-deposit of 7.5% or 10% for filing an appeal, an appeal can be filed without making the pre-deposit along with an application for waiver of the same and stay from recovery of government dues. [*Sea Breeze Courier* v. *Commissioner* - 2015-TIOL-1045-HC-KERALA-CUS]

CENTRAL EXCISE

Notifications & Circulars

Cenvat credit in case of transit sale through dealer: Central Board of Excise and Customs (CBEC) has clarified that where a registered dealer negotiates sale by splitting the consignment procured from a manufacturer or a registered importer and issues Cenvatable invoice for every sale transaction, the dealer can order direct transport of the consignments as per individual sales to the consignee without bringing the goods to his godown. It has also been clarified that in

case of direct transfer of goods from the port of import to the consignee, by the importer, such movement has to be recorded in the invoice. Circular No. 1003/10/2015-CX, dated 5-5-2015 stating so has been issued to clarify doubts after introduction of two provisos in Rule 11(2) of the Central Excise Rules, 2002 in Budget 2015 amendments on 1-3-2015. The Board explains that the purpose of the amendment is only to allow an additional facility for direct transport of goods from the manufacturer/importer where the Cenvat Credit is availed on basis of Cenvatable invoice issued by the registered dealer/importer.

Cenvat credit of Ed. Cess and SHE Cess – Utilisation: Cenvat credit of Education Cess and Secondary & Higher Education Cess on inputs and input services received by the manufacturer on or after 1-3-2015 can now be utilized for payment of Basic Excise duty (BED). Similarly, balance of 50% of the credit of such cesses on capital goods received during last financial year can also be utilized in the same way. Rule 3(7)(b) of the Cenvat Credit Rules, 2004 has been amended in this regard by Notification No. 12/2015-C.E. (N.T.), dated 30-4-2015. It may be noted that these cesses are no more leviable on goods with effect from 1-3-2015.

DTA clearance from EOU – Exemption available from Education Cess and SHE Cess: Exemption from Education Cess and Secondary & Higher Education Cess as available under Notification Nos. 14 & 15/2015-C.E. will also be applicable to DTA clearances of excisable goods from 100% EOU. Explanations have been inserted for this purpose in these notifications by Notification Nos. 26 & 27/2015-C.E., both dated 30-4-2015. Texts of these explanations have further been corrected by Corrigendum dated 8-5-2015 to reflect the correct position of law.

Export from DTA to SEZ – Excise Rule 18 rebate and Cenvat Rule 5 refund, available: Noting that according to provisions of the Special Economic Zones Act, supply of goods from DTA to the SEZ constitutes export, and that as per Section 51 of the said Act, the provisions thereof shall have over riding effect over provisions of any other law in case of any inconsistency, the CBEC has clarified that clearances of goods to an SEZ from the DTA will continue to be treated as export and therefore entitled to rebate under Rule 18 of Central Excise Rules, 2002 and of refund of accumulated Cenvat credit under Rule 5 of Cenvat Credit Rules, 2004. Circular No.1001/8/2015-CX.8, dated 28-4-2015 has been issued in this regard.

Specified computer parts – Lower rate of duty restricted to actual use in PC manufacture: Concessional rate of central excise duty on hard disk, CD ROM drive, DVD drive or writer, combo drive, flash memory and microprocessors has been further restricted. According to amendments made by Notification No. 24/2015-C.E., dated 30-4-2015 in Sl. No. 255 of Notification No. 12/2012-C.E., concessional rate of 6% would be available if said goods are used in the manufacture of computers falling under heading 8471 of Central Excise Tariff.

Ordnance factories and Defence PSUs – Excise duty exemption to be withdrawn: Ordnance factories and defence PSUs will not be exempted from central excise duty

from 1-6-2015. Notification No. 23/2015-C.E., dated 30-4-2015 issued for this purpose amends Notification Nos. 62 & 63/95-C.E. with effect from 1-6-2015.

Ratio decidendi

Sterilization of syringes and needles does not amount to manufacture: The Supreme Court has held that the sterilization of syringes and needles does not amount to manufacture. The Court in this regard also laid down guidelines and held that where the goods remain exactly or essentially same even after a particular process, the process would not fall under the category of 'manufacture'. It was held that only when the goods are transformed into goods which are different and/or new after a particular process and such new product is marketable as such, then the process would be covered under 'manufacture'. The Apex Court was of the view that process of sterilisation does not mean that such articles are not complete articles in themselves or that the process of sterilisation produces a transformation in the original articles leading to new articles known in the market as such. It was also noted that disposable syringes and needles are finished products themselves and that sterilization does not lead to any value addition in the said product. [*Servo-Med Industries* v. *Commissioner* – C.A. No. 583 of 2005, decided on 7-5-2015]

No 'manufacture' when raw rice mixed with dehydrated vegetables and packed and sold in retail: Mere addition of dehydrated vegetables and certain spices to the raw rice, would not make it a different product. The Supreme Court while holding so has observed that primary and essential character of rice remained the same as it continued to be known in the market as rice and sold as rice only. It was also noted that the product was to be cooked in the same form as any other rice, and hence there was no manufacture. Further, the product was found to be classifiable under heading 11.01 of Central Excise Tariff, as product of the milling industry, attracting nil rate of duty. The assessee had procured raw rice, dehydrated vegetables and spices and mixed them to arrive at different flavours. [*Satnam Overseas Ltd.* v. *Commissioner* - CA No. 8958/2003, decided on 18-3-2015]

Manufacture – Washing, dyeing, bleaching, hydro-extraction, tumble dyeing and drying: The Supreme Court has held that processes of washing, dyeing, bleaching, hydro-extraction, tumble dyeing and drying of grey fabric in running length would not be covered under Section Note 5(f) or 5(b) of Section XI of Central Excise Tariff. The Court in this regard noted that no new item came into existence after the said processes by the job worker and that it was only after these goods were sent to another jobworker for cutting, sewing and hamming that a new product came into existence. [*Commissioner* v. *S. Kumar Ltd.* – C.A. Nos. 8188-8189/2003, decided on 13-4-2015]

Demand – Extended period – Invocability when CBEC Circular providing clarification issued subsequently: The Supreme Court has dismissed department's appeal for invocation of extended period for demand of duty in a case where the assessee, during the period from April 1994 to September 1996 was not including certain costs in the cost of production

of captively consumed goods. The Court noted that it was for the first time that in October 1996, CBEC has by circular dated 30-10-1996 clarified that cost of material, labour cost and overheads including administrative cost, advertising expenses, depreciation, interest, etc., would be included in the cost of production. It was hence held that intentional mis-declaration was absent. [*Commissioner* v. *Asarwa Mills* – C.A. Nos. 5007-5024/2004 with C.A. Nos. 6032-6036/2004, decided on 10-4-2015]

MODVAT credit admissible on railway track material used for material handling: The Supreme Court of India has allowed MODVAT credit on railway track material used for handling raw materials and processed goods. Railway tracks were used for transporting of hot metal in ladle from blast furnace to pig (iron) casting machine where hot metal was poured. The Court in this regard held that the use of railway tracks was related to the actual production of goods and that without use of the said railways tracks, commercial production would be inexpedient. Considering the definition of 'capital goods' under Rule 57Q as prevalent then, the Court was of the view that when machines, machinery, plants, equipment, etc., were used for producing or processing any goods or bringing about any change in any substance for the manufacture of final product, the said goods would qualify as capital goods and be eligible for credit. [*Jayaswal Neco Ltd.* v. *Commissioner* - Civil Appeal No. 8554/2003, decided on 13-3-2015]

Valuation – Related person – Job worker when not dummy: The Supreme Court has upheld the order of the CESTAT which had rejected the contentions of the department that assessee's job worker was a dummy created and nurtured with the single motive of reduction of cost by bifurcation. The Court in this regard observed that the goods were supplied by the job worker to the assessee at the rates similar to the rates at which other companies were supplying and hence there was absence of any benefit to the principal-respondent on the basis of the alleged relationship. The Apex Court relied on its earlier order in the case of *Detergent India*, for this purpose. [*Commissioner* v. *Boron International Ltd.* – C.A. Nos. 9571-9578/2003, decided on 10-4-2015]

Area based exemption not deniable when TED refund allegedly taken wrongly: CESTAT New Delhi has held that area based exemption under Notification No. 56/2002-C.E., cannot be denied in a case where the goods from a unit present in Jammu (falling under area based exemption) are cleared to a unit against invalidated EPCG licence and Terminal Excise Duty (TED) refund is claimed. The Tribunal in this regard observed that claiming TED refund from DGFT is a matter between the assessee and the DGFT and on this ground it would not be correct to deny benefit of Notification No. 56/2002-C.E., moreso when all conditions of the said notification stood satisfied. [*Commissioner* v. *Meera & Company* – 2015 (319) ELT 97 (Tri.-Del.)]

Vacuum and gas filled bulbs for automobiles, sold to industrial consumers – Classification of: The Supreme Court of India has upheld the classification of vacuum and gas filled bulbs for automobiles, sold to industrial consumers, under sub-heading 8539 10 of Central

Excise Tariff. Sub-heading 8539.10 read as "Vacuum and gas filled bulbs of retail sale price not exceeding Rs. 20 per bulb" and hence according to the department only goods that are assessed under Section 4A of the Central Excise Act, 1944 would be classifiable under sub-heading 8539.10. Noting that under Rule 34 of the Standards of Weights and Measures (Packaged Commodity) Rules, 1977 said goods were exempt from affixing of RSP, the Court in this regard held that Section 4A in its wholesome form would not be applied. [*Commissioner* v. *Alwar Lamps Pvt. Ltd.* - CA No. 4035/2004 along with CA Nos. 4910-4914/2004 and 6043-6044/2004, decided on 6-4-2015]

SERVICE TAX

Ratio decidendi

No mandatory pre-deposit when appeal filed after 2014 amendment but dispute arose before amendment: The assessee, engaged in the business of manufacturing and trading of electronic goods, had mistakenly availed ineligible credit on input services which was reversed on being informed about the ineligibility. However, on the ground that the petitioner had not maintained separate books of accounts for the credit availed, the department had demanded duty along with equal penalty. The issue for consideration was whether the assessee was required to make pre-deposit of amount of 7.5% of the tax confirmed as a condition for pursuing the appellate remedy before the Tribunal. It was held by the High Court that since the *lis* commenced in 2013, the assessee is not be required to deposit the amount of 7.5%, as required pursuant to the 2014 amendment and that the law as applicable on the date of institution of the suit would govern the entire career of the suit. The Court held that appeal in this case can be filed in the Tribunal, together with an application for waiver of pre-deposit and stay of recovery of the amounts confirmed. [*Keltron II Business Group* v. *UOI*, 2015-TIOL-1009-HC-Kerala]

In another decision on mandatory pre-deposit, the Bangalore Bench of CESTAT held that since the proviso to Section 35F of Central Excise Act (as amended) excluded only stay applications and appeals pending prior to 16-8-2014, mandatory pre-deposit provisions would apply to appeals filed on or after the said date. [*Exora Business Parks* v. *CST*, 2015 (38) S.T.R. 480 (Tri.-Bang.)]

Custody of goods and instructions on delivery – Essentials of C&F service: The appellant-assessee was providing certain services to a cement manufacturer, as an agent. The assessee was required to undertake the activities of following up on allotment of coal rakes from the railways, expediting and supervising the loading of coal, checking samples and complying with formalities with regard to payment of railway freight. It was alleged by the department that service tax was payable on the aforesaid services under the head of clearing and forwarding agent services. Observing that the appellant had no

role in getting coal cleared in as much as the movement of coal was as per contract between the coal company and cement manufacturer, did not undertake loading or unloading of goods, custody was not taken by the appellant and there was no legal detention from which the goods were to be freed, the Supreme Court held that activities carried out by the appellant were in nature of liaisoning and supervising and were not taxable under Clearing and Forwarding Agent service. [*Coal Handlers Pvt. Ltd* v. *CCE*, 2015-TIOL-101-SC]

Refund when export invoice not indicating export of specified services: Opining that insisting on exact description of service in export invoice is an incorrect appreciation of facts, when the assessee is a registered service provider under the HTP and STP of the Central Government, the Tribunal held that assessee should be granted refund of unutilised Cenvat credit as sought by it. The department contended that though invoice was raised and earning received in foreign exchange the description in the invoice did not match with the services BAS and ITSS which the assessee claimed to have exported. However, the Tribunal stated that when services did not fall under the exclusionary clause and there was no dispute as to exports, refund should be granted. [*Capgemini India Pvt. Ltd* v. *CST*, Appeal no. ST/509/10-Mum, Order dated 9-4-2015, CESTAT, Mumbai]

Delay in claim due to delayed grant of approval by competent authority, not fatal: Examining the claim for refund under Notification No. 17/2011-ST, the Tribunal held that since the asssessee had duly applied for approval for input services prior to export, mere delay in approval by the prescribed authority cannot take away the vested right of the asssessee. Thus, the assessee was held as entitled to refund and the department's argument that the approval could operate only prospectively was rejected as not having force. [*Trizetto India Pvt. Ltd.* v. *CCE*, Appeal No. ST/88953/2013, Order dated 16-3-2015, CESTAT, Mumbai]

No service tax on reimbursement of postage: Observing that postage is in the nature of duty/tax and that service tax cannot be levied on amount charged as tax, the Tribunal held that service tax cannot be levied on amounts collected towards reimbursement of postal charges incurred by the service provider. It reiterated that tax cannot form part of consideration for a service and postal charges are in nature of duty payable for transmission of an article. [*Link Intime India Pvt. Ltd.* v. *CCE*, Appeal No.ST/14/2012, Order dated 24-2-2015, CESTAT, Mumbai]

Refund claim for service received in SEZ filed after merger with DTA unit, admissible: The department denied refund of tax paid on services availed by SEZ unit, which had later merged with the DTA unit. The Tribunal held that the merged unit could seek refund of the tax paid for services used for export of goods and it cannot be asked to fulfil conditions of Notification No.9/2009-ST., dated 3-3-2009 which it did not claim. After merger, the unit had become the rightful claimant of the services availed by the SEZ unit. [*Essar Steel India Ltd.* v. *CCE & ST*, Order No. A/10310/2015 dated 10-4-2015, CESTAT, Ahmedabad]

Cenvat credit on services used to maintain currency chest for providing banking service, admissible: Reasoning that currency chest service was not an exempted service since it was neither shown as taxable nor any specified service recipient identified to show it as an output service, the Tribunal held that Cenvat credit would be admissible on input services like security and rent-a-cab used to maintain currency chest. The assessee supported his case stating that currency chest services were was used to provide banking and financial services. The department had argued that the service was not taxable and services used to provide exempted service would not fall within the ambit of input services. [*Bank of India* v. *CCE,* Order Nos. 50398-50399/2015 dated 13-2-2015, CESTAT, Delhi]

Refund on services like ocean freight and on-carriage availed by exporter of goods, admissible: Cenvat credit was denied on services like ocean freight, terminal handling charges, on-carriage, etc., availed by the exporter on the ground that the services had been availed outside India. The Tribunal held that the goods were required to be delivered outside India, ownership of goods was with the exporter and the said charges formed part of selling price, the exporter could take credit of tax paid on the impugned services. [*Polyplex Corporation Ltd.* v. *CCE*, Order No. 50336/2015 dated 5-2-2015, CESTAT, Delhi]

Refund of service tax paid under wrong code: The petitioner sought refund of service tax paid under a wrong code, erroneously. Finding that the petitioner had also subsequently paid the tax along with interest and then sought refund, the High Court held that refund should be granted to the petitioner. [*Sundaram Industries Ltd* v. *Dept Of Central Excise*, 2015-TIOL-1216-HC-MAD-ST]

Assessee not disputing tax liability can approach Settlement Commission: Noting that the disputed amount of tax had been paid along with interest the High Court held that the assessee ought to permitted to approach the Settlement Commission. The department had rejected the request stating that the petitioner had invited the assessment order and could not approach the Settlement Commission. [*Thirumurugan Enterprises* v. *Addl. CCE,* 2015-TIOL-1201-HC-MAD-ST]

No coercive steps for recovery when liability not determined: Quashing the communication from the department regarding coercive steps for recovery, the High Court agreed with the contention of the petitioner that without there being any adjudication in any of the proceedings as provided under the Finance Act, 1994, coercive steps cannot be taken by the department for recovery of service tax or penalty or interest. The petitioner-assessee had paid service tax under protest and also filed returns for the period under dispute. But the department had not adjudicated the liability of the assessee and not issued any show cause notice but sought to recover the interest by coercive means. The High Court observed that provisions of Section 72 and Section 73 of Finance Act, 1994, involve complete adjudicatory process and legislature has taken care to ensure that before the assessment is made and the amount payable is determined,

the assessee is given complete opportunity of either being heard or represented. [*ICICI Bank* v. *UOI* , 2015-TIOL-1164-HC-MUM-ST]

No unjust enrichment when Cenvat credit account corrected by way of credit: Unconvinced by the ground of unjust enrichment which was put forth by the department to deny refund of service tax erroneously paid, subsequently corrected by restoring the balance in Cenvat account, the Tribunal held that the assessee could claim refund. On being advised that it was ineligible for Cenvat credit used, the assessee had paid the tax in cash but later realising that the service amounted to export of services, it reversed the debit to Cenvat account and applied for refund of tax paid. On facts, it was proved that incidence of service tax had not been passed on. The Tribunal also held that the application made within a year of payment of tax was within the period of limitation. [*Kirloskar Ebara Pumps Ltd.* v. *CCE*, 2015 (38) S.T.R. 488 (Tri.-Mumbai)

Charges paid during importation for sale on principal to principal basis not covered under BAS: At issue was the payment of handling and facilitation charges paid by the assessee for import of goods sold on high sea sale basis. The department contended that since agreement for sale preceded importation, the charges for procurement of goods were exigible to service tax under BAS. The Tribunal held that sale being on principal to principal basis, goods had been imported by the appellant-assessee on its own account and would not constitute BAS. Moreover, the charges also formed part of the sale price of goods. [*Indian Oil corporation* v. *CCE*, 2015 (38) S.T.R. 501 (Tri.-Mumbai)

Cleaning services have nexus with manufacture – Cenvat credit admissible: Clearing the doubts on admissibility of Cenvat credit on house-keeping services used for cleaning, maintenance of garden, trees, etc., to control pollution, the Tribunal held that the services were input services in relation to manufacture (as per relevant law) and credit was admissible. [*CCE* v. *Maruti Suzuki India Ltd*, 2015 (38) S.T.R. 503 (Tri.- Del.)]

Financial advisory service when input for manufacturing activity: The assessee argued that financing is necessary for carrying out manufacturing operations and financial advisory services were therefore input services and it could take credit of service tax paid on banking and financial services availed to sell certain shares. Upholding the order of the lower authorities, the Tribunal held that since share registry and accounting were covered under input service, the assessee could avail credit of the same. [*CCE & ST* v. *GMR Industries Ltd.*, 2015 (38) S.T.R.509 (Tri.-Bang.)]

Jurisdiction to claim refund for export of goods: The jurisdiction for claiming refund of service tax paid (in this case on cargo handling and CHA charges for export of goods) is based on the place of manufacture or warehouse. The Tribunal held that in the instant case where the assessee manufactured the goods at Akola but documents relating to export were prepared at the registered office in Indore, the jurisdiction to file refund was held to be Nagpur within whose jurisdiction manufacturing had taken place. [*CCE & Cus.* v. *Noble Grains India*, 2015 (38) S.T.R. 525 (Tri.-Mumbai)]

VALUE ADDED TAX (VAT)

Statute & Notification

Punjab VAT Act as extended to the Union Territory of Chandigarh - Amendment in Schedule E: Schedule E of Chandigarh VAT Act has been amended by Notification No. E&T-ETO (Ref.)-2015/991, dated 17-4-2015, (effective from 18-4-2015) to insert Serial Nos. 9 and 10 for batteries and mobiles. While batteries will attract VAT at the rate of 14.30%, mobiles would attract VAT at the rate of 9.35% with effect from 18-4-2015.

Kerala VAT Act – Amendments relating to 'multi-level marketing': Following amendments have been made under the Kerala Value Added Tax Act, 2003 by 'The Kerala Finance Bill, 2015' (Bill No. 345) with respect to "multi-level marketing":

- Under Section 2 of KVAT Act, new clause (xxviiA) is inserted defining multi-level marketing to mean marketing and sale of goods of a multi-level marketing entity through direct sellers or through direct sellers and distributors, otherwise than through shops, to the customers or consumers, generally in their houses or at their workplace or through demonstration of such goods at a particular place or by mail order sale.
- New clause (xxviiB) is also inserted to define 'multi-level marketing entity' as a company registered under the Companies Act, 2013 or any partnership firm registered under the Partnership Act, 1932 or under the Limited Liability Partnership Act, 2008 engaged in multi level marketing.
- Under Section 6 of the KVAT Act which provides for levy of tax on sale or purchase of goods, after the words 'any autonomous body' in sub-section (1) of Section 6, *"multi-level marketing entity, their distributor and/or agent engaged in multi level marketing"* has been inserted. Thus, multi-level marketing entity, their distributor/agent is liable to pay tax under Section 6 of the KVAT Act.
- Under Section 15(2) of the KVAT Act which provides for registration of dealers, new clause (xii) is inserted to cover *"multi-level marketing entity, their distributor and/or agent engaged in multi level marketing."* Thus, multi-level marketing entity or their distributor/agent is liable to take registration under Section 15(2) of the KVAT Act.

Ratio decidendi

Supply and installation of water chilling plant covered under fabrication and installation of plant and machinery: The Supreme Court of India has held that the transaction of fabrication, supply and installation of water chilling plants would fall under Entry 5 of Schedule II-A of the Gujarat Sales Tax Act, 1969 covering *"Fabrication and installation of plant and machinery"* chargeable to tax at the rate of 5%, under the composition scheme and not under Entry 2 covering *"Installation of air conditioners and A.C. coolers"* chargeable to tax at the rate of 15%. Taking note of the fact that the work involved design and fabrication, as specific lay-out details, foundation drawing and other necessary information required for erection of

the plant was supplied to the customer, the Court held that exercise as a whole contemplated by the work order was neither intended nor can be reduced to mere installation of the finally emerging apparatus, as the work order did not refer to any readymade or instantly available devices.

The Court delved into the dictionary meaning of the term "fabrication" and concluded that fabrication cannot be construed to be synonymous to installation. Further, interpreting the notification issued under Section 55A which provided for a scheme of composition under the Act, the Court remarked that no construction to legislation ought to be provided so as to render a part of it otiose or redundant. It was held that to exclude the work of fabrication from the work order placed by the customer would render the works contract involved in the transaction truncated to a form not desired by the customer. [*Voltas Ltd.* v. *State of Gujarat* - 2015-VIL-23-SC]

Hiring of cranes – Transfer of right to use: High Court of Bombay has held that the assessee in the case before it and carrying on the business of hiring of cranes, did not qualify to be a "dealer" under the "Maharashtra Sales Tax on the Transfer of Right to Use Any Goods for Any Purpose Act, 1985" and hence not liable to pay tax. Referring to the definition of the term "dealer" and "sale" under the Act, it was observed that for a person to come within the definition of "dealer" he is required to transfer the right to use any goods for any purpose. The High Court upon perusal of the terms and conditions of the contract derived that the driver, cleaner, diesel and oil were to be provided by the respondent; the transportation of accessories was to be done by the respondent; absence of provision in contract that the legal consequences such as permissions or licenses were to be transferred to the transferee; and that the ultimate control over the goods was with the assessee. Relying on judgment of the Supreme Court in the case of *Bharat Sanchar Nigam Ltd.* [2006-VIL-07-SC-LB] which laid down attributes for a transaction to constitute transfer of right to use goods, it was held that the assessee was not a "dealer" within the meaning of the term as defined under Section 2(4) of the Act and that the transaction was outside the purview of the definition of sale under Section 2(10) of the Act. [*Commissioner of Sales Tax, Maharashtra* v. *General Cranes* - 2015-VIL-181-BOM]

VAT on developers as works contractors under Haryana VAT Act: Constitutional validity of various provisions of Haryana Value Added Tax Act, 2003 and Haryana Value Added Tax Rules, 2003 were challenged by developers in Haryana. These writ petitions were filed mainly on two grounds -

- There is no mechanism for deduction of the value of land and other expenses related to land from the turnover of the developers.
- The turnover of the sub-contractor cannot be added to the turnover of the contractor/ developer.

While upholding the validity of the provisions, the High Court has held that Section 9 read with Rule 49 is optional in nature and dealer is not under any obligation to subscribe to this scheme, therefore if value of land is included for

payment of lumpsum under Rule 49, the same is not illegal or unconstitutional. Further, Rule 25(2) of the HVAT Rules has been read down to hold that VAT is to be paid only on the value of goods at the time of incorporation and does not purport to tax transfer of immovable property. The validity of Explanation (i) to Section 2(1)(zg) of the HVAT Act and Rule 25(2) of the HVAT Rules, Section 42(1) and (2) and Section 9 read with Rule 49 was upheld. Petitioners were given liberty to agitate the issue of refund of stamp duty before the appropriate authority. [*CHD Developers Limited* v. *State of Haryana* - 2015-VIL-173-P&H]

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

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

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

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

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

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

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

PUNE
607-609, Nucleus, 1 Church Road,
Camp, Pune – 411 001
Maharashtra
E-mail : lspune@lakshmisri.com

KOLKATA
2ND Floor, Kanak Building
41, Chowringhee Road
Kolkatta-700071
Phone : +91-33-40051 5570
E-mail : lskolkata@lakshmisri.com

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

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

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