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Service PEs – Employing the right structure

By **R. Subhashree**

The more you explain, the less clear things appear to be. This statement could apply to a host of things including service PEs. Echoing, perhaps, the modern marketing techniques where the ambassador becomes the brand, the concept of service PE is that the employees of an entity could well constitute a permanent establishment as opposed to the general perception of an establishment being a place, a fixed location which is accessible. Interestingly, the number of such personnel is not important as even two persons on deputation can constitute a PE. Once PE is established the (host) state gets jurisdiction to tax income accruing to the overseas entity as per applicable provisions, be it DTAA, domestic tax etc.

In the recent case of *JCB Bamford* (ITA No. 540/Del/2011) Delhi ITAT examined the following to determine existence of a service PE:

- There must be furnishing of services, including managerial services
- The services should not be taxable as royalty or FTS
- Be rendered by employees of the overseas (other State) entity to the entity in India
- The services should have been rendered in India
- Threshold of period of stay of 90 days or more should be satisfied

A snapshot of some cases which have dealt with Service PE and shaped our understanding is given below. Most cases refer to the *Director of India Tax (International Taxation)* v. *Morgan Stanley and Company Inc.* [(2007)292 ITR 416 (SC)] to examine nature of service provided as managerial or mere stewardship activities and whether by mere deputation the deputationists will become employees of the entity to which they are deputed.

	JCB Bamford – Service PE upheld	Tekmark – Not service PE	Verizon (AAR ruling) – Service PE
Control and supervision	On facts control with parent in UK.	Was with Indian entity	With Indian entity as per contract but employees' lien on overseas parent continues.
Issue of employee cards, deduction of TDS	Not determinative of employer employee relationship.		Not determinative
Nature of services	Managerial services	Not specified - personnel to work under direction of Indian entity. American company selected and offered personnel to work.	Managerial services

	JCB Bamford – Service PE upheld	Tekmark – Not service PE	Verizon (AAR ruling) – Service PE
Terms of contract	Deputationists continued to be employees of parent. No letter of appointment issued by Indian subsidiary.	Indian company has right to remove personnel from employment.	Employees of affiliate of parent deputed. Affiliate has powers to replace the deputed employees.
Duration	Threshold of 90 days satisfied.	Threshold of 90 days satisfied.	
Payment	Directed to be apportioned where effectively connected with PE, and taxed as business profits.	Actual cost reimbursed.	Reimbursement not limited to salary alone, other components exist. Payment made net of taxes, borne by Indian entity.

A factor which need to be kept in mind while structuring the business or finalising the terms of contract is that the arrangement must not only be cost effective, it must also be effort effective. For instance, if PE is established records and other documentary compliances will follow. The same transaction could attract multiple tax laws. Irrespective of whether a PE exists or not, liability under service tax would be attracted when services are received from the foreign entity by the Indian arm unless the personnel deputed become 'employees' of the Indian arm. In particular, post negative list, establishments in taxable and non-taxable territories are treated as separate entities and the arguments like self-service may not be attractive.

Employer

The term employer is not defined in the Income-tax Act, 1961, but a definition was attempted in the earlier DTC Bill 2010. It reads employer *means a person who controls an individual under an express or implied contract of employment and is obliged to compensate him by way of salary*. However this does not find a place in the 2013 version. The term employer can be understood in common parlance as a person who is offered certain services on agreed terms and compensates the provider of such service by way of salary or wages.

Supervision and control

Supervision and control had been tested on a host of grounds including,

- designation – '*To say that the Managing Director of a company is under the control and supervision of the company is nothing more than use of an expression*' in *Verizon* to hold that control is with the entity deputing the personnel
- right to dismiss
- disciplinary action – In *JCB Bamford* , complaints being handled by global HR head implied that the Indian entity had no control

It is thus, not sufficient to merely state that the persons deputed will be under control and supervision of entity in other State (India).

Service not taxable as royalty or FTS

In *JCB Bamford* the entire consideration for grant of licence, technical assistance, inspection and managerial services was offered to tax as royalty. After the finding of service PE, the income 'effectively connected' with the PE alone was to be determined and taxed as business profits. This is also an area for caution since royalty itself is subject to myriad interpretations and even if a payment does not fall under the category of royalty, it could find its way to 'business profits' and attract a higher rate of tax.

Bearing the burden of tax

An argument put forth in *Verizon* was that tax was already deducted from the salary paid and the actual amount was reimbursed to the overseas entity and further subjecting the same to tax as business profits would amount to double taxation. However, it was opined that salary and payment to the employer arise from different sources and bear different character. Also, the tax was to be borne by the Indian entity (licensee in *JCB Bamford*, and subsidiary in *Verizon*) and hence the overseas entity had recovered an additional amount.

Thus, establishing that there is no PE is not simply a matter of keeping the period of stay in India within threshold limits and laying down terms in the contract that control and supervision has passed from the deputing company to the Indian entity. In case of associated enterprises, the threshold is much less and again not only employees but other personnel rendering services could also lead to creation of PE. An entity must also bear in mind the overall cost in terms of its own tax burden under different laws.

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CENTRAL EXCISE

Notifications

Evasion deterrence – Chief Commissioner empowered to withdraw facilities or impose restrictions: Chief Commissioner of Central Excise has been given power to order withdrawal of certain facilities or impose certain restrictions where the manufacturer, dealer or exporter is found *prima facie* to be involved in certain offences as specified in Notification No. 16/2004-C.E. (N.T.), dated 21-3-2014. This notification has been issued in supersession of earlier Notification No. 5/2012-C.E. (N.T.) where officer authorized by the Central Board of Excise and Customs had power to pass such orders. Further, Notification No. 6/2012-C.E. (N.T.) authorizing Member (Central Excise), CBEC to issue such orders, has been rescinded. Rule 12AAA of Cenvat Credit Rules, 2004 and Rule 12CCC of Central Excise Rules, 2002 have also been amended in this regard by Notification Nos. 15 and 14/2014-C.E. (N.T.) respectively. Notification No. 16/2014-C.E. (N.T.) also provides for time period for which the restrictions would be effective. As per *Explanation* to Para 2(1) of the notification, period of imposition of restrictions may not be more than 6 months if specified offence is

committed for the first time but if the offence is committed subsequently, restrictions shall be for period upto one year.

Ratio decidendi

Refund – Unjust enrichment when not applicable: Allahabad High Court has held that incidence of duty cannot be said to have been passed by the assessee in case where MRP of the product has not changed during the relevant period, accounts showed that amount was recoverable from the department and duty was paid under protest. Dismissing the appeal filed by the department, the court relied on its earlier order in the case of *U.T. Ltd.* while distinguishing the Apex Court ruling in the case of *Solar Pesticides*. The duty was earlier paid under protest, not agreeing with the department's view on classification of "Gulabari". [*Commissioner* v. *Dabur India Ltd.* – Order dated 13-3-2014 in Central Excise Appeal No. 283 of 2008, Allahabad High Court]

The Supreme Court in a different case decided recently held that there would be no unjust enrichment where assessee was always asserting classification of the product under a particular heading, under which the classification was finally settled, though duty was paid under different heading on departmental directions. The court in this regard noted that no recovery was made by the assessee from its customers under the heading (not found suitable) and hence there was no question of having recovered excess amount. [*Commissioner* v. *Madura Coats Ltd.* – Order dated 12-2-2014 in Civil Appeal No. 7862 of 2009, Supreme Court]

Valuation – Rule 10A applicable only when inputs/goods predominantly supplied free of charge: Rule 10A of the Central Excise Valuation (Determination of Price of Goods) Rules, 2000 (on job work valuation) is not applicable in all situations where price is not the sole consideration. CESTAT, Ahmedabad has held that the said rule would be applicable only when inputs/goods are predominantly supplied free of charge to manufacturer of goods and that if some inputs alone are supplied free, the situation is covered under Section 4(1)(b) of Central Excise Act, 1944 read with Rule 6. The department argued that valuation shall be made under Rule 10A owing to presence of facts like approval of raw material supplier, price negotiation, advance for payment to vendors and some moulds and assembly lines being made available/done by brand name owner and price not being the sole consideration. The Tribunal, considering various clauses of agreements on fixed charges, mould amortisation, acceptance of order, credit time, however held that transactions pertained to sale and not job work on raw material supplied by brand name owner. It was also held that activities like monitoring and supervision of manufacturing activities was part of professional and commercial approach to sustain business, profitability and quality and that department's interpretation that Rule 10A would be applicable in all situations where buyer supplies inputs, will make Rule 6 redundant. Apex Court decision in *Fiat India* was found not applicable in the present case. [*Ravi Kiran Plastics Pvt. Limited* v. *Commissioner* – Order E/10112-10121/2014, dated 3-2-2014, CESTAT, Ahmedabad]

No penalty when excess credit taken inadvertently: Penalty imposed for excess availment of credit, taken inadvertently by the clerical staff reading numerical '3' as '8', has been set aside by CESTAT, Delhi. The Tribunal in this regard observed that to err is human and no malafide could be attributed to the assessee in the said mistake so as to impose penalty. [*Magnum Steels Ltd.* v. *Commissioner* – Final Order A51145/2014-(SM), dated 13-3-2014, CESTAT, Delhi]

Valuation – Advertisement expenses, transit insurance collected in excess and interest paid for bill discounting: Advertisement expenses incurred by dealer and partly reimbursed by the manufacturer; difference between transit insurance recovered from buyer and what was paid; and interest paid to financial institutions for discounting of bills are not includible in assessable value for payment of Central Excise duty. Advertisement expenses were held as not includible by the Tribunal observing that the cost incurred at dealer's option was not a routine expenditure and hence would not form part of cost of manufacture. Excess of insurance amount collected from the buyer was held as not includible observing that excess collection is beyond the scope of Central Excise Act, 1944. In respect of interest paid for bill discounting, the Tribunal agreed with assessee's proposition noting that addition of interest paid on bill discounting would result in anomaly and arbitrary taxation. [*Yamuna Motors India Pvt. Ltd.* v. *Commissioner* – 2014 (301) ELT 524 (Tri. – Del.)]

Suo motu re-credit of Cenvat credit reversed earlier, permissible: CESTAT, Ahmedabad has held re-credit of Cenvat credit, earlier reversed in order to claim refund of Terminal Excise Duty (TED), was permissible when the refund claim was subsequently withdrawn. Holding that there would be no unjust enrichment inasmuch as the case was not one of refund of excess paid duty, the Tribunal while allowing assessee's appeal, noted that the issue was covered in their favour in cases of *Sopariwala Exports* and *Motorola India*. It was also noted that there was no allegation that credit was taken contrary to the provisions. Reliance placed by department on *Mafatlal Industries* and *BDH Industries* was found not correct by the Tribunal here. [*STI Industries* v. *Commissioner* – Final Order No. A/10097/2014, dated 10-1-2014, CESTAT, Ahmedabad]

Refund – Requirement of pre-audit only procedural: CESTAT, Delhi has set aside Commissioner's (Appeal) Order denying refund on the sole ground that the refund was not pre-audited. The Tribunal in this regard held that in the absence of any dispute about the admissibility of refund, procedure of pre-audit prescribed by CBEC Circular No. 809/6/2005-CX, dated 1-3-2005, cannot act prejudicially to the interest of the assessee. Noting that such pre-audit, required to be done by department, was not a requirement in law, the Tribunal allowed assessee's appeal while also relying on Bombay High Court judgment in the case of *Bombay Chemicals Ltd.* [*Shyam Detergents* v. *Commissioner* – Final Order No. 51283/2014, dated 25-3-2014, CESTAT Delhi]

No penalty for non-submission of ARE-1: Bombay High Court has set aside demand and penalty on goods exported in a case involving non-submission of original or duplicate copy (Customs endorsed) of ARE-1. It was held that insistence on production of such document, terming it as a primary necessity was not supported by law. It was noted that adequate proof of exports existed inasmuch as commercial invoice, copy of bill of lading, copy of shipping bill and triplicate copy of ARE-1 and duplicate copy of AR-1 were with the department. Earlier decisions of the court in *UM Cables Ltd.* and *Aarti Industries Ltd.* (dealing with question of rebate) were also relied upon in this regard. [*Kaizen Plastomould Pvt. Ltd.* v. *Union of India* – Order dated 3-3-2014 in Writ Petition No. 152 of 2014, Bombay High Court].

Job work – Benefit under Notification No. 214/86-C.E. when leftover inputs/scrap purchased by job worker: Obligation under Notification No. 214/86-C.E. is discharged when the job worker purchases from the principal, inputs initially sent by the principal but leftover after processing of goods by the job worker. Commissioner (Appeals) in the impugned order had held that the left over inputs or scrap was required to be returned to the principal for fulfillment of conditions of said notification. The Tribunal in this regard also noted that no contrary judicial pronouncement, covering the issue, was brought before it. [*Dynamic Dish India Ltd.* v. *Commissioner* – 2014 (301) ELT 578 (Tri. – Bang.)]

Transfer of Cenvat credit when inputs/ capital goods not shifted to new site: CESTAT, Mumbai has granted stay and waived pre-deposit in a case involving transfer of Cenvat credit, on shifting of factory from one place to another, when inputs or capital goods were not shifted. It was noted that Rule 10 of Cenvat Credit Rules, 2004 nowhere stipulates that the credit that can be transferred should be attributable to inputs or capital goods that are transferred. Tribunal's earlier decision in the case of *Ispat Industries Ltd.* and Madras High Court decision in the case of *Commissioner* v. *CESTAT* was relied by the Tribunal in this regard. [*Kirloskar Oil Engines Ltd.* v. *Commissioner* – 2014-TIOL-489-CESTAT-Mum]

CUSTOMS

Notification & Public Notice

Online system for EODC/Redemption for AA/DFIA notified: The DGFT has notified the procedure for online application for EODC/ redemption under Advance Authorisation and DFIA scheme from 1-6-2014. As of now, online application would be required to be filed for EDI shipping bills. According to Public Notice No. 55(RE-2013/2009-2014), dated 14-3-2014 issued in this regard, in respect of non-EDI shipping bills and deemed export supplies, applications are to be made in manual mode till requisite changes are made.

Rate of duty on imports under India-Japan CEPA reduced: Notification No. 69/2011-Cus., dated 29-7-2011 has been amended to reduce the rate of Customs duty on various

products listed in the table annexed thereto. Notification No. 9/2014-Cus., dated 1-4-2014 issued in this regard substitutes the table in the basic notification.

Ratio decidendi

EPCG - Extension of time by DGFT for installation to be accepted by Customs: CESTAT, Bangalore has held that export obligation is also postponed if DGFT extends time for installation of the equipment. Contention of department that Customs was empowered to take action even when DGFT has granted time for installation was rejected by the Tribunal holding the demand to be premature as it remanded the matter with the direction to proceed if installation is not done within extended period. It was held that extension of time for fulfillment of export obligation by DGFT is to be invariably accepted by Customs. The Tribunal in this regard also noted that Customs representative was also present in EPCG Committee meeting when time was granted for installation. [*Berkeley Infraprojects* v. *Commissioner* – Final Order No. 20399/2014, dated 25-3-2014, CESTAT, Bangalore]

Appeal maintainable before DGFT against rejection of TED refund: Delhi High Court has allowed writ petition against DGFT Order refusing to entertain appeals against order rejecting TED refund. The court was of the view that the scope of Section 15(1) of the Foreign Trade (Development and Regulation) Act, 1992 was wide and that the assessee whose application for refund of terminal excise duty was rejected, was certainly the aggrieved person. After finding the appeal to be maintainable, the court directed DGFT to decide appeal expeditiously. [*Motherson Sumi Electric Wires* v. *Union of India* – 2014 TIOL-417-HC-DEL-EXIM]

Valuation – Serviceable goods not usable as such, are scrap: If the goods are serviceable but cannot be used as such then they are to be treated as scrap according to CESTAT, Mumbai. Punjab & Haryana High Court's Order in the case of *Patiala Castings* and CBEC Circular dated 12-5-2000 were relied by the Appellate Tribunal to dismiss department's appeal. Earlier examination report by one agency had held 50% of the goods to be serviceable scrap while another agency was of the view that the goods constituted high speed steel tools scrap only. Relying on an observation in the impugned order that the goods (bits used in rigs) were damaged and broken, it was held that they could not be used as such. [*Commissioner* v. *Bobsons Corporation* – 2014 (301) ELT 423 (Tri. – Mumbai)]

No confiscation and penalty for non-possession of IEC: Confiscation of goods and penalty imposed on the exporter for non-possession of Importer Exporter Code (IEC) has been set aside by CESTAT after it noted that penalty was imposed prior to filing of shipping bill and that he was allowed to file manual shipping bill. Observing that there was no export or even attempt to export and that filing of manual shipping bill was allowed by the department, it was held that provisions of law were not contravened. Rejecting the department's appeal, the Tribunal

held that activities subsequent to exporter being allowed to file manual shipping bill were legal. [*Commissioner* v. *Promac Engineering Industries Ltd.* – 2014 (301) ELT 265 (Tri. – Bang)]

Valuation – Sale price of importer, expenses incurred to be considered: CESTAT, Mumbai has held that assessable value is not to be taken on the basis of sale price less specified profit if cost price including the expenses incurred by the importer is available. Allowing assessee's appeal, the Tribunal in this regard, noted that after importing goods, certain expenses (local clearance, logistic cost, insurance, etc.) incurred by the importer are required to be included to arrive at cost price. Earlier the value of goods was enhanced by the department considering exorbitantly higher selling price as compared to value shown in bill of entry. [*IMCD Group B.V. India* v. *Commissioner* – 2014 (301) ELT 259 (Tri. – Mumbai)]

Provisional attachment of property of Director when not valid: Bombay High Court has allowed writ petition in a case involving recovery of penalty by way of provisional attachment of property of Directors. The court in this regard noting that it was incumbent upon authority to satisfy himself and record an opinion, held that communication to the Secretary, Cooperative Housing Society, not to allow property of Directors to be sold, did not answer the requirement of Section 28BA or Section 110 of the Customs Act, 1962. It was held that merely addressing communication and insisting on departmental NOC before transfer of property was not correct. [*Keyur Shah* v. *Union of India* – Order dated 4-3-2014 in W.P. Nos. 11700 and 11702 of 2013, Bombay High Court]

Freezing of bank account is not seizure of goods or document: Delhi High Court has held that freezing of bank account will not amount to seizure of goods liable for confiscation under Section 110(2) of the Customs Act, 1962 or seizure of documents under Section 110(3). The petitioner in this case had approached the court for de-freezing bank accounts as no notice under Section 110 was issued within six months of seizure/freezing. Relying on the case of *Harbans Lal* [1993 3 SCC 656], the court held that the goods must be returned if no show cause notice is issued within six months of seizure, though proceedings for confiscation may survive even if seized goods might have to be returned. In respect of freezing of account it was however held that such freezing will not amount to seizure of 'goods' under Section 110 and thus, there cannot be an unconditional de-freezing of accounts. The petitioner was hence directed to give bank guarantee of the amount credited in the account. [*Ravi Crop Science* v. *Union of India* - 2014-TIOL-213-HC-DEL]

Advance Authorisation - Delay in making application for re-validation, fatal: Madras High Court has held that power under Para 2.13 of Hand Book of Procedures, for revalidation of authorization, cannot be exercised by the Regional Authority beyond the period of six months. It was held that since extension can only be granted for a period of six months starting from date of expiry, Regional Authority cannot extend the validity of the authorization

if the application has been filed beyond this period of six months. The court noted that according to Para 2.9 of Foreign Trade Policy, authorization / permission cannot be claimed as right and that there is no power available under Para 4.23 of Hand Book of Procedures to consider revalidation after six months from date of expiry of original authorisation, where also revalidation was permissible for a maximum period of six months. The court while dismissing the writ petition also held that Para 2.5 of FTP providing for exemption from policy or procedure is not applicable as the same is available only in cases of genuine hardship. [*Madura Coats Private Ltd.* v. *DGFT* – Order dated 28-2-2014 in W.P.(MD) No.18266 of 2013, Madras High Court]

Semi-processed diamonds are classifiable as rough diamonds: Semi-processed diamonds are classifiable under sub-heading 7102.31 of the Customs Tariff Act, 1975 as '*diamonds unworked or simple sawn, cleaved or bruted*' and not under sub-heading 7102.39 as '*polished diamonds, cut or otherwise, worked but not mounted on set*'. Mumbai Bench of CESTAT relied on the expert opinion which described goods as semi-processed diamonds and HSN Explanatory Notes (sub-heading for rough diamonds covering diamonds which have a small number of polished facets) and CBEC Circular 35/2009-Cus., dated 29-12-2009 (covering semi cut diamonds). It was also noted that Kimberly Process Certificate produced by importer also certified the product to be rough diamond. [*S. Rajiv & Co.* v. *Commissioner* - 2014-TIOL-293-CESTAT-MUM]

Appeal to CESTAT not maintainable when adjudicating authority not complied with direction of Appellate Commissioner: Commissioner (appeals) directed the adjudicating authority to pass a speaking order as per Section 17(5) of the Customs Act, 1962 but the same was not passed. The Tribunal while holding that in such case no appeal would lie to Tribunal observed that it cannot control the functioning of the customs officer in a particular Commissionerate and that the assessee should take up the matter with jurisdictional executive Commissioner. [*IG International Pvt. Ltd.* v. *Commissioner* - 2014-TIOL-420-CESTAT-MUM]

SERVICE TAX

Ratio decidendi

VCES – Applicability of bar when issue pending in appeal: The applicant filed declaration under the Voluntary Compliance Encouragement Scheme ('VCES') declaring the service tax liability for the period from 1-4-2012 to 31-12-2012. It was rejected under proviso to Section 106(1) on the ground that a dispute regarding the applicant's eligibility to claim exemption on the said services under notification dated 10-9-2004, which exempted vocational training institutes imparting vocational education and training from payment of service tax, was pending for determination. The court set aside the rejection and held that the said proviso referring to 'any issue' means the issue as to service tax liability

or quantum of liability itself for a particular period must be pending before the Tribunal or tax authorities or should have been determined. As long as in respect of the particular distinct period, the subject matter of declaration or application is not pending or determined, the main part of Section 106 (1) would prevail and declaration would be admissible. [*Frankfinn Aviation Services* v. *Asst. Commissioner* - 2014-TIOL-396-HC-DEL-ST]

Caution deposit – Liability to service tax: While setting aide the demand for payment of service tax and penalty, the Bangalore Bench of CESTAT in the case before it ruled that the impugned amounts collected by the service provider were not service tax. The appellant, engaged in construction of residential apartments, being unsure of the tax liability, collected a certain amount from the buyers and kept it in escrow account. The appellant argued that this was a caution deposit and no amount collected as service tax had been withheld from the government so as to attract Section 73A of the Finance Act, 1994. Since there was no service rendered in respect of which the amount was collected, the amount was held as not 'service tax'. [*Silverline Estates* v. *Commissioner* – 2014-TIOL-458-CESTAT-BANG]

Suo motu re-credit of Cenvat credit of tax paid in cash, valid: Availment of credit suo motu after paying the service tax due in cash was at issue in the instant case. The assessee had debited the Cenvat credit account to discharge liability in respect of GTA service and commission to non-resident agents and on objection by department, the same was paid by cash but credit of the same was availed. The department objected to suo motu credit contending that the assessee ought to have applied for refund. The tribunal, relying on Madras High Court order in ICMC Corporation [*See Tax Amicus – Feb., 2014*] held that the assessee could take credit for which he was eligible initially. [*Ratnamani Metals* v. *Commissioner*, Order dated 7-3-2014 in Appeal No. E/1527/2009-SM, CESTAT, Ahmedabad]

No service tax invoice issued – Bar of unjust enrichment passed: In the instant case, the assessee - builders discharged service tax and later claimed refund when they realised that they were not liable to pay the same. On facts, they had not issued any invoice for the same and furnished a certificate from the buyers that no service tax had been collected from them. Holding that there was not unjust enrichment, the tribunal granted relief to the assessee. [*Vynkatesh Real Estate Developers* v. *Commissioner* – 2014-TIOL-425-CESTAT-MUM]

Unjust enrichment does not arise when service tax paid under by service recipient towards GTA service: The department argued against refund of service tax granted to the assessee, who, by mistake, did not claim exemption under Notification No. 32/2004-ST dated 3-12-2004 in respect of GTA services availed by him. Reasoning that recovery from service provider would not arise when service tax was discharged by the assessee as recipient of GTA service, the argument of

unjust enrichment was dismissed. [*Radicura Pharmaceuticals* v. *Commissioner,* Order dated 13-3-2014 in S.T. Appeal No. 56880/ 2013, CESTAT, Delhi]

GTA – Service recipient liable whether or not consignment note issued by service provider: Non-provision of consignment note does not alter tax liability of recipient of services in respect of GTA service. The tribunal held that a person who pays freight charges is liable to pay service tax and cannot violate the law because the service provider has not complied with law by not issuing consignment note. The assessee sought refund of service tax paid on reverse charge basis in respect of services provided by private truck owners contesting liability in such cases, which was rejected by the department. The Tribunal held that a private truck owner would also be covered under the definition of goods transport agency. [*Coromandel Agro products & Oils* v. *Commissioner*, 2014 (33) S.T.R. 660 (Tri.-Bang)]

Works Contract – Service tax paid at full rate without availing composition scheme, valid: Holding that the department cannot question the discharge of service tax at full rate on gross value of services without opting for composition scheme for works contract, the tribunal declined to accept the argument that Rule 3 of Works Contract Composition Scheme had an overriding effect on the valuation rules as provided in Rule 2A. In the instant case the assessee paid service tax at full rate and availed Cenvat credit on inputs used in the execution of works contract service. The tribunal reiterated that the composition scheme was an option available to the assessee, to be exercised at his discretion. [*S.V. Jiwani* v. *Commissioner,* Order dated 10-3-2014 in Appeal No. E/464/2011-DB, CESTAT, Ahmedabad]

Export of services – Actual recipient of benefit of services relevant: Examining the expression 'use outside India' to determine export of services (during the material period), the tribunal held that in the context of services, receipt, consumption and delivery (place of) are the same. It noted that the foreign entity did not have any branch office in India and all activities were carried out for its benefit. The department contended that place of performance was determinative and since services like logistics etc., could not be said to be delivered or used outside India, export was not satisfied which was not accepted by the tribunal while holding that the activity was covered under export of services. [*GAP International Sourcing* v. *Commissioner,* Order dated 28-2-2014 in Appeal No. ST/819/2008, CESTAT, Delhi]

Employee health insurance premium, gym, hostel facilities – Admissibility of Cenvat credit: Opining that, Cenvat credit would be admissible on health insurance premium only when it pertained to employee and not to his family or others the tribunal remanded the matter with a direction to verify coverage of health insurance premium. Upholding denial of credit by the department, the tribunal agreed that as regards service provider the services in relation to providing gym and hostel facilities are in no way related to the output service. It was held that it was not the case of manufacturer wherein such services may be

covered within his premises and be used in the manufacture of excisable goods. [*Infosys Ltd. v. Commissioner*, Order dated 26-2-2014 in Appeal No. 2045/2011, CESTAT, Bangalore]

Refund of unutilised credit – Calculation when both exempted and taxable services exported: The appellant was engaged in export of services which are dutiable as well exempted. It claimed that for calculating refund of unutilised Cenvat credit under Rule 5 of the Cenvat Credit Rules, 2004, the exempted exported services should be included in the export turnover of services as well as total turnover of services. The Tribunal ruled in favour of the appellant and held that the definition of 'export turnover of services' given in Clause D of Rule 5(1) of the said rules makes no distinction with respect to payments received from export of services and hence, even export of exempted services shall be added to the export turnover of services. The department argued that there being no tax credit on exempted services, it can be included only in total turnover. However, the tribunal found force in the assessee's argument that it did not provide any service in DTA, and no input service tax had been used with respect to services exported to fortify the refund claim of 100% of tax on services exported. [*Quintiles Technologies (India) Ltd* v. *CST* – 2014-TIOL-444-CESTAT-AHM]

Vocational training – Exemption to unrecognized institutes: The respondent was engaged in imparting procedural and practical skill based training in areas such as export import management, retail management and merchandising through courses which are not accredited or certified by any Central or State government or statutory authority. The issue before the court was whether the respondent was covered under vocational training institute as given under Notification No. 24/2004-S.T., and hence eligible for exemption granted under the said notification during the period from July 2003 to September, 2008. The Department contended that the respondent was not eligible for the exemption as the same was granted only to vocational training imparted by institutes such as ITI and State sponsored or recognised educational training institute. The court held that the definition of 'vocational training institute' as provided in the said notification did not require the training institute to be recognized or accredited for availing the exemption and the fact that such a condition was introduced only in 2010 further supported the said view. [*Commissioner* v. *Ashu Exports Pvt. Ltd.* – 2014-TIOL-379-HC-DEL-ST]

Works Contract - Value of free supplies not includible as per applicable law prior to 7-7-2009 - Terms of contract relevant: The tribunal addressed two issues in respect of works contract composition scheme where two separate contracts had been finalised prior to 7-7-2009. Granting relief to the assessee, the tribunal held that value of goods supplied free of cost would not be includible in the gross value. The department contended that delivery was complete / ownership passed only on completion of entire contract post 7-7-2009. But, as per terms of the contract it was shown that title and risk passed at the time of receipt at site. Ruling against artificial bifurcation, the tribunal referring to the terms of the contract,

held that in view of the distinct defects liability clause in the contracts, the supply contract and the construction contract were independent and could not be held as one. Hence, the argument of artificial bifurcation was held as without force. [*Essar Projects (India) Ltd* v. *Commissioner*, 2014 (33) S.T.R. 696 (Tri.-Ahmd)]

VALUE ADDED TAX (VAT)

Notifications & Circulars

Punjab VAT Act amended: Schedules A, B, D and E appended to the Punjab Value Added Tax Act, 2005 have been amended. Notification No. S.O. 23/P.A.8/2005/S.8/2014, dated 25-3-2014, issued in this regard is effective from 1-3-2014. In Schedule E, in S. No. 15, which deals with those commodities which are taxable at the first point of sale i.e. manufacturer's or first importer's stage, the following changes have been made. Corresponding amendments have also been made in Schedule A in respect of S.No. 87, items 6, 8, 9 and 14:

- In item 6, for the word *"jellies"*, the words *"branded snacks and namkeen"* have been substituted.
- In item 8, for the word *"jams"*, the words *"jam, jelly"* have been substituted.
- In item 9, the word "*branded*" has been omitted in respect of snacks.
- In item 14, the words "*Vegetable Oil including gingili oil and bran oil*" have been omitted.
- After item 23, two new entries have been created for vanaspati (hydrogenated vegetable oil) and for cigarette and cigar.

Further, in Schedule B, Entry 126 has been amended to read *"Vegetable oil including gingili and bran oil"* and in Schedule D, the entry with respect to *"cigarette and cigar"* has been omitted. In respect of Appendix A, S. No. 87, item 24 containing *"Vanaspati (Hydrogenated Vegetable Oil)"* has been inserted.

Provisions have also been made for specified items to be tax free at the subsequent stages when the same are packed in retail packing of upto 10 kg provided the tax has been paid at the first point of sale under Schedule E. The said commodities shall be chargeable under Schedule E, when packed in the packing of 10 kg or above, and the taxable persons shall be eligible for input tax credit. The list of specified commodities for the above purpose include processed fruits and vegetables i.e. fruit jam, jelly, pickles, fruit squash, paste, fruit drinks, fruit juice; roasted or fried grams and groundnuts, namkeens and snacks; branded atta, maida, suji and besan; branded cottage cheese (paneer), desi ghee, edible oil and vanaspati.

Further, as per amended provisions certain commodities shall be tax free at the subsequent stages, when packed in retail packaging of upto 1kg provided the tax has been paid at the first point of sale. The products eligible for this purpose include tea, branded spices, turmeric and dry chilies. It may however be noted that said commodities shall be chargeable under Schedule E, when packed in the packing of 1 kg or above, and the taxable persons shall be eligible for input tax credit.

Freight, inclusion of, in FOR destination sales under Rajasthan VAT: Inclusion or otherwise of freight and insurance charges in the sale price in cases of F.O.R. destination sales has been clarified by the Rajasthan Government. Circular No. F.16 (1086)VAT/Tax/CCT/2013/Pt./1716, dated 6-3-2014, issued with respect to Rajasthan VAT Act, 2003 states:

- In case the goods are sold on F.O.R. destination basis and the risk of any loss or damage is to be borne by the selling dealer, any sum charged by dealer in this respect at the time of or before the delivery shall be included in the sale price, even if the freight/transportation charges are mentioned separately in the contract.
- It has also been clarified that Explanation III to the definition of sale price (providing for exclusion of transport and other related expenses) is applicable only in circumstances where sale terminates at the point where the goods are delivered to a carrier or other bailee for transmission and the risk of any loss or damage during the transportation is to be borne by the buyer.

Himachal Pradesh Entry Tax – Exemption widened: Printing material, plates, machinery and ink used for the printing of newspapers have been exempted from entry tax in Himachal Pradesh. Notification No. EXN-F(10)-4/2011-Part-I, dated 1-4-2014, issued for this purpose substitutes Entry 53 of Schedule I to the Himachal Pradesh Tax on Entry of Goods into Local Area Act, 2010 with effect from 1-4-2014. Hitherto, only newsprint used for printing of newspaper enjoyed this benefit under Entry 53 of the Schedule.

Ratio decidendi

Salting and roasting do not change essential nature and use of dry fruits: Delhi High Court has held that 'Roasted Dry Fruits' come under Entry 81 (*kirana* items) of Schedule III of Delhi Value Added Tax Act, 2004 and hence chargeable to tax at the rate of 5% as dry fruits. Noting that salting or roasting does not change quality or essential nature of the article and mere fact that roasted and salted dry fruits can be used as snacks does not detract from their function as dry fruits, the court held that the article does not undergo any manufacturing process so as to transform from the description of 'dry fruits' under Entry 81 of Schedule III. It was hence held that "dry fruits - unprocessed, salted or roasted" have equal claim to be classified as *kirana* items within the said entry. The Department in this case had argued that there was no separate entry for dry fruits except its inclusion as an illustration of *kirana* items, which were day to day necessity items sold by retailers and that dry fruits, when fried or roasted, become snacks or namkeens and no longer remain *kirana* items. [*KBB Nuts Pvt. Ltd.* v. *Commissioner* – Order dated 28-3-2014 in ST. Appl. 5/2014, Delhi High Court]

Glassware not covered under the expression 'type of glass': Supreme Court of India has held that glassware is only a "form of glass" and not a "type of glass". The assessee, in the present case was engaged in the business of manufacture and inter-state sale of glass and glassware made of Opal glass and sought to take the benefit of lower rate of tax under a notification issued by the Jharkhand Government under Section 8(5)

of the Central Sales Tax Act, 1956. The said notification provided the benefit of reduced rate of tax to "*all types of glass and glass sheets*" sold in the course of inter-state trade. The Supreme Court noted various dictionary meanings of the terms 'type' and 'form' and held that glassware is only a form of glass and not a type of glass. It was hence held that, glassware manufactured by the assessee will not be covered within the ambit of the notification which only covers types of glass and not forms of glass. The Court in this regard also noted that as per settled rule of construction of a notification, a strict approach is to be adopted in administering whether a dealer/ manufacturer is covered by it and if the dealer/manufacturer falls within the notification, then the provisions of the notification are to be liberally construed. [*State of Jharkhand v. La Opala R.G. Ltd.* - 2014-VIL-08-SC]

Industrial cables – Classification under Delhi VAT: Cables having the capacity of 1100 volts are industrial cables and are classifiable under Entry 40 of Schedule III of Delhi VAT Act. Delhi High Court while holding so set aside Tribunal's order affirming Commissioner's Determination Order, classifying 'industrial cables' under the residuary entry under Schedule IV of the Delhi Value Added Tax Act, 2004. The Tribunal while interpreting the scope of the said Entry 40 had held that Central Excise Tariff Code indicated in various circulars issued by the Sales Tax Department, listing out goods that would be covered within Entry 40, would prevail in respect of classification of the article in question. The Delhi High Court however, noting that unlike Entry 40 various other entries in the Schedule to D-VAT Act carry reference to CET code, held that in the absence of express reference to CET code in the parent statute it is illogical to import reference to CET code through circular and in cases where reference to CET has not been made, common parlance test will apply. Reference to various definitions provided under the Electricity Act and the Electricity Supply Act was also made by the court in this regard. [*Anchor Electricals (P) Ltd. v. Commissioner Sales Tax* - 2014-VIL-81-Del]

INCOME TAX

Circular

Clarification on Section 10(2A) in cases where income of firm is exempt: The income of a partnership firm is to be taxed in the hands of the firm only and the same can under no circumstances be taxed in the hands of its partners. By way of Circular No. 8/2014 (F.No. 173/99/2013-ITA-I), dated 31-3-2014, CBDT has clarified that the entire profit credited to the partners' accounts in the firm would be exempt from tax in the hands of such partners, even if the income chargeable to tax is Nil in the hands of the firm on account of any exemption or deduction as per the provisions of the Income-tax Act.

Ratio decidendi

Companies operating in different geographical location can be regarded as comparables: The taxpayer was rendering telecommunication services in India. Calls of foreign service providers, including their associated enterprise (AE) destined to India, were

carried by the taxpayer as the foreign service providers cannot render telecommunication services in India. The consideration received from AE in Singapore was compared with the price paid to service providers in other countries to determine Arm's Length Price (ALP). The Transfer Pricing Officer rejected the comparison on the ground that the AE and the other service providers were operating in different geographical markets and hence could not be regarded as comparables. On appeal, the Tribunal held that geographical location, by itself, is not an important factor for deciding comparability. It held that geographical location of the market is not relevant unless market conditions, in which uncontrolled transactions have taken place are different from the conditions in which international transaction has taken place, and such a difference is on account of geographical location of the market. [*Bharti Airtel Limited* v. *ACIT,* Order dated 11-3-2014 in ITA No 5636/Del/2011, ITAT, Delhi]

Corporate Guarantee not involving any cost to taxpayer cannot be regarded as 'international transaction': The taxpayer had issued guarantee to bank on behalf of its subsidiary, without charging any consideration from the latter. The TPO made an adjustment for the commission not charged from the beneficiary-subsidiary. On appeal, the Tribunal examined the amended definition of 'international transaction' and held that where a taxpayer extends assistance in the form of guarantee without incurring any specific cost, such an assistance or accommodation does not have any bearing on its profits, income, losses or assets, and, therefore, it is outside the ambit of 'international transaction' within the meaning of the Income-tax Act. The Tribunal also held that the onus was on the department to show that the transaction has a 'real' impact on profits, income, losses or assets, in the present or future, on the basis of tangible material and not to merely rely on contingent or hypothetical events. [*Bharti Airtel Limited* v. *ACIT*, Order dated 11-3-2014 in ITA No.5816/Del/2012, ITAT, Delhi]

Law on when a 'satisfaction note' is to be prepared: On the basis of certain incriminating documents pertaining to the taxpayer, which were found in the course of search operations in the premises of a third party, proceedings were initiated against the taxpayer under Section 158BC read with Section 158BD of the Income-tax Act. The taxpayer alleged that the 'satisfaction note' was prepared after the proceedings of the searched party were completed and hence the proceedings were bad in law. On these facts, the Supreme Court explained the law on 'satisfaction note' and held that the same could be prepared at either of the following stages (a) at the time of or along with the initiation of proceedings against the searched person under Section 158BC; (b) along with the assessment proceedings under Section 158BC and (c) immediately after completion of the assessment proceedings under Section 158BC of the searched person. [*Commissioner* v. *Calcutta Knitwears*, Order dated 12-3-2014 in SLP (C) No. 10542 of 2011, Supreme Court]

Payment for transponder service is 'royalty': The taxpayer, engaged in broadcasting television channels from India, received transponder service from Intelsat, a tax resident of US. The taxpayer approached the Assessing Officer

(AO) under Section 195(2), denying liability to deduct tax, which was rejected by the AO. On these facts, the Tribunal held that, the definition of term 'royalty' remained unchanged despite insertion of *Explanation* 6 to Section 9(1)(vi) by Finance Act, 2012 as the explanation introduced retrospectively from 1-6-1976 was clarificatory in nature. The Tribunal also held that, as the term 'process' is not defined in the tax treaty, by virtue of Article 3(2) of the treaty, the meaning of term 'process' as defined in the Act would apply for this purpose. Thus, the use of transponder by the taxpayer for telecasting/broadcasting the programmes was regarded as use of process even within the meaning of tax treaty, the payment for which is liable to deduction of tax in India. [*Viacom 18 Media (P.) Ltd.* v. *ADIT (IT)*, Order dated 28-3-2014 in ITA No. 1584, 1585/Mum/2011, ITAT, Mumbai]

Interest on refund of TDS admissible from date of payment of tax: After rejection of the application under Section 195(2) of the Act, the resident / deductor deducted tax and sought refund of tax so deducted along with interest thereon. In the appeal before it the Supreme Court held that entitlement of interest under Section 244A cannot be restricted to a taxpayer only, without extending the similar benefit to a deductor who has deducted and deposited tax which was not deductible under law. The Supreme Court further held that refund due and payable to the deductor is debt-owed and payable by the revenue authorities from the date of payment of tax and hence they cannot ignore the obligation to reimburse the deductors' lawful monies with accrued interest for the period of undue retention of such monies. [*UOI* v. *Tata Chemicals*, Order dated 26-2-2014 in Civil Appeal No. 6301 of 2011, Supreme Court]