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In Focus

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New Service Tax Regime – Agreeing to be taxed

By **Dr. G. Gokul Kishore**

The new Service Tax regime based on negative list has been in operation for a little over one month. Among the numerous changes brought in by the new dispensation, Section 66B of Finance Act, 1994, the new charging section, deserves particular mention. In the earlier regime also, services which are currently not provided but are likely to be provided prospectively had been under service tax net with statutory backing in the form of erstwhile Section 65(105) while defining taxable services or Section 67 dealing with valuation of taxable services. But in the statutory dispensation now in effect from 1st July, 2012, charging provision seeks to tax services not yet provided. The new provision viz., Section 66B creates the charge once service is agreed to be provided. This article attempts to throw light on a few issues when service is agreed to be provided and agreeing not to provide.

Creating charge through deeming fiction

Section 67 covers those situations when services have not been provided presently but are likely to be provided and against which certain amounts have been received. This provision uses the expression 'service provided or to be provided' in two places to cast service tax liability even when consideration alone has been received without actually providing any service. In contrast, Section 66B expressly and for the first time, brings 'agreements' into picture and makes them as an event triggering tax liability. Because the word 'agreement' itself has not been used but its verb has been used in past tense, the act of agreeing becomes the determining factor without the requirement of any written document. It also points to liability getting attracted irrespective of the agreement being implied or express as what is relevant is consensus ad idem in a contract. An agreement involving consideration and intended to create legal relation is nothing but a contract.

Normally, taxable event is laid out in the charging section of a tax statute. Section 66B by mentioning 'service provided' and 'service agreed to be provided' seems to suggest that provision of service and agreement to provide service will be treated as taxable events so as to attract service tax liability. Revenue augmentation objectives have made tax administration create deeming fiction through Point of Taxation Rules, 2011 (POTR) wherein raising of invoice, completion of service and receipt of payment are defined as points of taxation. Point of taxation has been defined in Rule 2(e) of POTR as point in time when a service shall be deemed to have been provided. Completion of service and receipt of payment can be perceived as having some rationale to place tax burden. But when charging section does not create liability on raising of invoice, taking recourse to delegated legislation to deem such an activity as casting tax obligation, may not be an ideal method of administering a levy. Imposing tax on mere agreement to provide service is to tax intention per se but the taxman may argue that intention as manifested by issuing an invoice or receiving some payment merits his scrutiny.

I. Taxability matrix for agreements vis-à-vis invoices

	Agreement without invoice	Agreement with invoice
Liability to Service Tax	Not liable if no payment is received	Liable from date of issue of invoice. Date of completion of provision of service to be taken if invoice is not issued within prescribed time but the same does not arise when provision of services has not commenced. Liable from date of receipt if payment is received before.

II. Taxability matrix for agreements vis-à-vis service not provided

	Agreement exists – Service not provided ultimately	Agreement exists – Service not provided – Payment received	Agreement exists – Service not provided – Invoice raised
Liability to Service Tax	Not liable if no payment is received. Liable if consideration is retained	Liable. Rule 6(3) of Service Tax Rules, 1994 providing for credit of Service tax if amount is refunded to person concerned	Liable. Credit of Service Tax can be taken

Liability & payment while agreeing to abstain

Agreeing to the obligation to refrain from an act, being a declared service under Section 66E, will attract Service Tax liability even though issue of invoice or making payment may defer actual time of payment of tax. Rule 3 of POTR does not expressly provide for point at which tax becomes payable in case service is not provided i.e. refraining from an act. The residual provision Rule 8A of POTR provides for best judgment determination by Central Excise officer when date of invoice or date of payment or both are not available. But recourse to residual provision may not be required as refraining from an act is declared to be a service and Rule 3 of POTR will, therefore, come into play in this situation.

While invoice is unlikely in very many cases of abstinence, payment date may be taken as point of taxation on a combined reading of POTR and Section 65B(44) defining service which includes a declared service and which mentions consideration as a determining factor. Section 66E (e) uses the expression "agreeing to the obligation to refrain from an act". If something is obligatory, agreeing to abide by the same does not arise. Use of 'obligation' indicates the intention to provide colour of contract to such an act. This fortifies the above on reckoning receipt of payment as point of taxation in cases of abstinence, particularly those where invoice is not raised.

There may be situations when payments are agreed to be made at the end of a prescribed period for

refraining from doing an act. During the interregnum, service is provided by way of abstinence but payment may not be received. When invoice is not raised POTR takes completion of provision of service as the point for payment of tax. In this case, tax becomes payable at the end of the period when payment is made though service is being provided on a continuous basis by way of abstinence. It may be argued that as per Section 2(d) of Indian Contract Act, 1872, abstinence itself is a consideration and during the period of refraining from performance of an act, tax becomes payable. This may be applicable in respect of a contract, but for collecting tax, quantification and value become relevant and therefore, POTR comes into play to defer the same to receipt of payment.

One can only agree that the new provisions will throw up many more interesting situations and one has to wait for authoritative judicial pronouncements to obtain clarity.

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SERVICE TAX

Notifications & Circulars

Mega exemption notification amended: The mega exemption Notification No. 25/2012-S.T. has been amended by Notification No. 44/2012-S.T., dated 7-8-2012 to omit the word 'bovine' appearing at S. No. 33. This means that the exemption is available to slaughtering services in respect of all animals and the same will not be restricted to bovine animals alone.

Reverse charge amendments relating to Directors' services and security services: Service Tax Rules, 1994 and Notification No. 30/2012-S.T. have been amended to shift tax liability to service recipient in case of services provided or agreed to be provided by a director to a company. Notification Nos. 45 & 46/2012-S.T., both dated 7-8-2012 issued in this regard also include security services in specified cases where both provider and recipient are made liable under reverse charge.

Accounting code for Service Tax payment under new regime: For payment of service tax under the new regime of service tax based on negative list which is in force from 1st July, 2012, the accounting code will be 00441089. For penalty, the code will be 00441093 and for interest in case of delayed payment of tax, the code is 00441090. Circular No. 161/12/2012-ST, dated 6-7-2012 issued by C.B.E. & C. in this regard also clarifies that service specific accounting codes will also continue to operate for accounting of service tax pertaining to the past period

POTR amendments & rate revision – Clarification issued: The C.B.E. & C. has issued Circular No. 162/13/2012-ST, dated 6-7-2012 to clarify certain issues arising on account of amendments made in the Point of Taxation Rules, 2011 and the revision in the rate of service tax, effective from 1st April, 2012. It is clarified that in the case of continuous supply of services where the invoice has been issued or payment received on or before 31-3-2012, the point of taxation (POT) is to be determined under Rule 6 and not under Rule 4, as Rule 6 had an overriding effect over Rule 4. However, from 1-4-2012 Rule 6 stood omitted and POT in respect of continuous supply of services was also required to be determined under Rule 3 or Rule 4 as the case may be. Thus, from 1st April this year, in the case of continuous supply of services, when there is a change in effective

rate of tax, Rule 4 will be applicable. The change in effective rate of tax in various situations has also been explained in this circular taking works contract as example. It is further clarified that provisions of partial reverse charge will also be applicable in respect of continuous supply of services where the POT is on or after 1-7-2012.

Service Tax not leviable on foreign currency remitted from overseas: Service tax is not leviable on the amount of foreign currency remitted to India from overseas since as per the definition of service, transaction in money is excluded. It has also been clarified in Circular No. 163/14/2012-ST, dated 10-7-2012, that fee or conversion charge collected for sending foreign currency will also not attract service tax since both the person sending the money and the company carrying out the remittance, are located outside India. As per this circular, even the Indian counterpart bank or financial institution which charges the foreign bank or any other entity for the services provided at the receiving end, is not liable to service tax as the place of provision of service shall be the location of the recipient of service i.e. outside India.

Ratio decidendi

Service tax liability on composite contract of outdoor catering: The Karnataka High Court has held that the contract of outdoor catering is a composite contract falling under sub-clause (f) of clause (29A) of Article 366 of Constitution of India and is not an indivisible contract and that service tax is payable on service aspect and sales tax is payable on deemed sales aspect of the contract. The Tribunal had, in its order which was upheld by the High Court, allowed abatement under Notification No. 12/2003-S.T. for goods sold, while the Department had taken the stand that service tax was payable after availing abatement admissible to outdoor catering service under Notification No. 1/2006-S.T. [*Commissioner* v. *LSG Sky Chef India* – 2012 (27) S.T.R. 5 (Kar.)].

Amount collected from delegates who are non-clients, not chargeable to service tax: In this case, the appellant organized a conference involving educational discussion and collected some amount from each of the delegates which was used for organizing the conference. The question before the Tribunal was whether such activity of collecting the money from the delegates and organizing conference would be taxable under category of convention service. The Tribunal noted that the convention service for being taxable has to be provided to a client and in the case before it, delegates who had attended the conference were not clients of the appellant. It held that the money collected from the delegates was used to make arrangements for the mutual benefit of delegates in the conference and service tax was not chargeable on the amount received from the delegates [*Mayo College* v. *Commissioner* - 2012 (27) STR 53 (Tri.-Del.)].

E-filing charges includible in taxable value under CHA service: In this case, the appellants were Customs House Agents (CHA) and being a provider of CHA service, the appellants were liable to pay service tax on the gross amount received towards provision of CHA service. The question in this case was whether CMC charges form part of the value of CHA Service. The Tribunal considered Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 providing that any expenditure or cost incurred by the service provider in the course of providing taxable service are to be included in the value of taxable service. It was held that CMC charges, levied by the computer centre for filing the bill of entry and shipping bills electronically, are liable to be included in the value of the taxable service [*Pioneer Services* v. *Commissioner,* 2012-TIOL-949-CESTAT-MAD].

CENTRAL EXCISE

Notifications

Export promotion duty credit scrips can be used for domestic procurement: Duty credit scrips issued under various export promotion schemes can now be utilized for payment of central excise duties also. Notification Nos. 29 to 33/2012-C.E., all dated 9-7-2012 issued in this regard provide for exemption to goods procured from domestic market by utilizing duty credit scrips issued under the Focus Market Scheme (FMS), Focus Product Scheme (FPS), Agri. Infrastructure Incentive Scheme (AIIS), Vishesh Krishi and Gram Udyog Yojana (VKGUY) and Status Holders Incentive Scrip Scheme (SHIS). Suitable amendments have also been made in various customs notifications through Notification No. 44/2012-Cus. These notifications implement the policy announcements made in the supplement to Foreign Trade Policy 2012 on 5th June. Earlier this facility was available only in respect of scrips issued under Served From India Scheme (SFIS). The scrip has to be presented before the customs officer along with a letter or proforma invoice from the manufacturer/supplier; the customs officer is required to debit the excise duties leviable whereafter the scrip holder has to present such debited scrip, along with an undertaking, before the jurisdictional central excise officer at the time of clearance of the goods. The procedure now prescribed is different in as much as duties are to be debited by the customs officer and not the central excise officer as is presently made under SFIS.

Ratio decidendi

ER1 not required to be filed by manufacturers working under compounded levy scheme: Manufacturers working under compounded levy scheme are not required to file ER1 returns. CESTAT, Mumbai in a recent case while holding so, observed that Compounded Levy Scheme is a complete code in itself which prescribes the duties and responsibilities of the manufacturer and that Excise Rule 12 does not apply to such manufacturers. The Tribunal noted that Rule 12 applied to 'assessee' which is defined under Rule 2(c) as 'person liable to pay duty', and duty means duty payable under Section 3 of the Central Excise Act, 1944 and not under Section 3A ibid. Penalty under Rule 27, for not filing of such returns, was hence held by the Tribunal as not correct in law [*Zaidan Metal Rolling Mills Pvt. Ltd.* v. *Commissioner* - 2012-TIOL-801-CESTAT-Mum].

Manufacture – Term 'Consumer' does not cover industrial consumer: Word 'consumer' appearing in the expression 'adoption of any other treatment to render the product marketable to consumer' appearing in the relevant chapter note of Central Excise Tariff, does not cover an industrial user or manufacturer who processes the goods for his own industrial use. In the instant case, the assessee who is also engaged in repairing of transformers, subjected the transformer oil purchased in bulk to the processes of filtration and heat treatment. According to the Department the said activities amounted to manufacture under Note 4 of Chapter 27 of the Central Excise Tariff as per which any activity carried out to render the product marketable to consumer amounts to manufacture. The CESTAT while holding as aforesaid held that the process undertaken did not amount to manufacture [*Shivam Industries* v. *Commissioner* - 2012 (281) ELT 598 (Tri.-Del.)].

Cenvat credit on inputs contained in waste destroyed in factory, not required to be reversed: Cenvat credit on inputs contained in the waste

generated during manufacture of dutiable goods and subsequently destroyed in the factory is not required to be reversed under Rule 3(5) of the Cenvat Credit Rules, 2004. The Karnataka High Court has held that the Department cannot ask assessee to reverse the credit under Rule 3(5) as the inputs are not being cleared as such. It was held that even if remission was sought under Rule 21 of the Central Excise Rules, 2002 on the waste destroyed, credit cannot be denied. [*Commissioner* v. *Geltech Ltd.* - 2012 (281) ELT 170 (Kar.)].

Exemption to goods manufactured at the site of construction: Exemption under Notification No. 1/2011-C.E. (N.T.) was held as admissible by the Delhi High Court in the case where the assessee was engaged in the manufacture of pre-fabricated components used in the construction of Delhi Metro at different locations where elevated viaducts of tunnel were being constructed. The Department had sought to deny the exemption to goods manufactured at the site of construction for construction work at such site on the ground that the pre-fabricated structures were not manufactured at the construction site. The High Court however held that since the construction of elevated viaducts was being carried out all over Delhi, the construction sites were inter-connected and not located at one place and the casting yard allotted by DMRC itself constitutes the construction site. [*Commissioner* v. *Rajendra Narayan* - 2012 (281) ELT 38 (Del.)].

CUSTOMS

Notifications & Circulars

Sugar – Full exemption to specified imported sugar withdrawn: Raw sugar, refined or white sugar and raw sugar imported by a bulk consumer will now attract 10% effective rate of basic customs duty subject to conditions. These goods were fully exempted from such duty upto 30th June, 2012 when the exemption as provided under Sl. Nos. 76, 77 and 78 read with clause (b) of proviso to Notification No. 12/2012-Cus., ended. Notification No. 45/2012-Cus., dated 13-7-2012 issued in this regard omits the said clause.

Steel – Effective rate of duty on specified steel products reduced: Basic customs duty on certain flat rolled products of other alloy steel having width equal to or more than 600mm, other than that of silicon-electrical steel, has been reduced to 7.5%. Sl. No. (iv) of Notification No. 45/2012-Cus. issued to this effect, inserts tariff items 7225 30 90, 7225 40 19, sub-heading 7225 50 and tariff item 7225 99 00 in Sl No. 334 of Notification No. 12/2012-Cus.

Customs clearance on 24X7 basis to be available from 1st September, 2012: Specified Customs air cargo complexes and sea ports will be working 24x7, on pilot basis, from 1-9-2012 for clearance of facilitated bills of entry where no examination and assessment is required in case of imports. This facility is also being extended to exports where export containers are factory stuffed or where consignments are covered by free shipping bills. Presently ACC in Bangalore, Chennai, Delhi and Mumbai and sea ports in Chennai, JNPT, Kandla and Kolkata will be operational 24x7 for such purposes. Hitherto, only a few Customs stations viz. Vishakhapatnam, Kolkata, Mundra, Okha, Sikka, Mangalore, JNPT, Mumbai, Paradeep, Gopalpur, Ennore and Chennai allowed export clearance of factory stuffed containers on 24x7 basis. As per Circular No. 22/2012-Cus., dated 7-8-2012, possibility of 24x7 customs clearance is being explored for all import and export goods.

Mouse pads classifiable according to their constituent material: Mouse pads are classifiable depending on their constituent material and not as parts or accessories of computer mouse of Heading 84.71 of the Customs Tariff Act, 1975. C.B.E.C. Circular No. 19/2012-Cus., dated 11-7-2012 notes that a computer mouse can carry out its activities even without a mouse pad; and that a mouse pad did not meet the criterion to qualify as 'part' or as an 'accessory'.

Vehicles eligible for import under SFIS, clarified: Ambulances, sewage disposal trucks, refuse disposal vehicles and dumpers designed for off-highway use and which are pre-designed and pre-fitted with relevant devices and mechanisms enabling its use for the intended purpose are eligible to be imported by utilizing Served From India Scheme (SFIS) scrips. C.B.E. & C. Circular No. 18/2012-Cus., dated 5-7-2012 clarifies that such vehicles, in the nature of professional equipments, imported by service provider for use in his regular service business, are eligible for the exemption under Notification No. 91/2009-Cus.

Foreign Trade Policy changes clarified: The Central Board of Excise and Customs has issued a circular explaining the amended provisions of the Foreign Trade Policy. The Circular No. 20/2012-Cus., dated 27-7-2012 deals with provisions made effective by amending various customs notifications and also those FTP provisions which do not require any amendment in the customs or excise notifications. As per the Circular, Notification No. 39/2012–Cus., dated 12-6-2012 has allowed import of duty free embellishments against export of man-made made-ups and Notification No. 42/2012-Cus., dated 22-6-2012 amending Notification Nos. 100, 101, 102, 103 and 104/2009-Cus., provides for various provisions as earlier stated in the FTP on 5-6-2012. Some of the changes which do not require amendments in customs notifications are:

1. *Para 2.17 of FTP* – Import of re-manufactured goods shall be governed by the import policy applicable for second hand items/goods under para 2.17 of FTP.
2. *Para 4.1.2 of FTP (applicable to Advance Authorization and DFIA schemes)* - The formula/ norm for value addition (except for gems and jewellery) has been tightened by including reference to intent of claiming drawback.
3. *Para 4.1.14 of FTP* - Drawback would be allowed only for such duty paid items which have been endorsed on the authorization by the Regional Authority (RA).
4. *Para 2.12 of HBP, Vol. I* - The normal period of validity for the purpose of making imports under Advance Authorization, Annual Advance Authorization and DFIA schemes has been reduced to 12 months.
5. *Para 4.22 of HBP, Vol. I* - The period for fulfillment of export obligation has been reduced to 18 months, with certain exceptions. One extension of 6 months can be given by the RA.
6. *Para 5.3.3 of the HBP, Vol. I* - Separate authorization shall be issued in case application is filed under para 5.2A of FTP, under EPCG Scheme for restricted import of spares with reduced export obligation, subject to conditions.
7. *Chapter 8 of FTP* - Certain categories of supply of goods by main/sub-contractors have been deleted and therefore, they will not be regarded as deemed exports.

Revocation of registration of authorized couriers – Detailed procedure prescribed: Courier Imports and Exports (Electronic Declaration and Processing)

Regulations, 2010 have been amended to insert Regulation 13A. In this regulation, detailed procedures have been provided for revocation of registration of authorized couriers in specified circumstances. The procedure now prescribed provide for inquiry within three months (from order of suspension or initiation of inquiry) by the Deputy or Assistant Commissioner of Customs. A copy of the inquiry report is to be provided to the authorized courier who may then submit a representation to the Commissioner against the findings of the inquiry. The new provision prescribes a minimum period of 60 days for submission of the representation. Notification No. 65/2012-Customs (N.T.), dated 26-7-2012 issued in this regard also makes consequential amendments to Regulation 13 of the said Regulations.

Ratio decidendi

DFIA benefit admissible on transfer of authorization when Cenvat credit reversed: Cenvat credit reversed before utilization amounts to non-availment of credit. Bombay High Court in its recent order has held so in a case pertaining to benefit under Duty Free Import Authorisation (DFIA) when the authorization is transferred. The Court noted that para 4.2.6 of the Foreign Trade Policy allows duty free import of inputs under DFIA even to a transferee provided Cenvat facility has not been availed by the original licence holder. The petitioner had availed Cenvat credit on consumables used in the export product but had reversed the Cenvat credit along with interest after the manufactured final products were exported under DFIA. The Court while relying on an Apex Court order in the case of *Bombay Dyeing* – 2007 (215) ELT 3 (SC), held that if the credit availed on inputs used in the manufacture of final products was reversed before it was utilised either by reversing the credit or by cash payment with interest, then, it should be treated that the assessee had not availed the credit and the benefits under para 4.2.6 of the Foreign Trade Policy 2009-2014 could not be denied while transferring the DFIA [*Steelco Gujarat Limited* v. *Union of India* - Writ Petition No. 7033 of 2011, decided on 23-7-2012 by Bombay High Court].

Interest not available on return of seized currency: Interest is not payable on account of delay in return of seized currency. CESTAT, New Delhi while holding so, relied on the definition of 'goods' in Section 2(22) of the Customs Act which includes 'currency'. It observed that no interest is payable when the goods seized and confiscated, are later ordered to be released by any court. The Tribunal held that Section 27A provides for interest in case of duty ordered to be refunded whereas interest is not payable in case of seized currency which is in the nature of 'goods' and not 'duty'. [*Commissioner* v. *Smt Shashi Goyal* - 2012-TIOL-882-CESTAT-DEL].

Drawback admissible on export of goods got manufactured in EOU by DTA unit: DTA unit is eligible to obtain drawback on goods got manufactured from EOU and exported directly from such EOU. In the case before Karnataka High Court, the Department had denied drawback, relying on Notification No. 67/98-Cus. and Circular Nos. 74/99-Cus., and 31/2000-Cus., on the ground that goods were manufactured by an EOU. The High Court held that export goods belonged to a DTA unit and once duty on raw materials was paid, it became eligible for duty drawback under Section 75 of the Customs Act. It observed that this right cannot be taken away by issuing circulars contrary to statutory provisions. The High Court also held that forcing the exporters to approach authorities for fixing brand rate was arbitrary and absurd and exporter can choose as to whether to apply for brand rate of drawback or claim AIR of

drawback [*Karle International* v. *Commissioner* – 2012 (281) ELT 486 (Kar.)].

Special CVD exemption – Admissibility of, when imported goods sold along with domestically produced goods: Exemption from Special CVD or Special Additional Duty (SAD) under Notification No. 29/2010-Cus., is available even when the imported goods are sold along with domestically produced goods. The CESTAT, Mumbai has held that merely because imported indoor units of air conditioners were sold along with outdoor units, which were locally manufactured, it cannot be contended that such indoor units were not intended for retail sale. It noted that indoor units were being sold as standalone articles as also along with the outdoor units and that conclusion of the authorities that indoor units were not intended for retail sale was not backed by evidence. [*Daikin Airconditioning India Pvt. Ltd* v. *Commissioner* - 2012-TIOL-871-CESTAT-MUM]

Education Cess payment under DEPB – Board's Circular quashed: The Gujarat High Court has quashed CBEC Circular No. 5/2005-Cus., which clarified that in case of imports made under DEPB scheme, Education Cess @ 2% would be debited from the DEPB scrip. The High Court held that merely because the procedural conditions provided for adjustment of credit in DEPB scrip, it cannot be said that there was no exemption. It was held that the said Circular was contrary to Section 81 read with Section 84 of the Finance Act, 2004 and that Education Cess would be leviable only on such portion of customs duty as is not exempt under the DEPB scheme and not on the full amount. [*Gujarat Ambuja Exports Ltd.* v. *Govt. of India* - 2012-TIOL-546-HC-AHM-CUS].

Settlement of issues of co-noticee: The Special Bench of the Settlement Commission, Mumbai has held that the Commission has jurisdiction to entertain applications for settlement in respect of all noticees and co-noticees to proceedings constituting a 'case'. It was held that there is no automatic dropping of charges and settlement of case in respect of the co-noticees once the case against the main noticee is settled and that it cannot also settle cases against co-noticees who had not applied to it. It was held that the cases of co-noticees who have applied without main noticee coming for settlement cannot be settled by the Commission. However it was decided that the co-noticees may approach the Settlement Commission even after the case of the main noticee is settled, provided that the case of the co-noticee is still pending [*Settlement Commission, Special Bench Order No. 01/SB/CEX/2012, dated 18-6-2012*].

VALUE ADDED TAX (VAT)

Statutory changes

VAT rate enhanced in Karnataka: The rate of Value Added Tax for goods mentioned in the Third Schedule of the Karnataka VAT Act (covering among other goods, exim scrips, copyrights, patents and software licences) and the residuary category, has been enhanced from 5% to 5.50% and 14% to 14.50% respectively. Rate of VAT on works contracts has also been enhanced to 5.5% in case of specified works and 14.5% in the residuary category. Karnataka Value Added Tax (Second Amendment) Act, 2012 (54 of 2012), dated 1st August, 2012 makes such changes with effect from 1st August, 2012.

VAT rate on certain goods enhanced in Punjab: The applicable rate of VAT for cell phones has been enhanced from 5% to 8% with effect from 24-7-2012. The parts and accessories of cell phones such as head

phone, data cable, mobile charger, memory card, ear phone, audio device, mobile cover, mobile battery, bluetooth and mobile holder will also be taxable at the rate of 8%. Notification No. S. O. 42/P.A.8/2005/S.8/2012 dated 24th July, 2012 amends Schedule E of Punjab Value Added Tax Act, 2005. Further, an entry covering 'sugar including khandsari' has been inserted in Schedule B chargeable to tax at the rate of 5% with effect from 24-7-2012 by Notification No. S.O. 41/P.A.8/2005/S.8/2012 dated 24th July, 2012. The said goods were earlier exempt under Schedule A of the Punjab VAT Act.

Ratio decidendi

Sale in course of import – No exemption when inextricable link absent: The Madras High Court has held that exemption under Section 5(2) of the Central Sales Tax Act is not available when inextricable link between transaction of sale and actual import is absent. The issue was whether said exemption is available to the assessee who had exported stainless steel strips for conversion into coin blanks, to a company in Italy, after entering into an agreement with the Government of India for the manufacture and supply of stainless steel coin blanks. The court noted that the two agreements were independent and were in no way connected and that there was no privity of contract between the local purchaser i.e. the Government of India and the foreign seller. The court observed that the assessee had not established that there was any term or condition prohibiting diversion of the goods after the import i.e. the inextricable link between the transaction of sale and the actual import. It was hence held that the said transaction did not come within the ambit of 'sale in the course of import' under Section 5(2) of the CST Act [*State of Tamil Nadu* v. *TVL Steel Authority of India Ltd.* - 2012 VIL 46 Mad.].

Retrospective withdrawal of exemption, not valid: The Madhya Pradesh High Court has quashed a notification issued by Madhya Pradesh Government which withdrew the exemption on crude oil brought into a local area for use in refining and after refining, sold as edible oil interstate or stock transferred outside Madhya Pradesh. The State Government had earlier issued notifications granting exemption from payment of entry tax on crude oil in the state of Madhya Pradesh which was extended till 31st March 2007. However, it issued a subsequent notification dated 12-4-2007, withdrawing said exemption on crude oil for aforesaid purposes. The exemption was withdrawn with retrospective effect from 1-4-2004. The court held that if an exemption was granted by the State Government by issuing notifications, then the said exemption could not have been withdrawn with retrospective effect. It noticed that issuance of notification had far reaching consequences on the petitioner and in such a situation, the State Government could not have withdrawn such exemption with retrospective effect. The said notification withdrawing exemption was hence quashed and it was held that the petitioner was entitled to the exemption till 31-3-2007 [*Ambika Refinery* v. *State of Madhya Pradesh* - 2012 VIL 48 M.P.].

Loaders and dumpers are covered under 'plant and machinery': Loaders and dumpers are eligible for concessional rate of Central Sales Tax as they are covered under the entry of plant and machinery for use in manufacturing or processing of goods for sale. The Uttarakhand High Court in its recent order, after relying on the case of Indian Copper Corporation – AIR 1965 SC 891 has held that loaders and dumpers should be treated as plant and machinery of stone crusher. The lower authorities had not accepted the pleas of the

assessee stating that the goods namely loaders and dumpers may be used for some other purposes also while the asseesee had been contesting that without the said goods stone crushing activity cannot be undertaken. [*Vindhyavasini Stone Crusher Pvt. Ltd.* v. *Commissioner, Commercial Tax*– Uttarakhand High Court Judgment dated 15-6-2012 in Commercial Tax Revision No. 22 and 23/2011].

Towels and bed sheets classifiable under 'readymade garments': Towels and bed sheets are classifiable as readymade garments under Entry No. 51 of the Schedule IIA of the Gujarat Sales Tax Act, 1969 and are not covered under Entry 3 of the said Schedule covering cotton fabrics. The Gujarat High Court while holding so, observed that in common parlance, once the cotton fabric is stitched on both the ends, it can be called a towel or the bed sheet as it ceases to be a cotton fabric with the coming into existence of new commercial goods. It was held that the said goods would be liable to sales tax. [*Amulakh & Company* v. *State of Gujarat* – Gujarat High Court Judgment dated 29-6-2012 in Tax Appeal 1613 of 2010].

INCOME TAX

Circular

Expense for a purpose prohibited by law cannot be deducted: Expenditure of gift, travel facility, hospitality, cash or monetary grant or other such 'freebies' given to medical practioners and their professional associations by the pharmaceutical and allied health sector Industries will be inadmissible for deduction under Section 37(1) of the Income Tax Act, 1961. Circular No. 5/2012 [F. No. 225/142/2012-ITA. II], dated 1-8-2012 issued in this regard states that since Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 impose a prohibition on such freebies and hence any expense incurred on the same will be for an expense prohibited by law. This disallowance shall be made in the hands of such pharmaceutical or allied health sector Industries or other assessee which has provided aforesaid freebies and claimed it as a deductable expense against income. The circular also clarifies that an amount equivalent to the value of such benefits enjoyed by the medical practitioner or professional associations will be taxable as business income or income from other sources depending on the facts of each case.

Ratio decidendi

Payment for routine repairs does not constitute FTS: The ITAT, Hyderabad has held that payments made only towards repairs and refurbishing of the damaged turbines do not constitute fee for technical services (FTS). In the instant case Revenue contended the assessee should have deducted TDS on fee paid for repair and refurbishing of gas turbines to certain companies outside India. The assessee advanced an argument that no intellectual aspect was involved in carrying out these works and that in the absence of transfer of any technical knowledge or skill, payment towards the same is not covered by 'Fees for technical services' as per the India-Singapore DTAA. The Tribunal, refusing to accept the argument of Revenue that 'rendering' as defined in Section 9(1) of the Income-tax Act, 1961 should be understood to include all kinds of services, stated that routine repairs do not constitute FTS and TDS need not be deducted on the same. [*ADIT (International Taxation)* v. *BHEL-GE Gas Turbine Servicing P Ltd,* ITAT Hyderabad, 31-7-2012].

AAR is a Tribunal and SLP to SC normally not entertainable against its order: Disposing an application seeking leave to appeal to the Supreme Court against the order of the Authority for Advance Rulings (AAR), the Apex court held that AAR was a tribunal within meaning of expression in Articles 136 and 227 of the Constitution. The Apex Court reasoned that as the ruling by the AAR is binding on the applicant, the Commissioner and income tax authorities subordinate to him, the authority is a body acting in judicial capacity. It also held that unless an SLP raises substantial questions of general importance or a similar matter was pending before the Court, it would not entertain an SLP directly against the order of the Tribunal. It directed the applicant to move the appropriate High Court. [*Columbia Sportswear Company* v. *Director of Income Tax, Bangalore,* SLP (C) No. 31543 of 2011, SC order dated 30-7-2012].

ALP determinable only by using comparable 'uncontrolled' transaction: The net margin realized from a transaction with an Associated Enterprise (AE) found and accepted at Arm's Length Price (ALP) cannot be taken as internal comparable for computation of ALP of an international transaction with another AE. This ruling of ITAT, Mumbai on reference to a third member reasoned that on plain reading of the relevant provisions in Chapter X of the Income Tax Act, 1961 and Rule 10B of Income Tax Rules, 1962 there is no statutory sanction for roping in a comparable controlled transaction for the purposes of benchmarking. ALP can be determined only by making comparison with a comparable 'uncontrolled' transaction. A comparable may be internal or external, but it must be that of an uncontrolled or number of such uncontrolled transactions. The TPO had rejected external comparables furnished by the assessee and instead used a related party transaction which was held to be at arm's length. The order of the CIT(A) deleting additions made by the TPO / AO on account of ALP adjustment was upheld. [*ACIT, Mumbai* v. *Technimont ICB India P Ltd,* ITAT Mumbai, 17-7-2012].