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TAX amicus

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Articles

Service tax on Education Service

By **Geetika Srivastava**

As rightly quoted by Ralph Waldo Emerson – "For every benefit you receive a tax is levied". Taxes are now being levied on many transactions. However, education has always remained tax free. Our tax statutes have always spared education provided at primary and secondary levels. Under service tax law such benefit has been extended to even vocational training courses.

Even after introduction of the scheme of taxation of services on the basis of negative list, such benefits have not been withdrawn. Budget 2012 had implemented the scheme of taxing services as per the negative list, as a result of which, every service has been put to tax unless it is covered by the negative list of services enlisted under section 66D of the Finance Act, 1994 or the same has been granted a specific exemption from such levy. As the scheme suggests, no service tax shall be levied on the services falling under the negative list of services. Under the new scheme, where any activity undertaken by one person for another for a consideration has been taxed, the legislation has kept the services relating to provision of education outside the purview of service tax net through a specific entry provided under the negative list of services which covers the following:

(i) Pre-school and higher secondary education or equivalent;

(ii) Education provided as a part of a curriculum for obtaining a qualification recognized by any law for the time being in force;

(iii) Education provided as a part of an approved vocational education course

As a result, education at primary as well as secondary levels and education imparted for obtaining qualifications which are recognized by law have been kept outside the purview of service tax. Even education provided as a part of approved vocational education course has been kept out of the ambit of service tax. It is clear that no service tax has been levied on imparting education in order to ensure that education is available at nominal charges.

Here it is worth mentioning that the cost of education is not only affected by the tax leviable on the provision of education service but is also affected by the tax leviable on the services received by the educational institutions. Taking this into consideration, exemption has also been extended to specified services provided to specified educational institutions vide entry No. 9 of Notification No. 25/2012-S.T., dated 20-6-2012 ("mega exemption notification") which originally granted exemption to auxiliary educational services and renting of immovable property service provided *to or by* the education institutions in respect of education exempted from service tax. The above exemption remained in force during the period 1-7-2012 to 9-5-2013. However, in Budget 2013 this exemption was restricted to services provided to educational institutions providing exempted education. That is, exemption granted to such services rendered by the educational institutions was withdrawn.

Before proceeding to analyse the impact of such amendment, it is relevant to first understand the scope of the phrase- 'auxiliary educational services' as defined in the mega exemption notification. The term 'auxiliary educational services' covers a whole gamut of services which are necessary

and usually received by educational institutions for, and in relation to, imparting skill, knowledge, education, etc. to students as well as teachers. The definition also specifically includes certain services like services relating to admission to such institution, conduct of examination, catering for the students under any mid-day meals scheme sponsored by Government, or transportation of students, faculty or staff of such institution.

A close perusal of the definition of auxiliary educational services indicates that though various services used for, and in relation to, imparting education have been covered within its ambit, it does not encompass all the services received by an educational institution. In other words, all services received by an educational institution do not qualify for the aforesaid exemption. Only those services which are covered by the definition of auxiliary educational services or are in the nature of renting of immovable property service, have been granted the exemption. This would mean that there are certain other services which are not covered under the definition of auxiliary educational services and hence are not eligible for the exemption. For instance, construction and construction related services, web designing service, manpower supply service, etc. received by an educational institution are not covered by the definition of auxiliary educational services. It is also observed that no exemption has been separately provided to such services under the mega exemption notification. There are certain other services which may qualify as auxiliary educational services and doubts in this regard were raised by the industry. Many educational institutions and service providers rendering services to such educational institutions made representations to CBEC (Board) seeking clarification on the availability of exemption to such services in response to which Circular No. 172/7/2013-ST, dated 19-9-2013 was issued by the Board clarifying the scope of auxiliary educational services.

The Board in its circular had clarified that *all the services provided in respect of education are exempt* from service tax. The Board also mentioned few services in the circular which in their view were squarely covered under auxiliary educational services and hence were exempt under the mega exemption notification. The services mentioned by the Board included, hostel services, housekeeping services, security services, canteen, etc. According to the Board, such services are not taxable under the new regime.

Such interpretation given by the Board has raised another debate as to whether in light of the benevolent circular all services provided to educational institutions are exempted, or will it still be necessary for such services to first qualify as auxiliary educational services in order to qualify for the exemption. Also, the service providers to educational institutions and even educational institutions themselves were left with various doubts in their minds. The liberal interpretation of the exemption provided by the Board shows that there is a big gap in understanding of the trade and that of the Board. When the understanding as conveyed in the circular is seen, then the definition of auxiliary educational services as provided in the mega exemption notification becomes redundant. If the intention of legislature was indeed to grant exemption to all the services rendered to the educational institutions then there was no requirement for introducing the term - auxiliary educational services. Did the legislation intend to give the benefit only to limited services or was the benefit available to all the services provided to educational institutions? It can therefore be seen

that in spite of Board's Circular, the issue is not really free from doubt.

A harmonious construction of the entries is required to be made in order to understand the intention of the legislation. This is further justified by the fact that several services provided to educational institutions which are not covered by the definition of auxiliary educational services, have not been granted any other exemption elsewhere. This indicates that the exemption was restrictive in nature and was not meant to cover all services provided to the educational institutions. If all services were to be exempted then the definition of auxiliary educational service would become meaningless.

It has been held in plethora of judgments that an exemption notification should be construed strictly keeping in view the object and purpose of the notification. Hence in order to avail the benefit of exemption granted to the services provided to education institutions, such services should first qualify as auxiliary educational services. Thus, the service providers need to be careful while determining the availability of exemption to the services provided by them to the educational institutions. No doubt, the support of circular can be taken to avail the benefit in respect of services such as housekeeping, canteen, security, etc. Nevertheless, before availing the benefit of exemption of any services rendered to the educational institutions, due consideration shall be given to the definition of auxiliary educational services.

As already mentioned above, in Budget 2013, entry no. 9 of the mega exemption notification was amended. This amendment has drastically affected the education sector. At the time of its introduction, the entry granted relief to both the service providers as well as the educational institutions from levy of service tax on auxiliary educational services and renting of immovable property service rendered by them. The amendment made in Budget 2013 restricted the benefit of exemption to specified services received by educational institutions and the exemption available to specified services provided by educational institutions was taken away vide this amendment.

A careful examination of Budget 2013 documents indicates that the intention of legislature was only to withdraw the exemption to renting of immovable property service provided by educational institutions, and not to take away the exemption to auxiliary educational services rendered by educational institutions. However, the manner in which the amendment was actually carried out by simply deleting the word "or by" from entry no. 9 of the mega exemption notification, has not yielded the intended result. As a result, the services provided by educational institutions, except those specified in the negative list of services, have become susceptible to service tax.

Even after the amendment, can educational institutions still protect themselves from the levy of service tax? This seems possible if the specified services are rendered by the educational institutions bundled alongwith the main service of imparting education. This is a new challenge for the educational institutions to strategize ways and means to deliver these other services bundled alongwith education services falling under the negative list of services. Otherwise the educational institutions will have to charge service tax on such services adding to the cost of education which has never been the objective of law makers.

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'Canteen' in a mess - Amount recovered for food from employees

By **Deepak Suneja**

Ever since the introduction of the negative list regime of service tax on 1-7-2012, the first question that comes to mind while receiving any payment is "Is the amount being received liable to service tax?" From the amount of compensation as a non-compete fee to recovery of notice pay from employees, the companies are seeking expert's view to decide what are all the receipts being reflected on the credit side of their Profit& Loss Account that are chargeable to service tax.

The Government vide Draft Circular [1] has clarified that activities which are carried out by the employers for the employees for a consideration would fall within the definition of 'service' and would be taxed unless specified in the negative list or otherwise exempted. Similarly, the Presentation issued by Finance Ministry [2] has clearly stated that the amounts received from the employees for private use of company's facilities would be taxable, unless otherwise exempt. Thus, the doubt on taxability of service tax on the amount recovered from employees has been clarified. However, what has been confusing is the scope and implications of exemption under Mega Exemption Notification[3] with respect to amount recovered towards cost of food (normally at subsidized rates) being provided in canteens in the office or factory premises.

At the time of its introduction of Negative List regime, S. No. 19 of Mega Exemption Notification exempted services provided in relation to serving of food or beverages by a *restaurant, eating joint or a mess,* other than those having the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year, and a licence to serve alcoholic beverages. Thus, the doubt that prevailed was whether a factory canteen would qualify to be a 'restaurant, eating joint or a mess, or not.

Light was thrown on this issue by Draft Circular and Presentation issued by Finance Ministry, wherein it was clarified that the services of food and catering provided by the employer in a canteen would normally be exempted, unless such canteen has both the facility of air conditioning as well as licence to serve liquor. Thus, the industry took a sigh of relief and concluded that the amount being recovered by them towards cost of food was not chargeable to tax. However, soon enough they realised that availing the benefit of exemption might not turn out to be the best alternative. This was for the reason that the assessees decided to avail the benefit of Mega Exemption Notification, the activity qualified as exempted service and they had to follow complex procedure of Rule 6 of the Cenvat Credit Rule, 2004 in case they wanted to avail Cenvat credit on common input services like auditing, security, etc. On the other hand, in case they decided not to avail exemption Notification, proportionate Cenvat credit of service tax paid to the canteen contractors was allowed. Thus, some assessees decided not to avail the benefit of the exemption.

1 F. No. 354/127/2012-TRU dated 27-7-2012

2 'Budget 2012: Changes in Service Tax'

3 Notification No. 25/2012-S.T., dated 20-6-2012

The said Entry No. 19 of Mega Exemption Notification was amended[4] to cover services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess other than those having the facility of air conditioning or central air-heating in any part of the establishment, at any time during the year. With the said amendment, exemption was restricted to only those canteens which did not have the facility of air conditioning or central air-heating. Thus, all the canteens which had the facility of air conditioning were excluded from the exemption coverage.

Now, Entry No. 19A has been inserted in Mega Exemption Notification[5] which grants the benefit of exemption to service provided in relation to serving of food and beverages by a canteen maintained in a factory covered under the Factories Act, 1948, having the facility of air conditioning or central air-heating. The insertion of Entry No. 19A has again extended the exemption to canteens which have the facility of air conditioning or central air heating. However, such canteen has to be maintained necessarily in a factory which is covered under the Factories Act, 1948. If the canteen is maintained at any place outside a factory, or if the factory is not covered under the Factories Act, 1948, such canteen will not be allowed to enjoy this exemption. One may be puzzled as to whether the benefit of Notification would be extended only to such factories which have a requirement to maintain a canteen under the Factories Act, 1948 or it will be allowed to all the factories which are covered under the Factories Act, 1948. From plain reading of the entry, it seems that the benefit should be extended to all the factories covered under the Factories Act, 1948, even if it is not mandatory under Factories Act, 1948 for such factory to maintain the canteen.

However, one is forced to think as to why the benefit has not been extended to canteens being maintained in service provider's premises. Further, why should service tax be exempted to canteens in the factory having centralized air conditioner, as the same was not exempted before 1-4-2013. Also, the new entry requires critical analysis to understand its true impact on the assessees. Often, the companies hire outdoor caterers for managing the canteen. Thus, a point to ponder is whether the exemption would extend to such outdoor caterers providing service to factories. Unless the exemption also extends to outdoor caterers, the factories may be uninterested to take exemption, as the service tax charged by the contractors would become a cost for them and they would also have to reverse proportionate Cenvat credit on common services.

On one hand, the outdoor caterers would like to contend that the service provided by them is *in relation to serving of food* or beverages by a 'restaurant, eating joint or a mess' or a 'canteen'. Thus, their service should also be exempt from payment of service tax. On the other hand, the Department would argue that the intention of legislature was never to provide exemption to outdoor caterers and thus, the interpretation of the caterers is incorrect. This point would be a matter of dispute and deeper analysis will be required to decide which view would stand a better chance in the court of law.

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[4] Notification No. 3/2013-S.T. dated 1-3-2013, effective from 1-4-2013

[5] Notification No. 14/2013-S.T. dated 22-10-2013

CENTRAL EXCISE

Notifications

Valuation when part of goods manufactured are either captively consumed or removed to related person: Rule 8 of the Central Excise Valuation (Determination of Price of Goods) Rules, 2000 shall now cover cases where even a part of the production is captively consumed. Similarly, Rule 9/ Rule 10 of the Valuation Rules shall cover cases where part or whole of the goods are sold to/ through related persons/inter-connected undertaking. Notification No. 14/2013-C.E. (N.T.), dated 22-11-2013 issued in this regard amends Valuation Rules with effect from 1st December, 2013. Further, Circular No. 975/09/2013-CX, dated 25-11-2013 also clarifies that now each clearance is required to be assessed according to Section 4(1)(a) or the relevant rule dealing with the circumstances of clearance of the goods, as the case may be.

E-payment of Central Excise duty – Threshold limit for mandatory e-payment lowered: Threshold limit for e-payment of excise duty will be Rs. One lakh with effect from 1-1-2014. Presently, an assessee paying total excise duty of Rs. 10 lakh or more in the preceding financial year is required to deposit the same electronically through internet banking. Notification No. 15/2013-C.E. (N.T.), dated 22-11-2013 issued in this regard amends third proviso to Rule 8(1) of the Central Excise Rules, 2002.

Ratio decidendi

Rebate when goods exported after 6 months from date of removal: The Calcutta High Court has held that rebate of duty paid on export goods should not be denied on the ground that goods were not exported within 6 months from the date on which they were cleared from the factory of the manufacturer or warehouse, if there was sufficient cause for such delay. The court noted that Notification No. 19/2004-C.E.(N.T.), dated 6-9-2004, granting rebate, does not require that extension of time to carry out exports should be granted in advance, prior to the export and that the Commissioner may *post facto* grant extension of time. [*Kosmos Healthcare Pvt. Ltd.* v. *Asstt. Commissioner* - 2013 (297) ELT 345 (Cal.)].

Remission of duty - Fire caused by short-circuit is "unavoidable accident": CESTAT, Delhi has held that fire caused by short-circuiting is covered by the expression "unavoidable accident" for the purpose of grant of remission of duty under Rule 21 of the Central Excise Rules, 2002. It was observed that fire caused by short-circuiting cannot be avoided by taking precautionary measures. Observation of the Commissioner in the impugned order, about fire at the jobworker's premises, was rejected by the Tribunal holding same to be of no relevance. On the question of remission of duty on semi-finished goods, the Tribunal was of the view that the Department cannot seek duty on such goods, if the goods had not attained marketable status and that if such goods are dutiable, remission of duty has to be granted. [*M Kumar Udyog* v. *Commissioner* – CESTAT, New Delhi Order No. 58359/2013-SM(BR), dated 25-11-2013]

No interest payable if wrongly availed credit is reversed before utilization: CESTAT, Delhi has held that interest is not payable if wrongly availed Cenvat credit is reversed before utilization. The Tribunal relied on its earlier decision [*Sharda Energy*

& Minerals Ltd. - 2013 (291) ELT 404 (Tri.)], wherein the Karnataka High Court decision in the case of *Bill Forge Pvt Ltd.* [2012 (279) ELT 209 (Kar.)] was relied upon. The Karnataka High Court had distinguished the Supreme Court Judgment in the case of *Ind-Swift Laboratories Ltd.* The Tribunal in this case further set aside the penalty imposed, observing that the credit was wrongly availed due to bonafide mistake after the unit opted for SSI exemption. [*Gary Pharmaceuticals (P) Ltd.* v. *Commissioner* - 2013 (297) ELT 391 (Tri-Del.)]

Additional Duty of Excise is not exempted under Notification No. 67/95-CE: Additional duty under Additional Duties of Excise (Textiles and Textile Articles), 1978 shall be payable on intermediate goods which are further used in manufacture of dutiable goods. CESTAT, Ahmedabad has held that Notification No. 67/95-C.E., dated 16-3-1995 exempts basic excise duty alone and not such additional duty of excise. The Tribunal differed with the decision of in the case of *Raymond Ltd.* [2005 (192) ELT 868 (Tribunal)] and relied upon the decision of HP High Court in the case of *India Farm Tractors and Motors Ltd.* [2008 (222) ELT 184 (HP)] which held that Education Cess shall be payable even in cases where tractors are exempt from payment of excise duty. [*Commissioner* v. *Mahendra Petrochemical Ltd.* - 2013 (297) ELT 232 (Tri-Ahmd.)]

Reserve created in books of accounts for slow moving items does not require reversal of credit: The Tribunal in this case *prima facie* held that reserve created in books of accounts as per corporate policy for slow moving items and excess inventory shall not warrant reversal of Cenvat credit as per Rule 3(5B) of the Cenvat Credit Rules, 2004. In this case, the goods in respect of which provision were made were factually later used in the manufacture of dutiable products and the provision was reversed. The Tribunal *prima facie* held that these inputs cannot be treated as written off. [*Molex India Pvt. Ltd.* v. *Commissioner* - 2013 (297) ELT 266 (Tri-Bang.)]

Interest on reversal of Cenvat credit on removal of inputs as such: CESTAT, New Delhi has dismissed assessee's appeal against demand of interest on Cenvat credit reversed on the last date of the month, while removing Cenvatted inputs as such during the course of the month. It held that when inputs are removed as such, Cenvat credit is reversible on the date of clearance as otherwise Revenue will suffer till the time of reversal. [*Balaji Loha Pvt. Ltd.* v. *Commissioner* – CESTAT, New Delhi Order No. 58349/2013, dated 12-11-2013]

CUSTOMS

Notifications & Public Notices

Export of prohibited items allowed under Advance Authorisation Scheme and by an EOU: Para 4.1.13(a) of the Foreign Trade Policy (FTP) has been amended to allow export of prohibited goods under the Advance Authorisation Scheme, subject to conditions. In this regard, goods covered under Chapters 7 and 15 of the Schedule 2 to the ITC (HS) have been allowed to be exported subject to pre-import condition under notified SION/ prior fixation of norms by Norms Committee. Para 4.4.1(b) inserted in the Handbook of Procedures by Public Notice No. 37, dated 14-11-2013 allows such

export subject to certain other conditions. DGFT Notification No. 51(RE-2013)/2009-2014, dated 14-11-2013 which amends Para 4.1.13(a) of the FTP also amends Para 6.2(a)(i) to allow export of prohibited goods by an EOU subject to the condition that raw materials required to manufacture such export goods are imported and not domestically procured. Permission for such exports by an EOU is to be given by the Board of Approval.

Export of specified narcotics drugs and psychotropic substances permitted: Export of specified narcotics drugs and psychotropic substances has been allowed subject to a 'No Objection Certificate' from the Narcotics Commissioner of India, Gwalior. DGFT Notification No. 55(RE-2013)/2009-2014 dated 3-12-2013 in this regard amends Schedule 2 to ITC (HS) to include such goods under Chapter 29 thereof.

Ratio decidendi

Valuation - Inspection charges paid to third party before import and erection & commissioning after import: Inspection charges paid by the importer to third person, on behalf of the seller, prior to import, shall be included in assessable value, if the same has been paid as a condition for import of goods. In this case, decided by CESTAT, Ahmedabad, the contract for import required that the goods satisfy the tests conducted by third party before they are exported to India. It was held that since testing was necessary for import of goods, it was a condition for sale of goods. Further, the Tribunal held that installation, erection and commissioning charges payable under a separate contract shall not be includable, in the assessable value, as the same related to post-importation activity which is not a condition for import of goods. [*Commissioner* v. *Gujarat Pipavav Port Ltd.* - 2013 (297) ELT 200 (Tri-Ahmd.)]

Exemption available even if end-use certificate delayed: In this case, the assessee had imported heavy melting scrap after availing benefit of Notification No. 21/2002-Cus., dated 1-3-2002 with a condition that end use certificate shall be produced within 6 months. However, there was a delay of 3 months in submitting the same. The Tribunal while allowing exemption, noted that delay is permissible as per condition 20 of the notification itself. Earlier case law in the case of J.K. Corporation, 1996 (88) ELT 112 (Tri.), where it was held that extension could have been granted by the adjudicating authority himself, was also relied by the Tribunal in this regard to hold that exemption shall be available even if end use certificate is provided after 3 months from due date. [*Shri Balaji Castings* v. *Commissioner* - 2013 (297) ELT 234 (Tri-Mumbai.)]

Valuation – Price renegotiated & reduced after importation can be transaction value: CESTAT, Ahmedabad has held that if the price of goods is negotiated and reduced after importation for genuine reasons, such negotiated price can be considered as transaction value under Section 14 of the Customs Act. The Tribunal in this regard noted that re-negotiation in the present case was conducted after it was found that the vessel imported was not as per the original MoA. Further, the decision in the case of *Ashish Ship Breakers* [2003 (157) ELT 277] was distinguished by the Tribunal. [*Choudhary Ship Breakers* v. *Commissioner* - 2013-TIOL-1736-CESTAT-AHM]

'Free' is also a rate of duty - Notification No. 127/99-Cus. valid: Notification No. 127/99-Cus. issued under Section 8A of the Customs Tariff Act, is not ultra vires the provisions of said Section. Duty free import of wheat was denied in the present case on the ground that said notification provides for

50% Customs duty on such product. The assessee had argued that as the tariff rate on import of wheat is 'free', unless a rate of duty is mentioned in the Customs Tariff Act, imposition of fresh levy by way of notification cannot be issued under Section 8A to increase the rate of duty. Rejecting this plea of the petitioner, the Bombay High Court has held that 'free' is also a rate of duty. The court also devised a two pronged test that needs to be satisfied for issuance of notification under Section 8A. First, goods must be covered by First Schedule I to the Customs Tariff Act, 1975; and secondly, the Central Government should be satisfied that import duty should be increased immediately. [*Century Flour Mills Ltd.* v. *UOI* - 2013-TIOL-913-HC-MUM-CUS]

CVD not leviable on import of aluminium dross: Aluminium dross is not liable to additional duty of customs as the same is not liable to central excise duty. The Tribunal in this case, while upholding the impugned order, observed that issue of excise duty liability of aluminium dross was settled by the Supreme Court in the case of *Indian Aluminum Co. Ltd.* [2006 (203) ELT 3 (SC)]. In respect of valuation of goods, it was held that for computing the value of aluminium dross for payment of BCD, CBEC Circular dated 15-9-2005, dealing with computation of assessable value of copper dross on the basis of LME price of copper content less extraction cost, shall not be applicable, and there was no basis for rejection of assessable value in this case. [*Commissioner* v. *B.S. Smelters* - 2013 (297) ELT 211 (Tri-Del.)]

SERVICE TAX

Notification & Circular

E-payment of Service Tax – Threshold limit for mandatory e-payment lowered: Threshold limit for payment of service tax through electronic mode will be Rs. 1 lakh from 1-1-2014. Currently, an assessee paying service tax of Rs. 10 lakh or more in the preceding financial year is required to deposit the same electronically through internet banking. Notification No. 16/2013-S.T., dated 22-11-2013 amends Rule 6 of the Service Tax Rules, 1994, for this purpose.

Service Tax Amnesty Scheme (VCES) clarified: CBEC has clarified that a declaration filed under Voluntary Compliance Encouragement Scheme ('VCES') shall not be returned on the ground that it is incomplete and Department should assist the declarant in rectifying the defects. The scheme will be admissible in respect of any amount covered under the definition of 'taxes dues' even if it is paid before filing declaration if such amount has been paid after 10-5-2013 when the VCES came into effect. But declaration cannot be made if service tax along with interest relating to the period covered by the VCES has already been paid before 10-5-2013. In respect of the bar applicable when investigation or audit was initiated, declaration will be liable for rejection only in respect of the issue or period identifiable from summons or other documents. VCES benefit can be taken where documents like balance sheet, profit and loss account etc. are called for by department in the inquiries of roving nature. [CBEC Circular No. 174/9/2013-ST, dated 25-11-2013].

Ratio decidendi

Input service in respect of storage tanks outside factory premises – Cenvat credit admissible: Emphasising that 'directly or indirectly' and 'in or in relation to' are to be interpreted with

wide amplitude, the Bombay High Court held that in case of input service, it is sufficient if it is received by the manufacturer of final product, not necessarily in the factory. The stipulation of receipt at factory gate was only in respect of input or capital goods. Further input service is not restricted to procurement of inputs and inward transportation alone. In the instant case, the department sought to deny credit in respect of various input services used for setting up of storage tanks outside the factory. Ammonia stored in the tanks was intrinsic part of the manufacturing process. [*Deepak Fertilizers & Petrochemicals Corpn Ltd* v. *Commissioner* – 2013 (32) S.T.R. 532 (Bom.)]

Service consumed wholly in SEZ – CESTAT allows refund: Immunity from service tax enjoined in Special Economic Zones Act, 2005 cannot be eclipsed by Notification No. 9/2009-S.T. or 15/2009 S.T. Observing that the notification on refund of service tax merely operationalised the benefits, the Tribunal held that recipient of taxable services can claim refund of service tax paid even in respect of services consumed wholly in the SEZ. The appellant claimed refund of service tax paid by service providers in respect of Architect Service / Consulting Engineer service. [*Intas Pharma* v. *Commissioner* – 2013 (32) S.T.R. 543 (Tri.– Ahmd.)]

Maintaining mandated green cover & construction of compound wall around factory – Credit admissible on services used therefor: Examining the admissibility of Cenvat credit on manpower supply services used in factory premises, the Tribunal held that since the assessee was under obligation to develop 33% green power as per statutory permission, the claim was admissible. On construction of compound wall around the factory, reasoning that it was essential to demarcate premises, check pilferage and clandestine removal, construction service was held to be an eligible input service. [*Nirma Ltd* v. *Commissioner* – 2013 (32) S.T.R. 622 (Trib. – Ahmd.)]

Deduction of 50% of service tax by service recipient in works contract: At issue was the deduction of service tax (50%) in respect of works contracts, by the respondent. The association of contractors argued that in terms of Notification No. 30/2012-S.T. dated 20-6-2012, such 50% of liability was to be borne by the respondent. Dismissing the writ for want of *locus standi,* since the contracts were independently entered into by the member contractors, the court also opined that the object of the notification was to check pilferage of tax. Even if service tax had been included and shown separately in the invoices, the respondent (service receiver) would have been justified in deducting 50% of the full service tax liability. [*Contractor Association* v. *Rajasthan Rajya Vidyut Prasaran Nigam* – 2013 (32) S.T.R. 396 (Raj.)]

Electricity charges paid and recovered on actual basis from tenants not part of taxable value: Against the argument of the department on reimbursement of electricity charges paid to the Electricity Board, the assessee contended that electricity was goods and its supply was not chargeable to service tax and that charges on actual basis were not part of renting of immovable property. Finding force in this contention, the Tribunal held that supply of electricity to tenant was sale of goods and value of goods supplied by service provider is exempt from service tax. [*ICC Reality (India) P Ltd* v. *Commissioner* – 2013 (32) S.T.R. 427 (Tri.-Mumbai)]

Input services utilised by corporate office but distributed to factory – Credit admissible: There exists a presumption in favour of appellant (assessee) when expenditure incurred is recorded in the books of accounts. Agreeing with the contention

that input services being intangible it is difficult to establish one to one correlation, the Tribunal held that credit is admissible in respect of Rent-a-Cab, telephone and contract bus services used by the corporate office. The department's stand was that such measures are for welfare of executives and officers in corporate office and have no nexus with manufacturing activity taking place in the factory. However, the Tribunal stated such interpretation as contrary to the plain meaning and inclusive part of the definition of input service. The corporate office, an input service distributor could distribute the credit it could not utilise. [*Thiru Arooran Sugars Ltd* v. *Commissioner* – 2013 (32) S.T.R. 435 (Tri. - Chennai)]

Vivisection of composite contracts prior to 1-6-2007 to tax service portion, valid:

Composite contracts can be vivisected and the service portion involved therein can be charged to service tax even prior to 1-6-2007 when the works contract service was introduced. Answering a challenge to Notification No. 15/2004-S.T. dated 10-9-2004, Notification No. 18/2005-S.T. dated 7-6-2005 and Notification No. 1/2006-ST dated 1-3-2006 granting abatement, the Delhi High Court held that the impugned notifications did not widen the charging section and indirectly tax goods. Distinguishing between object of tax and measure of tax , the court opined that the notification merely provided a convenient option to the assessee to calculate his liability and computation of service component is a matter of detail and not a matter relating to validity of imposition of service tax. It thus emphasised that service tax can be levied on the service component of any contract involving service with sale of goods etc. [*G D Builders* v. *UOI* – 2013-TIOL-908-HC- DEL]

Credit not availed by a service provider as per notification, cannot be passed on:

The appellant availed credit of duty paid on input (pipeline used for transport of gas) sold to them by EPC contractors, who had availed benefit of Notification No. 12/2003-S.T. The department sought to deny Cenvat credit on the pipes arguing that the contractors could not pass on credit since they had deducted cost of goods sold from value of services and as per the notification could not take credit of duty. The Tribunal upheld the department's view that once benefit of said notification is availed, credit in respect of duty paid on inputs or capital goods is not available. Also, the pipes had not been used by the appellant for providing any output service, they were used to lay the pipeline used for providing service. [*Gujarat State Petronet Ltd* v. *Commissioner* – 2013 (32) S.T.R.510 (Tri – Ahmd.)]

VALUE ADDED TAX (VAT)

Notifications

Punjab VAT Act amended: The Punjab VAT (Second Amendment) Act, 2013 has been notified vide Notification No. 49-Leg./2013 dated 15th November 2013. Sub-section (7) of Section 6, which authorises the State Government to charge tax in advance has been amended whereby State Government or the Commissioner or a person authorized by him have been authorized to exempt any taxable person or a class of taxable persons from payment of tax in advance or reduce the rate of payment of such tax under notified conditions. New Section 8-C empowers the Government to notify that in respect of any goods or class of goods covered under the Standards of Weights and Measures

(Packaged Commodities) Rules, 1977, a taxable person who is a manufacturer or a first importer of goods, may, at his option, pay tax on the basis of MRP printed on the goods. Section 8-D, inserted now, empowers the government to grant tax incentives to such class of industries, as and when notified in the industrial policy. Retention of tax collected by such class of industries is provided for in Section 8-E.

Amendment has been made in Section 13 (with effect from 1-4-2014) which provides for input tax credit. As per the amendments, ITC shall not be available unless the goods *are sold* within the State or in course of inter-state trade or commerce or in the course of export or *are used* in manufacture, processing or packing of taxable goods for sale. Consequently, Section 13(9) has been amended to omit reversal of input tax credit on goods which could not be used for purpose specified in Section 13(1). Further, Section 13(1A) has been omitted (*with effect from 4-2-2013*) which allowed the advance tax collected under Section 6(7) as ITC. Sub-section (4) of Section 29, has been amended to provide that an assessment may be made within a period of *six years* (instead of three years existing earlier) after the date when the annual statement was filed or due to be filed, whichever is later.

Tripura VAT - Revision in rate of tax: Tripura State Government has increased the rate of tax on goods specified in Schedule II(b) of the Tripura VAT Act, 2004, from 13.5% to 14.5%. Notification No. F.I-11(17)-TAX/2007(PART-III), dated 20-11-2013 under Section 16 of the Tripura VAT has been issued in this regard.

Ratio decidendi

Optional service charges not includible in sale price: As per separate contract of warranty, the assessee charged "Optional Service Charges" from the consumers for providing after sales service. The scheme was only optional and not necessarily every customer used to agree to it. The Rajasthan High Court noted that in the case of the respondent-assessee itself, the Tax Board had decided the issue which also came up before it in the case of *CTO, Anti Evasion, Jaipur* v. *Whirlpool India Ltd.* wherein it was held that such charges are excludible from the sale price of goods sold. The court further in the case of *CTO, Anti Evasion, Jaipur* v. *Godrej GE Appliances* decided on 29-5-2013 came to the same conclusion. Relying on the above cases, the petition was dismissed on the ground that the issue was settled. [*Assistant Commissioner, Anti Evasion* v. *Godrej GE Appliances* - 2013-VIL-101-RAJ]

Sale of business - Includibility in 'turnover': The Madras High Court has held that the amount realised by the assessee by way of sale of the business as a whole cannot be included in the turnover of sale under the Tamil Nadu General Sales Tax Act, 1959. In the instant case, the assessee entered into a business transfer agreement with another company for the sale and transfer of its business of manufacture of specified products alongwith land and building in relation to the business located in two independent units. The other business carried on at different place was however retained. The court considered the terms of the agreement entered into between the assessee and the purchaser which was for the transfer of business and handing over of the possession to the purchaser on the effective date of transfer. Further, there was no separate contract for the transfer of movable and immovable property. The court held that although separate values were given to movable and immovable assets, the bifurcation of the price would not go against the intention of the parties which was to transfer the business as a whole. Amount realised by way of sale of the business as a whole was hence held as not includible in the turnover. [*Eicher Motors Limited* v. *The State of Tamil Nadu* - 2013-VIL-111-Mad]

INCOME TAX

Ratio decidendi

Payment to foreign commission agent providing technical inputs – Taxable as FTS: The assessee had paid 'commission' to overseas commission agent who was also a director in the assessee company. Examining nature of work undertaken by the said commission the Tribunal held that though the services were described as sales support to secure orders for supply of software, in essence it involved technical knowledge and inputs. Hence the payment was taxable as Fee for Technical Services (FTS). The second ground advanced by the assessee that the agent-director was a non-resident, without a personal establishment / fixed base in India. The Tribunal held that the payment is taxable at the hands of the agent under 'Independent personal services' as per Article 14 of Indo-Swiss DTAA and given his role as director, the office of assessee company which would have been regularly available to him is to be treated as his fixed base. The ITAT however did not clarify as to how these services fell within the definition of 'professional services' under Article 14(2). [*ITO.* v. *Device Driven (India) P.Ltd.* - ITAT Mumbai decision dated 29-11-2013]

Fiscally transparent entities eligible to claim treaty benefits: The taxpayer, a partnership firm established in Denmark, was appointed as an agent of two Danish companies which were engaged in operating ships across the globe. The taxpayer was to manage their shipping operations globally and represented them in all their matters of business over the world, in consideration for a 'Management Fee'. The Tribunal held that, even though a partnership firm may be a fiscally transparent entity, as long as its profits were taxed in the hands of its partners in the resident country, benefits of the tax treaty could not be denied to the partnership. As regards shipping income, the tribunal held that the same belongs to the managed companies and is taxable in Denmark being the place of their effective management. [*DDIT (Intl. Tax)* v. *A.P. Moller* - 39 Taxmann.com 27 (Mumbai-Trib.), dated 8-11-2013]

'Copyright' and 'Copyrighted article' distinguishable despite amendment in definition of royalty in Indian legislation: The Indian branch of a US company imported certain software and delivered the same to customers in India. The tax payer also provided certain support services viz., installation, customization and training for operating the software for the customers in India. The High Court held that income is not royalty since for a payment to qualify as royalty it is necessary to establish that the licensee obtains all or any of the copyright rights in the work. A distinction has to be made between the acquiring of a 'copyright' and a 'copyrighted article'. A non-exclusive and non-transferable license enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of Tax Treaty. It opined that copying the program onto the computer's hard drive or random access memory or making an archival copy is an essential step in utilizing the program and should be disregarded in analyzing the character of the transaction for tax purposes. [*DIT* v. *Infrasoft Ltd.* - Delhi High Court Order dated 22-11-2013]

Charges for providing connectivity taxable as 'royalty' for use of equipment / process: The tax payer, a non resident company, was engaged in the business of providing international

connectivity services. The international leg of the telecom service was provided by the tax payer, and the Indian leg was provided by VSNL. The AO concluded that the payment received by the tax payer from its Indian customers for providing bandwidth services outside India was 'royalty' for the use of or right to use equipment or use of process under Section 9(1)(vi) of the Act as well as under Article 12(3)(b) of the India-Singapore DTAA. On appeal, the High Court held that provision of service was not possible without the use of equipment ensuring the committed bandwidth. The payment was royalty for the use of equipment or alternatively for use of the 'process'. [*Verizon Communications Singapore Pte Ltd.* v. *ITO* - (2013) 39 Taxmann.com 70 (Mad)]