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Cenvat credit – Of mindset and (juris)prudence

By **Dr. G. Gokul Kishore**

From excisability and manufacture to valuation, Union Excise Duties have witnessed pitched courtroom battles over the past few decades. Going by the judicial rulings in the past 2 decades, it appears Cenvat Credit can be crowned as 'mother of all battles'. Rhetorical analogies apart, it is painful to note that the approach of the Department treating Cenvat credit as largesse to be bestowed upon assessees only if it wishes, points to the mind-set which is one of denial and riddled with suspicion. Unless the spirit of taxing value addition alone is imbibed and applied, both cost and woes of assessees, in the present regime and in the GST era, are bound to increase impacting competitiveness of the industry and interest of consumers alike.

Let us take the issue of denial of Cenvat credit on goods used for laying of foundation or making of structures for support of capital goods. One of the relatively recent amendments to Cenvat Credit Rules, 2004 (CCR), definition of input hastens to exclude goods used to support machinery and other such capital goods. The very use of the term 'capital goods' indicates that goods which go into the making of support structures are, no doubt, used in relation to manufacture. The grand old user test of inputs i.e. 'used in or in relation to manufacture' has been sidelined deriving strength from CESTAT Larger Bench's decision in *Vandana Global* [2010 (253) ELT 440 (Tri-LB)] holding credit as not admissible on such goods before and after amendment to the relevant rule on 7-7-2009. It will be appropriate to note that the statute even today acknowledges the above test when clause (F) of the definition of input under Rule 2(k) of CCR excludes goods having no relationship whatsoever with manufacture of a final product. That the goods which go into the making of the foundation for capital goods and which holds machinery to run without vibration and thus participating directly in production, are seen as not having any relationship with manufacture by way of express exclusion, vindicates the veracity of the statement made in the previous para – issue of credit is one of mind-set.

The second sacrosanct requirement for admissibility of credit has all along been 'use in the factory' which is fully satisfied in the case of goods used to lay foundation or to erect support structures for capital goods. Use in office was despised and credit was / is denied on such goods and assessees have to engage in long drawn litigation to avail credit when offices are integrally connected with plant. The subject goods are better placed vis-à-vis goods used in office of the manufacturer and yet, credit is barred. The rationale may be to plug revenue leakage as such goods may be diverted for purposes not related to manufacture. But, this is a verifiable fact and onus could have been fixed on the claimant, but outright restriction manifests systemic weakness to plug leakage.

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Another incidental victim of the above amendment is the nexus theory built painstakingly over years of jurisprudence. Despite satisfying the nexus test, the above goods are treated unfairly and thus ostracised from the family of credit eligible inputs. It is an irony that on the one hand, credit is denied on such items thus pushing up the cost and on the other hand, stimulus to rev up the economy is rolled out by resorting to duty cuts occasionally.

Fortunately, a few tribunal decisions have come to the rescue of the assessees. Distinguishing the ratio of *Vandana Global*, the Chennai Bench of CESTAT in *India Cement Ltd.* v. *Commissioner* [2013-TIOL-1649 (Cestat-Mad.)] upheld credit admissibility on MS angles, MS beams, channels, etc., used for erecting various items of capital goods like electrostatic precipitator for raw mill project and additional fly ash handing system. Cenvat credit on steel items used for fabrication of cooling bed for rolling mills, where cooling bed gets permanently attached to the earth, was held as permissible by the Delhi Bench of CESTAT in *Jodhpur Alloys Pvt. Ltd.* v. *Commissioner* [2012 (292) ELT 448 (Tri-Del.)]. It held that Cenvat credit would be admissible on steel items used for fabrication of cooling bed for rolling mills as such rolling mills qualify to be capital goods and the said steel items would be 'inputs' as they were necessary for manufacture of part of capital goods. In this case also Department placed reliance on *Vandana Global* but the same was not accepted.

While talking about capital goods, one item which cannot be missed is welding electrode which is used for repair and maintenance of plant and machinery. Even after a majority of High Courts holding credit as admissible on such electrodes [*Hindustan Zinc* - 2008 (228) E.L.T. 517 (Raj.) and *Ambuja Cements* 2010 (256) E.L.T. 690 (Chhattisgarh)] and even after more than 100 cases have been fought before Tribunal on this item, even today one finds this issue being agitated before the CESTAT. The honour of being the latest in this list is shared by the Tribunal order passed in *Mangalam Cements Ltd.* [CESTAT, Delhi, Final Order Nos. 50177-50179, dated 17-1-2014] wherein the Bench allowed credit considering the overwhelming affirmative view in respect of this item though there was a contra view of A.P. High Court.

As the Department watches all these litigations, a simple amendment to the CCR providing for express inclusion of items like welding electrodes, just as grinding wheels or storage tanks, would have helped the exchequer in channelizing its resources in more productive work. But one wonders whether such considerations do matter at all for the department when we go through orders like the one in *Pepsico India Holding* v. *Commissioner* [2012 (284) E.L.T. 514 (Tri. - Mumbai)] wherein the department went upto CESTAT with the hope of sustaining its stand on denial of credit on the ground that the invoices bore number which were hand-written or rubber-stamped and not printed.

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CENTRAL EXCISE

Circular

Valuation – Supreme Court judgment in Fiat case clarified: CBEC has clarified that transaction value shall not be rejected in all cases where the same is less than cost of production plus profit. Circular No. 979/03/2014-CX, dated 15-1-2014 notes that each case in this regard has to be seen and concluded on the basis of its facts. This Circular also lays down various aspects which are required to be considered by the department to apply the ratio of the Apex Court judgment and clarifies that for the period prior to the date of this judgment, in cases where show-cause notice has been issued on grounds of the said judgment alone, extended period may not be invoked.

Ratio decidendi

Valuation – Inclusion of discounts, where conditions therefor not fulfilled: Cash discounts given at the time of clearance and when prompt payments are not made, will it necessitate inclusion in the assessable value of goods? CESTAT, Ahmedabad has referred this issue to the President, CESTAT for constitution of Three Member Bench, to consider whether the issue needs to be referred to Five Member Bench of the Tribunal. Doubts as raised by Larger Bench in the case of *Lucas TVS Ltd.* in respect of LB decision in case of *Arvind Mills* were also noted by the Bench in this regard. The Tribunal, in this case, expressed the view that under the new Section 4 (Transaction value) of the Central Excise Act, 1944, even a consideration paid at a time other than sale would also be required to be added. [*Gujarat Guardians Ltd.* v. *Commissioner* – CESTAT Ahmedabad Interim Order 2/2014, dated 29-1-2014]

Refund - Suo-motu credit of incorrectly reversed Cenvat credit, valid: Madras High Court has held that suo-motu re-credit of Cenvat credit wrongly reversed earlier is available as the same is only an account entry reversal. It was also held that the question of unjust enrichment, in the present case, has no substance or based on any legal principle, and would not arise as it was not a case of refund of duty under Section 11B of Central Excise Act, 1944. Department's contention that refund of such reversed credit should have been claimed, instead of taking re-credit, was rejected by the court also noting that the reversed credit was in respect of input services falling under Rule 6(5) of the Cenvat Credit Rules, 2004. It may be noted that the decision of CESTAT Larger Bench in the case of *BDH Industries* [2008 (229) ELT 364 (Tri.-LB)], was not discussed here. [*ICMC Corporation Ltd.* v. *Commissioner* – 2014-TIOL-121-HC-MAD-CX]

Cenvat credit can be utilized for payment of duty on inputs procured duty free and cleared as such: CESTAT, Chennai has held that there is no bar under Central Excise (Removal of Goods at Concessional Rate of duty for Manufacture of Excisable Goods) Rules, 2001 which restricts clearance of goods procured duty free under said rules, on payment of duty. The Tribunal allowed the appeal in this case where the assessee had utilized Cenvat credit for payment of duty on removal of goods procured without payment of duty when such goods could not be utilized for specified purposes (exports). The assessee had procured inputs without payment of duty under Notification No. 43/2001-C.E. (N.T.) for use in

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manufacture of export goods but could not utilize the same fully and hence removed them partly as such on payment of duty by utilizing Cenvat credit. [*Ginger Clothing Pvt. Ltd.* v. *Commissioner* – 2014 (299) ELT 469 (Tri.-Chennai)]

Cenvat credit not deniable on purchases from dealer even when manufacturer fraudulent: CESTAT, New Delhi has held that Cenvat credit cannot be denied to bona fide manufacturer when goods were purchased from Second Stage Dealer (SSD) on the basis that the manufacturer who sold the goods to First Stage Dealer (who in turn sold the goods to SSD) was fraudulent and did not clear any duty paid goods. The Tribunal held that the assessee had satisfied the requirement of the Cenvat Credit Rules of knowing the identity of supplier of the goods which in this case was SSD. It was also observed that receipt of goods and use in manufacture of final products was not in doubt or disputed by the Department. [*Super Trading Company* v. *Commissioner* - 2014 (299) ELT 75 (Tri.-Del.)]. Allahabad High Court has also in its recent Order dated 15-1-2014 held that it is impractical to require assessee to go behind records maintained by the dealer [*Commissioner* v. *Juhi Alloys Ltd.* – CEAD No. 6 of 2014].

Cenvat credit to be reversed on inputs removed 'as such' to SEZ: The Tribunal held that Cenvat credit shall be reversed by assessee on inputs removed as such to a unit in SEZ. The Tribunal in this regard noted that the Cenvat Credit Rules, 2004 is a complete code in itself and there is no exception under the rules to provide for non-reversal in cases of removal of goods to SEZ. The Department in this case had demanded reversal of credit pleading that supply to SEZ is not physical export but has been deemed as export. The Tribunal, however, allowed Department's appeal for demand under Rule 3(5) of the Cenvat Credit Rules while also observing that Rules 6(6) of the said Rules and Rules 18 and 19 of the Central Excise Rules were not applicable to the dispute. [*Commissioner* v. *Sundaram Brake Linings Ltd.* – 2014 (299) ELT 342 (Tri.-Chennai)]

Valuation – Cost in part recovered from dealers towards gift items, not includible: CESTAT has held that part amount recovered from wholesalers/ retailers for gift items supplied to them is not includible in the assessable value of manufactured goods. The Tribunal in this regard noted that adjudication had neither brought out nexus between gift and the goods cleared, nor how part recovery of cost of gift depressed the value of goods cleared. [*Commissioner* v. *Grasim Industries* – 2013 (298) ELT 739 (Tri.-Del.)]

ARE-1 is mandatory to claim rebate on exports: Allahabad High Court has held that filing of ARE-1 is compulsory/obligatory in order to claim rebate of duty paid under Rule 18 of the Central Excise Rules, 2002. It was noted that the procedure of filing ARE-1, as envisaged under Notification No. 19/2004-C.E. (N.T.), was devised to ensure that the goods are actually exported by the manufacturer and to prevent mischievous and unscrupulous persons from claiming export benefits. The Court dismissed assessee's petition, observing that provision of collateral documentary evidence, as mentioned in the CBEC's Supplementary Instructions, for export under bond, was not available in cases of export under rebate claim. [*Vee Excel Drugs & Pharmaceuticals Pvt. Ltd.* v. *Union of India* – Allahabad High Court Order dated 7-1-2014 in W.P. No. 1020 of 2013]

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Cutting of carpet rolls into smaller sizes to form mats is not manufacture: CESTAT Larger Bench has held that the activity of cutting of carpet rolls into smaller sizes and subjecting such cut sizes to a process of stitching & lining at edges to form mats does not amount to manufacture under Section 2(f) of Central Excise Act, 1944. The Tribunal in this regard noted that the said process does not result in emergence of any distinct independent commodity. [*Win Enterprises* v. *Commissioner* – 2014 (299) ELT 206 (Tri.-LB)]

Excise dues of previous owner not recoverable from an auction purchaser: The Tribunal has held that the excise dues of the previous owner cannot be recovered under Section 11 of Central Excise Act, 1944 from an auction purchaser of a factory premises under SARFAESI Act, 2002. The Tribunal in this regard relied on the Delhi High Court decision in the case of *Agarwal Metal Works Pvt. Ltd.* [2011 (263) ELT 397]. The department in this case had relied on the sale deeds executed by the banks in favour of assessee, indicating that the assessee should discharge such confirmed demands. [*Spentex Industries Ltd.* v. *Commissioner* – Final Order No. A/11803/2013 dated 17-12-2013, CESTAT Ahmedabad]

Option to pay 25% penalty available by order of Tribunal if such option not given by Assessing Officer: The Gujarat High Court has affirmed the view that in case the assessing officer does not give an option to the assessee under Section 11AC of the Central Excise Act, 1944 to pay duty amount, interest and 25% penalty within 30 days of receipt of order, such option may be given by the Tribunal in its order. The High Court followed earlier Gujarat High Court decisions in the cases of *Gopal Fibers Pvt. Ltd.* and *Harish Silk Mills*. It was noted that Section 11AC does not restrict the benefit of reduced penalty to 30 days from communication of original order only. [*Commissioner* v. *Rita Dyeing & Printing Mills Pvt. Ltd.* – 2014 (299) ELT 408 (Guj.)]

CUSTOMS

Notifications & Circulars

Drawback rates revised – All Industry Rates of duty drawback have been revised by Notification No. 5/2014-Cus.(N.T.), dated 21-1-2014, effective from 25-1-2014. As per CBEC Circular No. 3/2014-Cus., dated 30-1-2014, clarifying the changes, separate entries have been created for specified items in Chapters 3, 60 to 63 and 84; drawback caps have been changed for certain items under Chapters 42, 57 and 87, and drawback rates and caps have been rationalized for specified items under Chapters 48 and 95. Customs portion of certain drawback rates in respect of goods under Chapter 87 has also been enhanced.

Export duty imposed on iron ore pellets: Export of iron ore pellets classifiable under Tariff Item 2601 12 10 of Customs Tariff would now be liable to export duty of 5%. Serial No. 23 of Notification No. 27/2011-Cus., which hitherto carried 'Nil' rate, has been amended in this regard by Notification No. 3/2014-Cus., dated 27-1-2014.

Tunnel boring machines and parts - Exemption from CVD withdrawn: 'Tunnel Boring Machines' and parts & components for use in the assembly of the said machines would now be liable to additional customs duty. Serial

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No. 397 of Notification No. 12/2012-Cus. has been amended in this regard by Notification No. 4/2014-Cus., dated 3-2-2014.

Cotton Yarn exports - Benefit of Incremental Export Incentivisation Scheme available: Cotton yarn has been deleted from the list of export products/sectors ineligible for claiming benefit of Incremental Export Incentivisation Scheme (IEIS). Serial No. (xviii) of Para 3.14.5 of the Foreign Trade Policy, whereby IEIS benefit was restricted on export of cotton yarn, has been deleted by DGFT Notification No. 66, dated 23-1-2014.

Ratio decidendi

Valuation – Transaction value when cannot be rejected: CESTAT, Delhi, in a recent case, has allowed importer's appeal, upholding transaction value holding that the department did not produce evidence of additional consideration and that since the value was accepted at another port, such other imports were to be considered contemporaneous. Methodology to consider value of raw materials was found not acceptable by the Tribunal which also held that the imported goods, PU Belts in this case, cannot be compared with leather belts. It was noted that market enquiry by the department was not relevant in the absence of details inasmuch as even little difference would make lot of effect on price range, and because there was no evidence that goods procured by department were of the same type. Undervaluation was not accepted by the Tribunal after holding that reliance on NIDB data was not appropriate. [*Impex Steel & Bearing Co.* v. *Commissioner* – Final Order No. 50199/2014, dated 21-1-2014, CESTAT, Delhi]

Valuation – Transaction value not applicable if tariff values notified: Writ petitions were filed for release of goods (areca nuts) on the ground that the transaction value based assessment under Section 14(1) of the Customs Act will apply. The department contended that since the tariff value for the goods were prescribed in Notification No. 85/2013-Cus., this value should be taken. In the light of the non-obstante clause in Section 14(2) of the Customs Act and the fact that the notification itself was not challenged, the High Court held that release of goods cannot be directed and plea for adopting transaction value could not be accepted. However, it was left open to challenge the assessment in an appropriate forum. [*Commissioner* v. *Ashirbad Udyog* – 2014-TIOL-92-HC-MAD-CUS]

Confiscation of goods meant for re-export when not proper: CESTAT, Ahmedabad has held after conducting 100% examination and assessment and after verifying the identity of imported goods, it is not proper to reopen assessments subsequently to hold that identity of goods already exported was not established. Part of export goods, in the present case involving drawback claim on re-exports, was indigenously manufactured and part of them were processed after imports. The appellants had furnished detailed reconciliation statements, tally sheets and records maintained which established a continuous link from the time of filing bills of entry to processing activities done and subsequent re-export. It was noted that there was no allegation of diversion of goods and the department did not claim that the goods were only of domestic manufacture. Tribunal in this regard, noting that burden of proof to establish

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indigenous nature of goods and extent of export lies with the investigation, held that exporter should not to be denied export incentives based on presumptions/doubts raised by statements when even cross examination was not extended. [*Rollwell Forge Ltd.* v. *Commissioner* – Order No. A/10038-10040/2014, dated 10-1-2014, CESTAT, Ahmedabad]

Availment of exemption not mandatory under Customs law: CESTAT, Chennai has held that provisions for mandatory availment of exemption as present in Section 5A of Central Excise Act, 1944 are not there in Section 25 of Customs Act, 1962. The case involved payment of duty, not availing exemption under Notification No. 29/2010-Cus., and then subsequent claim of refund under Notification No. 102/2007-Cus. The department had submitted that refund would amount to change of original assessment and that option to pay duty would not be available when goods are exempted. The Tribunal however rejected department's appeal observing that for grant of refund of SAD under Notification No. 102/2007-Cus., re-assessment of bills of entry was not prescribed; that refund was not claimed under Section 27 of Customs Act and lis between assessee and department was absent at the time of clearance. It was noted that payment of duty on import and claiming refund later was of no consequence to the department. [*Redington India Ltd.* v. *Commissioner* – Final Order No. 40018-40041/2014, dated 7-1-2014, CESTAT, Chennai]

Speaking order required for restricting vessel exit from India: CESTAT, Mumbai has held that if department wants to retain the vessel in India, they have to pass a speaking order with reasons and that vessel cannot be held back merely on the basis of oral instructions. The appellant, in this case, was refused permission to take the vessel out of India, on oral instructions, in spite of compliance with the directions of the Tribunal's stay order. [*Hind Offshore Private Limited* v. *Commissioner* – 2014-TIOL-180-CESTAT-MUM]

Interest on delayed refund available after three months from date of application: CESTAT, Kolkata has rejected department's argument that interest on delayed refund, under Section 27A of Customs Act 1962, by the department is payable after three months from the date of CESTAT order granting such refund. Tribunal in this regard relied on Apex Court decision in the case of *Ranbaxy Lab Ltd.* in respect of Section 11BB of the Central Excise Act, 1962. The order of Commissioner (Appeals) directing payment of interest from three months from the date of filing of refund application was hence upheld. [*Commissioner* v. *Amarnath Enviroplast Limited* – 2014-TIOL-163-CESTAT-KOL]

Quantum of pre-deposit – Order dismissing appeal after 92% of pre-deposit, set aside: Delhi High Court, exercising its discretion under Article 226 of Constitution of India, has set aside the order dismissing appeal for want of full pre-deposit where pre-deposit of around 92% of the amount was already made. It was held that approach of Commissioner would result in right to appeal being defeated. The court in this regard also noted that there was no material on record to suggest that there was any mis-declaration to deny relief to the importer. [*Pernod Ricard India* v. *Commissioner* – 2014-TIOL-140-HC-DEL-CUS]

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SERVICE TAX

Notifications & Circulars

Exemption to RWAs, clarified: Notification No. 25/2012-S.T. provides exemption upto Rs.5000 per month per member contributed to Resident Welfare Association (RWA) towards sourcing of goods or services from third person for common use. CBEC now clarifies that if such contribution exceeds Rs. 5000, the entire contribution of such member (s) would be ineligible for exemption. If the RWA collects and makes payment towards electricity bill, acting as pure agent without charging any commission, exclusion from the value of taxable service would be available. In respect of common motor, electricity, etc., such exclusion would not be permissible, as per the Circular No. 175/01/2014-S.T., dated 10-1-2014.

Mega exemption – 'Governmental authority' amended: Notification No. 25/2012-S.T. has been amended in respect of the definition of 'governmental authority'. The amended definition retains the condition on carrying out functions entrusted to a municipality but the authority or body may be one set up by legislature or established by government with 90% or more participation by way of equity or control. Before amendment, all three conditions on body established by government satisfying limit on equity/control, body entrusted with municipal functions and set up by legislature were required to be satisfied.

Ratio decidendi

Valuation - Every incidental expense & reimbursement do not form part of gross value: In this case, the issue was whether the consideration – gross amount for the purpose of valuation would include the charges like telephone, labour, electricity, etc., paid by the client to the clearing and forwarding agent, when such charges were reimbursed based on actuals. The Madras High Court held that as per relevant provisions, the gross amount referred therein would apply to the receipts of such sum which would bear the character of remuneration or commission and in the present case, the expenditure incurred did not bear such character. It thus upheld CESTAT order holding the impugned amounts as not includible in taxable value. [*Commissioner* v. *Sangamitra Services Agency* – 2014 (33) S.T.R. 137 (Mad.)]

Dealing with securities issued on behalf of government – Service tax not applicable: In this case, the respondent was dealing in government securities. It was contended by the department that the Reserve Bank of India is a body corporate and the subscription to securities of a body corporate will fall within the meaning of underwriting as per the Finance Act, 1994. However, as per CBEC Circular No. 126/8/2010-S.T., dated 10-8-2010, primary dealers deal with government securities issued by the RBI on behalf of the Central Government and government securities are not securities of a body corporate. Accordingly, it was held by the Tribunal that the respondent cannot be said to have subscribed to the securities of body corporate to fall within the meaning of underwriting as provided in the Finance Act, 1994 and no service tax would be payable. [*Commissioner* v. *Kotak Mahindra Capital* – 2014-TIOL-77-CESTAT-Mumbai]

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Refund of service tax admissible on terminal handling charges, CHA, storage and warehousing in relation to export: Holding that the services of terminal handling, CHA, storage and warehousing are covered by the Notification No. 41/2007-S.T., dated 6-10-2007, the Tribunal set aside denial of refund claim. The department contended that the activity of terminal handling had been registered under Business Auxiliary Services and clearing and forwarding charges, storage and warehousing were not covered by the notification. The Tribunal relied on precedents to decide on coverage under the notification and the test of service tax being paid and use of said services for export. [*Fibre Bond Industries* v. *CST,* 2014 – TIOL-145-CESTAT-MUM]

Mere provision of table space to financial institutions not covered under BAS: Answering a reference on taxability of provision of table space under the head Business Auxiliary Services (BAS), a Larger Bench of the Tribunal has held that mere provision of space with furniture does not amount to BAS. After discussing different case law covering various facts and situations, it emphasised that the activity undertaken as evidenced by transactional documents and other evidence would determine taxability. At issue was the provision of table space to banks /financial institutions by an automobile dealer. The discussion in the order indicates that payment of commission, marketing of financial products, verification of documents, etc., would be such other activities which could fall under the ambit of BAS. [*Pagariya Auto Centre* v. *Commissioner* – 2014-TIOL-145-CESTAT-MUM]

Cenvat credit of service tax on transportation not admissible to principal when both manufacture and duty payment made by job worker: In a case where job workers had undertaken manufacturing and also paid duty, the principal (appellant) sought to take credit of service tax paid on transportation of inputs to the job workers' premises and transportation of finished goods removed by job workers to the depots of appellant. The Tribunal held that Cenvat credit of service tax on transportation would not be admissible when neither manufacturing activity had been undertaken and nor excise duty paid on goods by the appellant. Considering the plea of revenue-neutrality the Tribunal observed that procedures laid down for taking credit cannot be bypassed only because the job worker could have taken credit. [*Lotte India Corporation* v. *Commissioner* – CESTAT, Chennai, Order dated 24-1-2014]

Contract for civil works without advice on planning and designing of space not covered under Interior Decorator Service: The department sought to collect service tax under Interior Decorator Service in respect of works like renovation, partition, false ceiling, flooring, etc. The assessee argued that no consultancy or technical service in respect of planning and design of spaces had been provided and only civil/ electrical works had been carried out. Agreeing with the assessee the Tribunal held that since the assessee merely undertook activity as per design and drawing supplied, no service had been rendered under the Interior Decorator Service. [*Commissioner* v. *Indecor Slides* – 2014-TIOL-146-CESTAT-MUM]

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Recovery before expiry of time-limit to file appeal & stay, not valid: The petitioner challenged the communications issued to them by the Department seeking reversal of excess Cenvat credit along with interest and penalty determined under the order passed by the Commissioner of Service Tax within two days, failing which coercive proceedings for recovery were threatened. The said communications had been issued before the expiry of the statutory period for filing appeal against the said order. The Bombay High Court held that since the impugned communications were issued without waiting for the expiry of statutory period of three months provided to file appeal and stay application to the Tribunal, they were contrary to the provisions of the Finance Act, 1994 and also in contravention of the circular dated 1-1-2013 issued by CBEC. [*Tata Teleservices (Maharashtra) Limited* v. *The Ministry Of Finance, Department of Revenue* – 2014-TIOL-147-HC-MUM-ST]

VALUE ADDED TAX (VAT)

Notifications

Maharashtra VAT Rules amended: Rule 58 of the Maharashtra Value Added Tax Rules, 2005 ("M-VAT Rules") has been amended by Notification No. VAT 1513/CR-147/Taxation-1 dated 29-1-2014. The amended rules have been deemed to have come into force with effect from 20th June, 2006. As per the changes, the prescribed percentage of deduction for computing the value of goods is to be applied after deducting the cost of land determined under Rule 58 (1A) from the total contract price. Deduction of cost of land has been provided for under Rule 58(1A) for construction contracts where along with immovable property the land or interest in land underlying the immovable property is transferred. If the actual cost of the land is higher than that determined in accordance with the Annual Statement of Rates (including guidelines) prepared under the relevant provisions then upon proving the same, the dealer will be entitled to refund of the excess tax paid. Rules 58(1B) and (1C) have been inserted after Rule 58(1A). As per Rule 58(1B) the value of goods involved in the contracts for construction of flats etc. will depend upon the stage at which the purchaser entered into contract. The following table has been provided for this computation.

S. No.	Stage during which the developer enters into a contract with the purchaser	Amount to be determined as value of goods involved in works contract
1.	Before issue of the Commencement Certificate	100%
2.	From the Commencement Certificate to the completion of plinth level	95%
3.	After the completion of plinth level to the completion of 100% of RCC framework	85%
4.	After the completion of 100% RCC framework to the Occupancy Certificate	55%
5.	After the Occupancy Certificate	Nil

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Delhi Tax Compliance Achievement (Amendment) Scheme, 2014: The amnesty scheme under Delhi VAT has been amended by Notification No. F.3 (24) / Fin (Rev-I)/ 2013-14/ dated 30-1-2014. As per the Delhi Tax Compliance Achievement (Amendment) Scheme, 2014. ("Amending Scheme"), the last date for making a declaration to the designated authority in DSC-1 has been extended to 18th February, 2014. Also certain major changes have been made in the Delhi Tax Compliance Achievement Scheme, 2013 ("Original Scheme" or "Scheme"). As regards the dealers engaged in the execution of works contract, the following has been provided by inserting provisos and explanation after Clause 3(3) of the Original Scheme:

- Tax deficiency caused due to claiming excess deduction in the return on account of labour and services, by the existing registered dealer, will not be covered in the Original Scheme and shall be payable in accordance with Section 4 of Delhi VAT Act.
- Tax due can be calculated under part (a) or (b) i.e. including the land value or excluding the land value, differently for different contracts entered into by the declarant.
- Further, contract between landowner and the builder/developer and that between builder and the intended buyer(s) shall be treated as different contracts.

A registered dealer, who failed to pay tax and file his returns, has declared tax dues for the tax periods ending on or before 31-3-2013 shall file return and pay the net tax as per Section 11 for all the tax periods in default. Upon payment of the tax dues along with interest, the said dealer will get immunity from penalty for late payment of tax and late filing of return. Those who are not availing the scheme will not be entitled to claim refund for the part payments made prior to availing the scheme if the amount of such payment exceeds the tax due by virtue of waiver of interest or penalty available under the scheme.

Ratio decidendi

Clubbing of production of two units not permissible when exemption is unit-specific: The assessee was granted sales tax exemption under Rule 28A of the Haryana General Sales Tax Rules, 1975 subject to the condition that the industrial unit availing the benefit shall continue its production at least for the next five years after availing the benefit, not below the level of average production for the preceding five years. It was noticed that the assessee was not maintaining the level of production of the preceding five years and accordingly a show cause notice was issued to the assessee. However, the assessee contended that it had established another unit as part of expansion which had commenced commercial production and that the production figures of the unit consequent to expansion must also be taken into account.

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The question before the Supreme Court was whether the production of a different unit in the same State can be clubbed to determine whether the unit availing the exemption has fulfilled the condition. The Supreme Court noted that the exemption was 'unit' specific. Accordingly, the Court held that clubbing of the production of the two units was not permissible and the production in respect of the second unit cannot be taken to be on account of the first unit that availed exemption. [*State of Haryana* v. *Bharti Teletech Ltd.* – 2013-VIL-02-SC].

Permission to use trademark when not amounts to transfer of right to use: The assessee was manufacturing and selling Indian made foreign liquor. Different companies were permitted at the same time the right to use trademark of the assessee company. The question before the court was whether the right to use the trademark, permitted by the assessee to various companies, amounted to a transfer of right to use goods and chargeable under Section 3F of the Uttar Pradesh Trade Tax Act, 1948. The court referred to the judgment of the Supreme Court in the case of *BSNL* v. *Union of India* [2006 (3) SCC 1] wherein it was held that to constitute a transaction for the transfer of rights to use the goods, *inter-alia,* two conditions must be satisfied viz. (a) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor, and (b) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others. Accordingly, it was held that in the instant case, the permission granted for the use of the trade mark would only be treated as licence and not as transfer of right to use the trademark since it did not satisfy the abovementioned requirements as laid down by the Supreme Court. [*The Commissioner, Commercial Tax* v. *Seagram India Pvt. Ltd.* – 2014-VIL-30-ALH]

Exchange / barter also covered under 'sale' under Rajasthan Sales Tax Act: The petitioner was a dealer of television sets and introduced an exchange scheme under which old TV sets of customers were exchanged with new TV sets and a differential amount was charged from the customers and received by the petitioner by way of credit notes. The question before the court was whether receiving old television sets in exchange of new television sets as per the scheme were purchases made by the petitioner or not. The assessee contended that the transaction was not a sale or purchase and was in the nature of barter/exchange and did not fall within the definition of 'sale' under the Rajasthan Sales Tax Act, 1994. The court noted the definition of sale as per which every transfer of property in goods by one person to another for consideration would mean sale. Therefore, the transaction in the instant case was held to sale. The court opined that even exchange/barter will fall within the definition of sale/purchase as defined under the RST Act. [*Bhatia Agency* v. *CTO* – 2014-VIL-23-RAJ]

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INCOME TAX

Ratio decidendi

Market rate for Section 80IA deduction in captive power unit need not be limited to electricity grid rate: For computing deduction under section 80IA in respect of power supplied by captive power plant to the cement unit, the taxpayer adopted the price at which the power was supplied by the independent power supplier to DISCOMs. Indian Revenue Authorities (IRA), however, recomputed the deduction taking 'average annual landed cost' [price at which state electricity grid supplied to cement unit] as the market price. On appeal, the Tribunal held that where 'two or more' market values are available, the taxpayer has discretion to adopt any one of them as market value. [*Shree Cement Ltd.* v. *ADIT* – ITAT, Jaipur, Order dated 27-1-2014 in ITA No. 503/JP/2012]

Revised return constitutes 'application' for condonation of delay under Section 119 (2) (b): The taxpayer had claimed refund of TDS for year 2004 by filing a revised return in September, 2011. The taxpayer thereafter filed an application u/s 119 (2) (b) for condonation of delay in filing of revised return which was rejected on the ground that claim for refund cannot be entertained if the same is filed beyond the period of 6 years from the end of assessment year for which the application is made. On appeal, the High Court held that filing of revised return itself should be considered as application for condonation of delay and if the claim of refund is not disputed on merits, the same cannot be denied only on hyper technical view of limitation. [*Devdas Rama Mangalore* v. *CIT* – Bombay High Court Order dated 15-1-2014 in WP No. 2422/2013]

Commercial advantages viz. huge client base, licenses and operational branches constitute 'intangible assets': The taxpayer had taken over four banks along with their assets and liabilities including huge client base, fully functional branches with immediate access to the money markets in respective areas. Tribunal held that the amount of consideration, paid in excess of liabilities over realization value of assets taken over, for taking over the commercial advantage viz. huge client base, licenses and operational branches falls within the ambit of the expression 'business or commercial rights of similar nature' as contemplated in section 32(1)(ii) of the Act and accordingly eligible for depreciation. [*The Cosmos Co-op Bank Ltd.* v. *DCIT* – Order dated 23-1-2014 by ITAT, Pune in ITA No. 460-61/PN/2012]

Activities confined to purchase of goods for export outside India not taxable: The appellant, a TESCO's liaison office (LO) in India, acting as a communication channel between TESCO Hong Kong and the manufacturers in India for sourcing apparels argued that it performs a small, insignificant part of activities which are confined to the purchase of goods for the purpose of export outside India. Tribunal held that, as there was no evidence on record to suggest that the LO indulged in commercial activities and therefore

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exemption under Explanation 1(b) to section 9(1)(i) of the Act could not be denied. [*Tesco International Sourcing Ltd.* v. *DDIT (Intl. Tax)* – Order dated 10-1-2013 by ITAT, Bangalore in ITA (IT) No. 1323-27/Bang/2011]

Sales promotion activity of a liaison office is taxable: The taxpayer had established an LO in India. LO was promoting sales of appellant's product, LO had also appointed a Technical Support Manager and the employees of the LO were offered a sales incentive plan whereby they were remunerated based on the achievement of the sales target in India. Tribunal held that since the employees were promoting the sale of the appellant's goods in India, the income attributable to LO is taxable in India. [*Brown & Sharpe Inc.* v. *ACIT* – Order dated 17-1-2014 by ITAT, Delhi in ITA No. 5026/Del/2011]

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