Lakshmikumaran & Sridharan tax

TAX

amicus

An e-newsletter from Lakshmikumaran & Sridharan, New Delhi, India

January, 2013 / Issue–19

Lakshmikumaran & Sridharan wishes you a very happy and prosperous New Year 2013

Contents

January
2013

Article

Determination of place of provision of service – A thorny issue

By **Kapil Sharma & Narendra Singhvi**

The new regime for taxation of services based on a negative list of services has come into force with effect from 1stt July, 2012. To implement this new regime, certain provisions in the Finance Act, 1994 have been amended and some provisions have been added. A new charging provision viz., Section 66B has been introduced to widen the scope of tax on services. This provision *inter-alia* provides that service tax shall be chargeable on all services provided within the taxable territory. The definition of 'taxable territory' includes all parts of India except the State of Jammu and Kashmir ('J&K').

In order to determine, whether a service has been provided within the taxable territory or not, the Central Government has introduced 'the Place of Provision of Services Rules, 2012' ('POPS Rules') replacing the Export of Services Rules, 2005 and the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 (commonly referred as 'Import of Services Rules'). The thrust of this article is to highlight the issues arising out of the new POPS Rules and not to examine the scope of individual rules therein.

The POPS Rules do hint at an attempt to create a common approach for the determination of the place of supply both for goods and services, as India will transit to a GST regime in the near future. There are, in all, 14 rules in the POPS Rules.

Rule 2 provides for various definitions, the most important being the definitions for 'location of the service provider' and 'location of the service recipient'. The main criterion for determining the place of provision for many supplies/ transactions is linked to the location of the service provider/ recipient.

These two terms are defined in a similar way to mean either the place for which a single registration has been obtained or the place of business establishment/fixed establishment/establishment most directly concerned with the provision of service/usual place of residence. However, in the absence of statutory definitions for the terms 'fixed establishment', 'business establishment', etc., determination of location of the service provider/ recipient itself becomes litigious, making the application of these rules more difficult.

Further, these definitions have an inherent lacuna in respect of a conglomerate having branches across India including J&K and having a centralized registration for all its branches including that in J&K. The question is: 'Will service tax be payable on services provided from or received in J&K considering the fact that the branch in J&K is deemed to be outside the taxable territory?'

The determination of location of the service provider/recipient, in respect of intangible services such as telecommunication, IPR, etc., in which services are received at more than one location, both within and outside the taxable territory, is also a challenge under these definitions.

Rule 4 of the POPS Rules provides for determination of the place of provision of services in respect of performance-based services. However, there is no clarity in this regard when we consider

© 2013 Lakshmikumaran & Sridharan, India
All rights reserved

services which are physically received and consumed outside the taxable territory, for example, goods made available for use outside India.

The place of provision of services directly connected with the immovable property, under Rule 5, shall be the location where such immovable property is located or *intended to be located.* By use of the words 'intended to be located', the scope of Rule 5 has been expanded to include services in relation to an immovable property which is yet to come into existence. However, is a service directly connected with an immovable property or not, is a question that can pose problems.

When any service is provided at more than one location, including a location in the taxable territory, the place of provision of such a service, under Rule 7, shall be the location in the taxable territory where the greatest proportion of the service is provided. This rule is indeed regressive in that, just because a small part is performed in the taxable territory, a major part outside the taxable territory also gets taxed. Further, no mechanism has been prescribed to ascertain the place of greatest proportion of taxable service, under these rules.

Rule 8, the most debated rule, provides that where both the service provider and the service recipient are located within the taxable territory, the place of provision of service shall be the location of the service recipient. The debate in fact originates from the pre-dominant position that Rule 8 acquires when the principle of choosing the rule, from among the rules that merit equal consideration, as prescribed in Rule 14, is to be followed. In other words, if a particular service is covered by any or all of the rules contained in Rules 3 to 7, and also Rule 8, then the place of provision of service shall be determined by adopting Rule 8 only. Accordingly, where both service provider and service recipient are located in India, services based on performance or services connected with immovable property cannot be said to have been provided outside India under Rules 4 and 5 respectively, as Rule 8 acquires predominance automatically. The principle contained in Rule 8, further, defies the logic of classification of services, on which the POPS Rules are based, and indicates that overriding this logic, these are more location/ contract centric rules.

Rule 9 provides for the determination of the place of provision in respect of certain specified services, such as intermediary services, to be the location of the service provider. The definition of 'intermediary' under Rule 2 indicates that it applies only to persons facilitating the provision of services. In other words it does not extend to intermediaries in respect of goods. Thus there can be confusion while applying Rule 9 to intermediaries who facilitate the provision of composite services such as works contract, which involve the supply of goods as well as provision of services.

Have the POPS Rules indeed simplified the levy of tax on services, or have they further complicated the already complex service tax law? What happens when GST is introduced? Will these rules support the new regime? How will the POPS Rules differentiate between taxable and non-taxable territories under the GST regime? How is the place of taxation of goods sold between two states located within the taxable territory itself to be determined? These and many more questions arise as we think of the future of levy of tax on goods and services.

[The first author is a Principal Associate and second author is an Associate, Tax Practice, Lakshmikumaran & Sridharan, New Delhi]

© 2013 Lakshmikumaran & Sridharan, India
All rights reserved

CUSTOMS

Notifications & Circulars

Effective rates of duty further reduced on imports from various countries under trade agreements: The effective rates of duty contained in various exemption notifications applicable to import of specified goods from various countries who have signed preferential trade agreements with India, have been further reduced. While in respect of imports from South Korea, Malaysia, Singapore and various ASEAN countries the rates have been reduced across the board, in the case of imports from Japan, the rates have been reduced for only two tariff lines. The following parent exemption notifications stand amended with effect from 1-1-2013 (except for Singapore, which is effective from 18-12-2012):

- South Korea - Notification No. 152/2009-Cus. dated 31-12-2009 as amended by Notification No. 66/2012-Cus.
- Malaysia - Notification No. 53/2011-Cus., dated 1-7-2011 as amended by Notification No. 67/2012-Cus.
- ASEAN countries – Notification No. 46/2011-Cus., dated 1-6-2011 as amended by Notification No. 64/2012-Cus.
- Japan - Notification No. 69/2011-Cus., dated 29-7-2011 as amended by Notification No. 65/2012-Cus.
- Singapore – Notification No. 10/2008-Cus., dated 15-1-2008 as amended by Notification No. 61/2012-Cus.

Effective rate of duty on imports from Pakistan and Sri Lanka, reduced: Effective rate of duty on specified imports from Pakistan and Sri Lanka under the SAFTA agreement, has been further reduced. Notification No. 68/2012-Cus., dated 31-12-2012 has been issued for this purpose and it supersedes earlier Notification No. 125/2011-Cus.

Incremental Exports Incentivisation Scheme announced: A new scheme to incentivize incremental exports has been announced by inserting Para 3.14.4 in the Foreign Trade Policy, 2009-14. Under the scheme, an exporter will be entitled to transferable duty credit scrip @ 2% on the incremental growth achieved on FOB value of exports during the period from 1-1-2013 to 31-3-2013 as compared to the period from 1-1-2012 to 31-3-2012. However, certain exports (supplies to SEZ, deemed exports, export of certain commodities, etc.) will not be taken into account for the purpose of calculation of export performance under the scheme. Further, the scheme is region specific and will cover exports to USA, EU and Asian countries (except Singapore, UAE and Hong Kong) only. Notification No. 27(RE-2012)/2009-2014, dated 28-12-2012 issued by DGFT amends Para 3.17.8 also of the FTP which means, the benefit under this new scheme will be in addition to the benefit available under any other scheme under Chapter 3 of the FTP. Public Notice No. 41/2009-2012(RE-2012) also prescribes the procedure whereunder application for grant of benefit under this scheme is required to be filed in ANF 3F to the RA concerned. Under this scheme the export performance achieved by one IEC holder is not allowed to be transferred to another IEC holder.

Re-import of goods from Bhutan for the purpose of repair and reconditioning: Notification No. 158/95-Cus., dated 14-11-1995 allows duty free re-import of goods manufactured in India and parts of such goods whether of Indian or foreign manufacture, for the purpose of repair or for

© 2013 Lakshmikumaran & Sridharan, India
All rights reserved

reconditioning, on fulfillment of conditions provided therein. Notification No. 60/2012-Cus., dated 6-12-2012 has amended this parent notification to allow such re-import of goods from Bhutan as well within 10 years from the date of export.

Export obligation relief for sectors which witnessed decline in exports: In terms of Para 5.11.2 of Handbook of Procedure Vol-1 (2009-14), DGFT has issued a list comprising of 223 items, which witnessed a decline in exports, by more than 5%, in the year 2011-12 as compared to 2010-11. This list has been issued for re-fixation of the annual average export obligation for EPCG Authorisations for the year 2011-12. Policy Circular No. 9(RE-2012)/2009-14 dated 27-12-2012 also directs for appropriate endorsement of the reduction in average export obligation in the licence file of the office of RA as well as in the amendment sheet to be issued to the EPCG Authorisation holder.

Classification of cordless infrared devices for remote control: When cordless infrared devices for remote control are presented in a set for retail sale directly to users without repacking, along with principal/main device with which they are used, they shall be classified along the principal/main device by application of Rule 3(b) and Rule 6 of General Rules of Interpretation. CBEC Circular No. 1/2013-Cus., dated 1-1-2013 while clarifying the above also instructs that in cases where cordless infrared devices for remote control are presented separately, they shall be classified under sub-heading 8543.70 of Customs Tariff, by application of Rule 1 and Rule 6 of the said Rules.

Imports for mega power projects – FDRs can be replaced with bank guarantee: Notification No. 12/2012-Cus. allows duty free import for supplies to mega and ultra mega power projects. Conditions for such duty free import were amended on 27-6-2012 by giving an option to the importer to furnish security either in the form of a fixed deposit receipt (FDR) or bank guarantee from a scheduled bank. Now, CBEC Circular No. 2/2013-Cus., dated 1-1-2013 clarifies that it has been decided to allow replacement of FDRs given prior to 27-6-2012 with bank guarantee.

Ratio decidendi

Interest on delay in refund of bank guarantee: The Madras High Court has held that interest is payable for delay in refund of bank guarantee encashed earlier. The court held that interest is not payable under Section 27A of the Customs Act, 1962, but the assessee was entitled to interest considering the Supreme Court judgment in the case of *Sandvik Asia*. Earlier, the Department had denied interest on the ground that Section 27A would apply only when the refund was payable under Section 27 and that since Section 27 was not applicable for refund of bank guarantee already enforced, Section 27A would not be applicable. [*Areva T&D India Ltd.* v. *Commissioner* – 2012 TIOL 1045 HC-MAD-Cus.].

Countervailing duty when not payable on MRP basis: CESTAT, Mumbai has held that CVD on import of torches for undertaking the activity of packing/ re-packing & labeling which amounts to manufacture under the Central Excise Act, 1944, shall not be payable on MRP basis. The Tribunal in this case held that the retail sale price of the product is required to be declared only if the commodity is meant for retail sales and as the torches in this case were subject to the activity of packing/ re-packing & labeling which amounts to manufacture, the same shall be exempted from declaration of MRP under Rule 3 of the Legal Metrology (Packaged Commodities) Rules, 2011. [*Starlite Components Ltd.* v. *Commissioner* - 2012 (286) E.L.T. 43 (Tri-Mumbai)].

© 2013 Lakshmikumaran & Sridharan, India
All rights reserved

Refund claimed by CHA through letter when valid: CESTAT, Bangalore has held that refund claim filed by CHA who was duly authorized by the importer, even though the same is not in proper format, is valid. The Tribunal held so, while it observed that in the case before it, the original authority had accepted that there was short landing of goods. Refund claim filed originally by CHA was not accepted and the Department asked the importer to file the claim in proper format. The claim filed subsequently by the importer was held as time-barred. The Tribunal while holding refund as admissible ordered that the letter filed by CHA seeking refund would be treated as a claim in this case. [*P.S.Tech Com Pvt. Ltd.* v. *Commissioner* – 2012 TIOL 1843-CESTAT-Bang.].

EOU – Exemption in the absence of specific mention in notification: Additional duty on high speed diesel payable under Section 116 of Finance Act, 1999 was demanded on the ground that the same was not specifically exempted under Notification 52/2003-Cus. CESTAT, Delhi however held that there was no need for an exemption notification to authorize deposit of goods in the bonded warehouse of 100% EOU. Further, relying upon the larger bench decision in the case of *Paras Fab International* [2010 (256) ELT 556 Tri.-Del.], the Tribunal held that the imported goods warehoused in the premises of 100% EOU and used for purpose of manufacturing in bond cannot be treated to have been 'removed for home consumption' and hence no liability for any kind of duty can arise in such cases. [*Commissioner* v. *STI India Ltd.* - 2012-TIOL-1867-CESTAT-DEL].

Company's dues cannot be recovered from former Directors: Relying on the definition of 'defaulter' in Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995, the Delhi High Court has held that the director and the company are separate juristic persons and therefore dues recoverable from the company cannot be recovered from a former director. The court noted that there is no provision in the Customs Act corresponding to Section 179 of the Income tax Act, 1961 or Section 18 of the Central Sales Tax Act, 1956 to enable the revenue authorities to proceed against directors of companies or such third parties who are not defaulters. In this case, the department had sought recovery of customs duty dues from a former director. [*Anita Grover* v. *Commissioner* - 2012-TIOL-1049 HC-DEL-CUS].

CENTRAL EXCISE

Circular

Recovery of confirmed demands – New guidelines issued: New guidelines for initiating recovery proceedings by the Revenue Department have been issued by C.B.E. & C. The Circular No. 967/1/2013-CX, dated 1-1-2013 pertains to recovery in cases where the stay application is pending or where no stay application or appeal has been filed against the order confirming demand of tax / duty. The present circular supersedes earlier circulars issued on this subject besides amending CBEC's Excise Manual of Supplementary Instructions. As per the circular, in cases where an appeal has been filed along with a stay application against an adjudication order, recovery proceedings are to be initiated after 30 days of filing of such appeal if stay has not been granted. The new procedure is applicable in all the cases of appeals lying with the Commissioner (Appeals) and with the CESTAT. In case where no appeal has been filed, the circular instructs the department to wait for completion of the statutory period for filing of appeal (Statutory period for filing of appeal to Commissioner (Appeals) and CESTAT is 60 and 90 days respectively). If

© 2013 Lakshmikumaran & Sridharan, India
All rights reserved

appeal has been filed without stay application, recovery proceedings will commence without waiting for expiry of the statutory time period for filing appeal. The said procedure would also be applicable in cases where appeal to CESTAT is against an order-in-appeal [Order of Commissioner (Appeals)] where the demand is confirmed for the first time. In cases where the Tribunal or the High Court confirms the demand, recovery will be initiated immediately on issue of the relevant order, if no stay is in operation.

Ratio decidendi

Commissioner cannot challenge revision order of the Central Govt.: The Delhi High Court has held that neither the Assistant Commissioner (Tech.), Central Excise, nor the Union of India can question the order passed in revision under Section 35EE of the Central Excise Act, 1944 by the Central Government as no writ can be filed by a government functionary questioning the decision of the Government itself and the Union of India cannot also question its own order. The Court noted that the said section repeatedly refers to the "Central Government" and not to any official or functionary thereof and that the Joint Secretary acts for the Central Government in passing the order and hence the decision is of the Central Government itself. The Court hence held that if the Commissioner chooses to take the revisionary route and question the legality and propriety of the order of the Commissioner (Appeals) before the Central Government under Section 35EE, he must, if the decision of the Central Government goes against him, accept it as final. It was observed that the section does not recognise any grievance that the Commissioner may nurse against the decision of the Central Government. [*Union of India* v. *Ind Metal Extrusions Pvt. Ltd.* – Delhi High Court decision dated 2-1-2013 in W.P. (C) 504/2010].

Valuation to be under Rule 4 when goods cleared to both related and unrelated buyers: CESTAT, Delhi has held that when the goods are cleared to both related and unrelated buyers, then valuation of such goods should be made under Rule 4 of the Central Excise Valuation Rules and not under Rule 8 or 9 as contended by the department. The Tribunal in this regard noted that while both the adjudicating and the appellate authority had held, without giving any reason, that the goods were supplied only to related parties, the SCN had stated that during the period the goods were cleared both to related as well as unrelated parties. It was also held that Rule 8 and 9 are in the nature of exception to Rule 4 which is the general rule for valuation of excisable goods. [*Oswal Woolen Mills* v. *Commissioner* – 2012 TIOL-1963-CESTAT DEL.].

Authorisation to search when not valid: The Bombay High Court has held that authorization to search is not valid in a case where the first authority competent to search had not said anything but had merely placed the file for approval before higher authorities namely Additional Director who also only suggested grant of permission to search. It was noted by the High Court that the remarks made by the Additional Director cannot be taken as express authorization as he had himself put up the matter before a higher authority who simply signed without recording any remark. The court held that it was difficult to find out which authority had actually applied his/her mind and had granted authorization. It was also noted that the intelligence report also did not show as to who had received the alleged information. The search was hence held as not valid and legal. [*Samadhan Steel Traders* v. *Union of India* – 2012 (286) E.L.T. 343 (Bom.)].

Duty liability on clearance of nil-rated goods in DTA by EOU: The Bombay High Court in a recent judgment has held that fresh mushrooms cleared in DTA by the assessee-EOU would not be liable to duty. The court observed that the Department ought to have relied on Commissioner (Appeals)'s Order which had held that even though the said goods were excisable,

© 2013 Lakshmikumaran & Sridharan, India
All rights reserved

they cannot be made liable to duty as the rate of duty for them was nil. It rejected the argument of the Department that the said decision of Commissioner (A) pertained to the period before the amendment to the Central Excise Tariff Act, 1985 in 2005 and that the said goods were not excisable earlier but were made excisable for the first time only in 2005. The court noted that the said amendment was brought to align Excise Tariff with Customs Tariff and not with a view to bring in new goods under excise as clarified by the department and that the Commissioner (A) also, in relation to the earlier period, had held that the goods were excisable. It was hence held that the adjudicating officer was bound by the decision of the Commissioner (A) even though it pertained to period prior to the amendment in the Central Excise Tariff Act. [*ECO Valley Farms & Foods Limited* v. *Commissioner* – Bombay High Court Order dated 14-12-2012 in Central Excise Appeal No. 46 of 2012].

Cenvat credit on diesel locomotive used within factory: CESTAT, Kolkata has held that diesel locomotive used as an accessory to the torpedo ladle car used in transportation of molten metal from the blast furnace to conarc furnace and then to the pig casting machine is eligible for Cenvat credit. It was noted that the diesel locomotive enhanced the effectiveness of the ladle car when it carried around 300-350 MT of molten metal. The Tribunal held that without the locomotives, the handling and in turn the production of the iron and steel products could not have been possible. [*Commissioner* v. *Bhushan Steel* – 2012-TIOL 1964-CESTAT-KOL.].

Area based exemption – Trial production when becomes commercial production: The Gauhati High Court has held that once the trial production of the unit had commenced and the goods were sold for commercial consideration, it can be said that the commercial production had started and consequently, the benefit of Notification No. 20/2007-CE was deniable in the case before it. The assessee commenced trial production of goods in February, 2007 and such production was reflected in its excise returns and duty was paid on the removal of goods, however, the assessee was granted approval of Research Design & Standard Organization in June, 2007. Notification No. 20/2007-C.E., dated 25-4-2007 was issued providing exemption to unit which commenced 'commercial production' after 1-4-2007. [*Railtrack Concrete Production Pvt. Ltd. v. Commissioner* - 2012 (286) E.L.T. 30 (Gau.)].

Cenvat credit on LSHS used as fuel for electricity generation and such electricity used for manufacture of exempted goods: The Supreme Court has referred the issue of eligibility of Cenvat credit on Low Sulphur Heavy Stock (LSHS) used for generation of electricity, further used in manufacture of exempted fertilizer, to the Larger Bench of the Supreme Court. The reference was made in view of the conflicting decisions – one in assessee's own case [2009 (240) E.L.T. 661 (S.C.)], in which credit of duty paid on LSHS was denied and another in the case of *Gujarat State Fertilizers & Chem. Ltd.* [2008 (229) E.L.T. 9 (S.C.)], wherein such credit was allowed. [*Commissioner* v. *Gujarat Narmada Valley Fertilizers Company Ltd.* - 2012 (286) E.L.T. 481 (S.C.)].

Education Cesses not exempted under area-based exemption notification: CESTAT, New Delhi has denied exemption under Notification No. 56/2002-CE (area-based exemption to units in J&K) from Education Cess and Secondary and Higher Education Cess. The Tribunal, in the light of decision of Guwahati High Court in the case of *Dharampal Satyapal Ltd.* [2012 (275) ELT 71 (Gau.)], held that since Education Cess is not specifically exempted under the said notification, the same shall continue to be payable. [*Tawi Chemical Industries Ltd.* v. *Commissioner* - 2012 (286) E.L.T. 553 (Tri-Del)].

© 2013 Lakshmikumaran & Sridharan, India
All rights reserved

SERVICE TAX

Circulars

Service tax not payable based on reminder letters for paying insurance premium: C.B.E. & C. has clarified that service tax payment does not arise based on reminder notices/letters issued by life insurance companies to policy holders to pay renewal premiums. As per Circular No.166/1/2013-S.T., issued on the first day of this year, under the Point of Taxation Rules 2011, generally the point of taxation is the date of issue of invoice or receipt of payment (whichever is earlier) and such point of taxation does not arise on account of these reminders.

Transportation of milk by rail – Exemption clarified as admissible: By Circular No. 167/2/2013-S.T.., dated 1-1-2013, the C.B.E. & C. has clarified that exemption will be admissible to transportation of milk by rail as per S. No. 20(i) of Notification No. 25/2012-S.T., The relevant entry includes milk products without expressly mentioning 'milk' but the circular states that the word 'foodstuff' appearing in this entry includes milk.

Ratio decidendi

Works contract – Composition scheme not available to on-going contracts as on 1-6-2007 on which tax paid under other category: The Supreme Court has held that the option of composition scheme was not available to works contract which was 'on-going' as on 1-6-2007 and in respect of which Service Tax had been paid already under a different category of service. It held that option to pay tax under composition scheme must be exercised before payment of tax on a particular works contract and the assessee did not exercise such option on the mode of payment of tax after 1st July, 2007 with regard to reclassified works contract. Further, the court noted that the appellant in the instant case had not challenged the validity of the relevant rule. It held that the relevant circular was not discriminatory as those who paid tax adopting classification prior to 1-6-2007 and those who opted to pay tax under composition scheme belonged to different classes. [*Nagarjuna Construction Co. Ltd.* v. *Government of India* - 2012 (28) S.T.R. 561 (S.C.)]

Valuation – Free of cost supplies when not includible: In this case, the appellant was maintaining & operating equipments of its clients. Such services of maintenance & operation necessarily required electricity. Such electricity was provided free of cost by the client to the appellant. The issue before the Bombay High Court was whether such FOC electricity was includible in the value of service. The court held that since no benefit accrued to the appellant by such supply of electricity, the same did not amount to additional consideration for the service provided. The High Court directed the Tribunal to hear the appeal without pre-desposit. [*Inox Air Products Ltd.* v. *Commissioner* - 2012 (28) S.T.R. 570 (Bom.)].

Service tax liability absent on intra-company services: In this case, Mahindra and Mahindra Limited, a legal entity, was having two separate divisions. The appellant was the logistics division which provided various logistics services to the farm equipment sector division and on such services provided, service tax was demanded. The Tribunal, rejecting the demand, held that two divisions of the same legal entity cannot be considered as separate legal entities merely because separate registration was taken by them under service tax law. [*Mahindra Logistics Ltd.* v. *Commissioner* - 2012-TIOL-1919-CESTAT-MUM].

© 2013 Lakshmikumaran & Sridharan, India
All rights reserved

VALUE ADDED TAX (VAT)

Notifications & Circulars

Delhi VAT - Submission of information in Form T2 effective from 1-2-2013: Requirement of submission of details of invoice and Goods Receipt Note, in respect of all goods purchased/ received as stock transfer from outside Delhi, in Form T2 has been postponed from 1-1-2013 to 1-2-2013. Notification No. F. 7 (433)/ Policy-II/ VAT/ 2012/1079-1090), dated 3-1-2013 has been issued in this regard.

Generating Sets - VAT rate reduced in Tamil Nadu: The rate of VAT payable by a dealer under Tamil Nadu Value Added Tax Act, 2005, on the sale of generating sets used for producing electricity, has been reduced from 14.5 % to 5%. This Notification G.O.Ms. No. 154, dated 8-12-2012 has been given effect from 7-12-2012.

Motor vehicles - Exemption from payment of entry tax in Tamil Nadu in specified cases: Tamil Nadu has exempted importers from payment of entry tax in respect of entry of cars and two wheelers into the local area for sale thereon to embassies or consulates and its diplomatic officers, in case of specified countries, for their official and personal use under reciprocal arrangements with India. Notification G.O.Ms. No. 153, dated 8-12-2012, effective from 8-12-2012, lists some 119 countries for said purpose.

Composition scheme for lease transactions under AP VAT - Instructions: By Circular C.C.No.1 CCT's Ref. AIII(1)/68/2011, dated 2-1-2013, it has been clarified that, as part of the amendments to the APVAT Act, 2005, provisions introducing composition schemes in respect of lease transactions (transfer of right to use) and certain transactions of printers, have come into force already with retrospective effect and that the dealers cannot be denied the benefit of composition just for want of notification of the relevant rules. All audit/assessing authorities have been instructed to accept the option exercised by dealers in any form for payment of tax by way of composition in respect of such transactions. Dealers can exercise option for single transaction or for multiple transactions or even for a period under single option form. Dealers, who have not filed such option, can do so at any time before filing return covering those transactions. Further, in the absence of any specific option exercised by the dealers in this regard, filing of the monthly returns as per the provisions of composition scheme shall be taken as deemed exercise of such option for composition.

Ratio decidendi

Transfer of right to use trademark is sale: The Kerala High Court has held that transfer of right to use a trademark is 'sale' as defined under Kerala Value Added Tax Act, 2003. The petitioner, sole proprietor of a trademark and engaged in the business of marketing, trading, export and import of jewellary etc. had entered into franchisee agreements with various companies, under which, on mutually agreed terms, the companies were allowed to use the trademark owned by the petitioner in return of a royalty on which service tax was also paid. The court, noting that in this transaction, franchisees were authorized to use the petitioner's trademark against payment of agreed royalty, held that such a transaction would qualify to be deemed sale and would be chargeable to VAT. As regards the requirement prescribed in the case of *BSNL* [(2006) 3 SCC 1] that the transfer of right to use goods shall be in exclusion of the transferor, the

© 2013 Lakshmikumaran & Sridharan, India
All rights reserved

court observed that the Supreme Court in the *BSNL* case was not dealing with transfer of intellectual property rights such as trademark and that it was on the petitioner to plead and prove that no exclusive right within a territory was given to the franchisees, which the petitioner failed to do. It was also noted that as per the franchisee agreement the franchisee had undertaken not to use the showroom for any purpose or activity other than provided for in the agreement and in these circumstances the *BSNL* decision cannot be applied in the present case. The court relying on various orders held that trademarks are goods as defined under K-VAT. [*Malabar Gold Private Limited v. Commercial Tax Officer* - 2012-VIL-112-Ker.].

VAT credit when dealer registration cancelled: In this case, the petitioner had made certain purchases after 1-1-2011 from one entity whose registration under the Gujarat Value Added Tax Act was cancelled with effect from 1-1-2011. Since the registration was cancelled with effect from 1-1-2011, the department denied credit to the petitioner on the purchases made after that date. The case of the petitioner was that credit was not deniable on the purchases made till cancellation order was published as required under the Act and in any case, till 6-3-2012, when the order was passed. The Gujarat High Court noted that as per the provisions of the VAT Act, in case of a dealer whose registration has been cancelled or suspended, the purchases made from such a dealer would be ineligible for tax credit under Section 11(5)(mmmm) of the Act, if such purchases are made after the name of the selling dealer is published under Section 27(11) of the Act. The order of cancellation of registration of the dealer was passed on 6-3-2012 and therefore, publication as required under Section 27(11) of the Act would be some time thereafter. The court hence held that tax credit cannot be denied for the purchases made by the petitioner from such dealer prior to 6-3-2012. [*Meet Traders* v. *State of Gujarat* - 2012-VIL-110-GUJ.].

INCOME TAX

Ratio decidendi

Network access charges is revenue expenditure and not capital in nature: In the instant case, the assessee had made payment for availing e-mail infrastructure owned by the parent company for communication between its employees and outside business partners. Assessee claimed the said expenditure to be revenue in nature. However, the Department disallowed the same on the ground that the same was capital in nature being debited under the head 'software expenditure'. The ITAT, Mumbai held that such secured internet facilities facilitates the day-to-day business operation of the assessee and does not bring into existence any enduring benefit or creation of a new asset to the assessee and accordingly allowed the appeal [*Evonik Degussa India (P.) Ltd.* v. *ACIT,* ITAT Mumbai, I.T.A No. 7653(Mum.) of 2011 dated 21-11-2012].

Fees for technical services taxable on receipt basis as per India-USA treaty: In the instant case, the amount payable to the USA entity as fees for technical services had been brought to tax in India in the hands of the assessee by the revenue authorities. The assessee disputed the same on the ground that as per the India-USA treaty such payment becomes taxable only in the year of payment. As per India-USA treaty, the term 'fees for technical services'

© 2013 Lakshmikumaran & Sridharan, India
All rights reserved

is defined to mean '*Payments* of any amount in consideration for the services of managerial, technical or consultancy nature including the provision of services of technical or other personnel'. In this regard reliance was placed by the assessee on the case of *Siemens Aktiengesellschaft* wherein interpreting a similar language employed in India-Germany treaty, it was held by the Tribunal that the same should be reckoned to taxation only when it is actually received by the assessee and not otherwise. The said decision was upheld by the Bombay High Court. The Tribunal relying on the said judicial pronouncements, held that the amount payable by the assessee to the USA entity could not be brought to tax in India during the year under consideration as fees for technical services as per the relevant provisions of the DTAAs since the same had not been paid to the said entity. [*Booz. Allen & Hamilton (India) Ltd.* v. *ADIT (IT),* ITAT Mumbai, I.T.A No. 4505(Mum.) of 2003, dated 21-12-2012].

Computation of profits of non-resident from services to oil exploration industry - Section 44BB being specific is applicable and not Section 44DA: The assessee was engaged in the business of providing geophysical services to oil and gas exploration industry, conducting electromagnetic survey and processing and interpretation of data. The assessee contended that he was eligible to pay tax as per Section 44BB while the department argued that the assessee was liable to pay tax as per Section 44DA. The Delhi High Court held that Section 44BB is a special provision for computing the profits and gains of a non-resident in connection with the business of providing services or facilities in connection with, or supplying plant and machinery on hire, used or to be used, in the prospecting for, or extraction or production of mineral oils including petroleum and natural gas. It held that Section 44DA is a provision which applies to non-residents and it is broader and more general in nature and provides for assessment of the income of the non-resident by way of royalty or fees for technical services, where such non-resident carries on business in India through a permanent establishment situated therein or performs services from a fixed place of profession situated in India and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with the permanent establishment or fixed place of profession. The High Court dismissed the writ petition holding that in the impugned case profits shall be computed as per Section 44BB and not Section 44DA. [*DIT* v. *OHM Limited,* Order of Delhi High Court dated 6-12-2012 in W.P (C) 6830/2011].

Taxability of royalty under retrospective law & reimbursement of expenses: In the instant case, the assessee received certain amount towards reimbursement of international telecom connectivity charges, without any mark-up. The assessee claimed that the said amount did not fall under *'royalty'* as defined in India-USA treaty. It was a *'reimbursement of expenses'* and accordingly it was not income. However, the department claimed that the said amount had to be assessed as *'royalty'* irrespective of the position under the treaty in view of the retrospective insertion by the Finance Act, 2012. The ITAT, Mumbai held that even after the retrospective amendment is applied, the amount would not constitute *'royalty'* as the same was not received for the use or right to use any industrial, commercial or scientific equipment owned by the assessee. Further, the said amount can be considered as royalty in the hands of telecom operators who owns the equipment and not in the hands of an intermediary like the assessee who merely made the payment and got the reimbursement of the same. [*WNS North America INC* v. *ADIT,* ITA 8621/Mum/2010, Order dated 14-12-2012].

© 2013 Lakshmikumaran & Sridharan, India
All rights reserved

Transfer Pricing – Principle of aggregation of interconnected transactions: Where a tax payer is engaged in both manufacturing and trading activities, the Tribunal held that if both the segments are intertwined and inter-related warranting a 'Combined Transaction Approach', it is permissible in arriving at a single Arm's Length Price ('ALP') for both the segments put together. In the facts of the tax payer, income from trading in spare parts was triggered as a result of its manufacturing activities, including warranty commitments. The Tribunal therefore held that though function, assets and risks of the trading and manufacturing segments generally differ, determination of a single ALP under the facts is permissible. The Tribunal opined that granting of approval by the Commissioner to the Assessing Officer for making a reference to the Transfer Pricing Officer as per Section 92CA(1) of the Act is an administrative function and hence the Commissioner is not required to apply his mind to see whether the proposal received from the Assessing Officer is acceptable or not. Reasoning that transfer pricing provisions are anti-avoidance provisions which have been incorporated to protect the tax base of the country from being eroded and hence will over-ride all other provisions of the Act, the Tribunal therefore held total income of the tax payer can be increased due to transfer pricing adjustment though such adjustments are not specifically included in the definition of 'income'. For the same reason, the Tribunal also held that transfer pricing provisions would override Section 40A(2) of the Act and therefore, transfer pricing adjustment can be made though no dis-allowance was made under Section 40(A)(2) of the Act. [*Toyota Kirloskar Motors Pvt Ltd* v. *ACIT,* ITAT Bangalore, I.T.A. No. 828/Bang/2010, dated 22-1-2012]

Disclaimer: *Tax Amicus* is meant for informational purpose only and does not purport to be advice or opinion, legal or otherwise, whatsoever. The information provided is not intended to create an attorney-client relationship and not for advertising or soliciting. Lakshmikumaran & Sridharan does not intend to advertise its services or solicit work through this newsletter. Lakshmikumaran & Sridharan or its associates are not responsible for any error or omission in this newsletter or for any action taken based on its contents. The views expressed in the article(s) in this newsletter are personal views of the author(s). Unsolicited mails or information sent to Lakshmikumaran & Sridharan will not be treated as confidential and do not create attorney-client relationship with Lakshmikumaran & Sridharan. This issue covers news and developments till 5th January, 2013. To unsubscribe, e-mail Knowledge Management Team at newslettertax@lakshmisri.com

www.lslaw.in http://addb-lslaw.in

© 2013 Lakshmikumaran & Sridharan, India
All rights reserved