Lakshmikumaran & Sridharan tax

TAX

# amicus

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

March 2014 / Issue–33

## Contents



**March**
**2014**

## Article

# How relevant is the "relevant period" for credit distribution?

By **Shweta Kathuria**

Rule 7 of the Cenvat Credit Rules ['Credit Rules' for short] relating to distribution of credit by an Input Service Distributor ("ISD") has always been a problem area of the Credit Rules. Ever since the inception of this concept, it has always been surrounded by doubts and confusion. To understand the issues, let us first understand the concept of ISD. This concept was first introduced in the year 2004 and it means an office of the manufacturer or service provider, which receives invoices towards purchases of input services from the providers of input service and further distributes the credit of service tax by issuing invoice, bill or challan to such manufacturer or service provider.

In many cases, a manufacturer/ service provider has different units or premises located in various parts of the country. It may happen that the bill/ invoice in respect of an input service is raised in the name of the head office, whereas credit can be availed only in a factory or a premises of the service provider. In order to provide for a mechanism whereby the tax credit could be passed on to the respective factory/ premises, such head office distributes the tax credit to these units through the medium of invoices.

Thus, as can be seen, an ISD has always been a conduit to pass on the credit on the services consumed at the manufacturing/ service providing locations but the invoice of which was not received at such locations.

One doubt that remained for a very long time was whether the ISD was entitled to distribute credit to any unit or only to those units to which the input service was related. For a very long time, the law was simple as it did not require the assessee to maintain a record for each input service and its relation with the units to which the credit had to be distributed. The Karnataka High Court had also upheld this in the case of *CCE, Bangalore* v. *ECOF Industries Pvt. Ltd.* [2012 (277) ELT 317].

Therefore, even in a case where an input service did not have any nexus with such manufacturing unit, the credit thereon could still be distributed to such unit. Thus, even though such a situation was illogical, it was nevertheless benevolent.

The aforesaid possibility was removed in the Finance Act, 2012 and the Rule 7 was amended to allow distribution of credit on an input service only to such unit(s) to which it related. In order to find out the proportion in which the credit had to be distributed to these units, the rule required the turnover of respective units as the basis for determining the ratio. Vide Explanation 3 to the said rule, while determining the ratio, the turnovers of the "relevant period" had to be adopted.

The said amendment became the genesis of the next series of confusion. The said explanation provided that the relevant period shall be the month/ quarter (in case of SSI units) previous to the month/ quarter in which the credit has to be distributed. Therefore, if credit on any particular input service was earned in the month of April, 2012 and the assessee opted not to distribute it in April itself and instead waited till the month when

the turnover of dutiable goods was more, the assessee was legally entitled to do so. Though the said distribution was legally valid, the same resulted in an illogical distribution.

To rectify the aforesaid inconsistency, Notification No. 5/2014-C.E. (N.T.) dated 24-2-2014 was issued to amend the definition of "relevant period" in Rule 7 of the Cenvat Credit Rules, 2004. The said amendment comes into effect from 1-4-2014. As per the amended rule, instead of distributing credit on the basis of turnover of the previous month/ quarter, credit shall now be distributed on the basis of the turnover of preceding financial year. The amended rule also provides that if the assessee does not have turnover for some or all the units in the preceding financial year, the last quarter for which details of turnover of all the units are available shall be adopted.

Therefore, through the aforesaid amendment, the illogical distribution mentioned above was removed to some extent. Thus, now the assessee would necessarily be required to follow the turnover figures of the preceding financial year only irrespective of the month in which it distributes the credit. Further, a new assessee who starts its business would not be able to distribute the credit in the first quarter of its production.

But as the saying goes "the show must go on", in respect of Rule 7, the saying should be "the controversies must go on". The latest one being the second amendment made by Notification No. 5/2014-CE (NT). The second amendment in Rule 7 is that the Cenvat credit attributable to more than one unit shall be distributed by the ISD on pro-rata basis *to such units* divided by the total turnover of *all its units.*

A reading of the new rule indicates that if a service is common to more than one unit (but not common to all the units of the assessee), credit shall be distributed pro-rata to the units to which such service relates. However, the distributable credit shall be determined by applying the total turnover of all the units of the assessee, resulting in non-distribution of some portion of the credit.

This implication can be understood with the help of an example. Assuming, an assessee has four units, say A, B, C and D. It is receiving advertisement service for a product which is manufactured only in A and C units. Credit on advertisement service is Rs. 10,000.

| | A | B | C | D | |
|---|---|---|---|---|---|
| Turnover in FY 2013-14 (in Rs. Crores) | 150 | 250 | 400 | 200 | |
| Total Turnover of A, B, C & D | | | | | 1000 |

$$\text{Unit A} = 10{,}000 \times \frac{150}{1{,}000} = \text{Rs. } 1{,}500$$

$$\text{Unit C} = 10{,}000 \times \frac{400}{1{,}000} = \text{Rs. } 4{,}000$$

Thus, out of the total credit of Rs. 10,000 attributable wholly to dutiable goods, Cenvat credit of Rs. 5,500 can only be distributed and Cenvat credit of Rs. 4,500 would not be distributed.

Therefore, a plain reading of the amended rule can lead to an unfair situation. The trade has to, therefore, take up this anomaly for redressal.

**[The author is a Principal Associate, Tax Practice, Lakshmikumaran & Sridharan, New Delhi]**

# CENTRAL EXCISE

## Notification

**Importers required to take registration from 1-4-2014:** In December, 2013 certain amendments in the Central Excise Rules, 2002 and Cenvat Credit Rules, 2004 were proposed (to be effective from 1-3-2014) to provide for registration of importers issuing invoices on which Cenvat credit can be taken. These notifications proposing the said amendments have now been rescinded by Notification Nos. 6 & 7/2014-C.E. (N.T.) and instead new notifications have been issued giving similar effect in a different manner. As per new Notification Nos. 8 to 11/2014-C.E.(N.T.), all dated 28-2-2014, procedures for obtaining registration and submitting return which are applicable to dealers will be applicable to importers from 1-4-2014.

## Ratio decidendi

**Valuation – Inclusion of sales tax amount retained:** Interpreting meaning of the term "actually paid" used in the definition of transaction value under Section 4(3)(d) of the Central Excise Act, 1944, the Supreme Court of India has held that portion of sales tax retained by the assessee, under an incentive scheme, is not the tax actually paid by him and hence the same would be includible in the assessable value for the purpose of Central Excise duty. The said finding of the Court was in respect of the period post 1-7-2000 i.e. transaction value period. For the period prior to July 2000, the Court relying on CBEC's Circular No. 378/11-98-CX, dated 12-3-1998 however held that the portion of sales tax retained by the assessee is not includible as the provisions applicable then provided for exclusion of sales tax payable. The assessee was availing benefit under the Sales Tax New Incentive Scheme for Industries, 1989 whereunder it was entitled to retain 75% of the sales tax collected from its customers and pay to government only 25% of the sales tax collected. [*Commissioner* v. *Super Synotex (India) Ltd.* – 2014-TIOL-19-SC-CX]

**Cenvat credit of differential duty paid on imported goods on account of fraud/ suppression, available:** CESTAT, Ahmedabad has held that provision denying Cenvat credit of differential duty paid on account of fraud/ suppression shall not apply to imported goods consumed by the importer himself. The Tribunal, relying on the case of *Karnataka Soaps & Detergents Ltd.* [2008 (258) ELT 62 (Kar.)], held that the restriction of denial of credit in case of fraud or suppression is applicable only in case of sale of goods. Tribunal in this regard also noted that 'Explanation' added to Cenvat Rule 9(1)(b) after the said decision of Karnataka High Court can only clarify the provisions of the said rule and cannot elaborate its scope. [*Essar Oil Ltd.* v. *Commissioner* – CESTAT Ahmedabad Order No. A/10044/2014, dated 16-1-2014]

**Cenvat credit reversal cannot be insisted based on circular when rule therefor is absent:** Gujarat High Court has held that in the absence of statutory provisions, merely based on CBEC's circular, Department cannot enforce reversal of credit. It was held that in case assessee writes off value of inputs as per accounting policy,

no credit is required to be reversed. The relevant period in this case however was before introduction of Cenvat Credit Rules and there was no provision for reversing credit in case inputs were written off in the books of account. It was noted that there was no authority under the rules and CBEC could not have issued circular for reversal of credit. The court also observed that the issue would have to be analyzed separately for period post introduction of Rule 3(5B) of the Cenvat Credit Rules, 2004. [*Commissioner* v. *Ingersoll Rand India Ltd.* - 2014 (300) ELT 347 (Guj.)]

**No penalty for inter-unit shifting of goods without permission:** CESTAT, New Delhi has set aside penalties imposed for contravention of Rules 4 and 8 of the Central Excise Rules, 2002 and Rule 3(5) of Cenvat Credit Rules, 2004. The case involved shifting of capital goods, inputs, semi-finished goods and finished goods from one factory to another of the same assessee. Department had contended stock transfer and hence contravention of above provisions leading to penalty under Rule 25 of the Excise Rules and Rule 15 of the Cenvat Rules. Tribunal in this regard noted that Commissioner (Appeals) had observed that there is no provision of law requiring permission from department. Observing that the assessee had intimated the Department of such transfer, it was held that Department could have then checked the inventory, etc. [*Tej International* v. *Commissioner* – CESTAT Delhi Final Order No. 50750-50751/2014, dated 19-2-2014]

**Suo-motu re-credit of excess credit reversed earlier, available:** Appellate Tribunal at Mumbai has held that suo motu re-credit of the credit which was earlier reversed in excess is available as the same is not a 'duty'. Tribunal in this regard held that provisions of Section 11B of Central Excise Act, 1944 would not apply to the instant situation of reversal of excess credit. Tribunal's earlier order in the case of *Sopariwala Exports* was also noted in this context. [*NOCIL* v. *Commissioner* – 2014-TIOL-203-CESTAT-MUM]

**Cenvat credit of CVD paid on re-imported damaged goods, available:** CESTAT, Delhi has allowed Cenvat credit on transformers re-imported after damage during testing abroad. Earlier, the damaged goods were re-imported and cleared on payment of duty which included CVD and assessee after repairing some of the parts of said damaged transformers cleared the same from factory. Cenvat credit proportionate to the damaged parts was denied holding that damaged parts could not be held to be inputs for manufacture of final products. The Tribunal however while allowing credit observed that it was full transformer and not parts which were imported and that customs authorities had not objected to payment of duty on damaged parts. It was held that merely because some parts were damaged, requiring re-conditioning, etc., same cannot be a ground for denial of credit of duty paid on them. [*Bharat Heavy Electricals Ltd.* v. *Commissioner* – CESTAT Delhi Final Order No. 50527, dated 13-2-2014]

**Rebate of duty paid on export of exempted goods is available:** The High Court of Gujarat has allowed rebate under Rule 18 of the Central Excise Rules, 2002 of the excise duty paid on export goods, which were otherwise unconditionally exempt from whole of excise duty. The court in this regard noted that the assessee was not liable to

pay duty in the light of absolute exemption under Notification No. 29/2004-C.E. and had not got any other benefit, other than the export promotion benefits under Customs law, which otherwise also were available. Department's stand that payment of duty at the will of assessee cannot be compared to other cases of refund/rebate of duty, was also rejected by the Court. [*Arvind Ltd.* v. *UOI* – 2014 (300) ELT 481 (Guj.)]

**Physician samples to be valued under Section 4 and not 4A:** Physician samples manufactured for sale to brand owner are to be valued at transaction value under Section 4(1)(a) and not under Section 4A (MRP based assessment) of the Central Excise Act, 1944. The Department in this case, relying on Larger Bench decision in the case of *Cadila Pharmaceuticals,* was of the view that once an item is covered under Section 4A, it cannot be assessed under Section 4. The Tribunal in this regard noted that Notification No. 2/2005-C.E.(N.T.) specified 'retail sale price' in respect of medicaments as retail price declared under the provisions of Drugs (Price Control) Order as per which it was clear that requirement of displaying retail price is only for the goods intended for sale. It was held that since the samples were not intended for sale, there was no requirement of displaying the price and hence valuation could not be made under Section 4A. Tribunal's earlier decisions holding valuation under Section 4(1)(a) in case of manufacture of samples on principal to principal basis were also noted here. [*Gelnova Laboratories (I) Pvt. Ltd.* v. *Commissioner* – 2014 (300) ELT 437 (Tri-Mumbai)]

**Valuation - Cost of inputs received from other unit:** Cost of inputs received from other unit, for calculating cost of production (COP) of final products will be 110% of cost of production of inputs. The assessee had received inputs from its other unit on which excise duty was paid by such unit under Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 @ 110% of COP. The final product manufactured was cleared to its third unit on payment of excise duty on 110% of COP. While calculating COP of such final product, the assessee had taken actual cost of inputs instead of 110% of COP on which excise duty was paid by first unit. It was held that 110% of COP of inputs is required to be taken for calculating cost of production of final product. [*Tata Iron & Steel Co. Ltd.* v. *Commissioner* – 2014 (300) ELT 571 (Tri-Mum.)]

# CUSTOMS

## Notifications & Public Notices

**Foreign Trade Policy and Handbook of Procedures 2009-14 extended beyond 31-3-2014:** In order to provide continuity to policy environment, the existing Foreign Trade Policy 2009-14 (RE-2013) and Handbook of Procedures Vol. I 2009-14 (RE-2013) have been extended for period beyond prescribed date of 31st March 2014 until further orders. Notification No. 69(RE–2013)/2009-2014, dated 19-2-2014 and Public Notice No. 51(RE: 2013)/2009-2014, dated 19-2-2014 have been issued in this regard.

**EO extension - Additional 3 years given to EPCG holders covered under CDR Scheme:** EPCG Authorization holders availing relief under

Corporate Debt Restructuring (CDR) mechanism, have been allowed export obligation extension of 3 years (from the date of approval of the CDR mechanism/scheme), without any composition fee. Notification No. 70(RE–2013)/2009-2014, dated 20-2-2014 issued for this purpose inserts new Para 5.5.1(c) in the Foreign Trade Policy (FTP) 2009-14.

**MLFPS - Additional products included in Table 3 of Appendix 37D:** DGFT has enhanced the incentive of MLFPS to certain additional products under Appendix 37D only for the limited period of exports made with effect from 1-3-2014 to 31-8-2014. Such exports will be eligible for the incentive in addition to any benefit which the same item may be entitled to under Table 1 or Table 2 of Appendix 37D. Notification No. 71(RE–2013)/2009-2014 and Public Notice No. 53 (RE-2013)/2009-2014, both dated 27-2-2014 have been issued in this regard.

## Ratio decidendi

**TED refund available once supply falls within category of deemed exports:** Delhi High Court has allowed refund of Terminal Excise Duty (TED) on the goods supplied to EOU in a case where such refund was denied on the basis of a clarification given by the Policy Interpretation Committee stating that refund should be availed under Cenvat Credit Rules rather than the FTP. The court in this regard held that Cenvat Credit Rules and FTP framed under FTDR Act, 1992 are independent of each other and once supply of goods fall within the category of deemed export, the unit will be entitled to TED refund. It was noted that subsequent amendment to grant exemption was no reason to deny refund of payment already made. Calcutta High Court judgment in the case of *IFGL Refractories Ltd.* was also noted here. [*Kandoi Metal Powders Mfg Co. Pvt. Ltd.* v. *Union of India* – 2014-TIOL-230-HC-DEL]

**Interpretation by DGFT binding on all officers under FTDR Act but Para 8.3.6 adopting Drawback Rules is ultra vires:** Gujarat High Court has held that the interpretation given by the DGFT will be binding on all officers under the FTDR Act but such interpretation will not be binding on the HC/ SC while making judicial review. The court in this regard interpreted Para 2.3 of the Foreign Trade Policy. The court however, in respect of Para 8.3.6 of the Handbook of Procedures Vol.1 which adopted the duty drawback rules, held the same to be *ultra vires*. It was held that the provisions under the FTDR Act have not conferred such powers upon the DGFT and that it is only the central government which can exercise its power to frame rules under Section 19 of the said Act. It was also held that Para 7 of the declaration under ANF-8 form read with HOP cannot confer any power upon DGFT to recall any adjudication under the Act. [*Alstom India Ltd.* v. *Union of India* – 2014-TIOL-223-HC-AHM]

**Speaking order under Section 17(5) mandatory:** High Court of Delhi has held that Customs authorities are obliged to issue speaking order under Section 17(5) of the Customs Act. It was held that the fact that assessee had appealed against the Deputy Commissioner's order in relation to refund does not relieve the department from their duty to deal with the application for reassessment under Section 17(4) and (5) of the Customs Act, 1962. [*Sony India Pvt. Ltd.* v. *Union of India* – 2014-TIOL-189-HC-DEL-CUS]

**Tower Sections of WOEG classifiable under CTH 8503 as parts of WOEG:** Taking into consideration Section Note 1(f) and 2 of Section XV of the Customs Tariff, CESTAT Ahmedabad has held that the tower sections of Wind Operated Electricity Generator (WOEG) are correctly classifiable under Heading 8503 of the Customs Tariff Act, 1975 as part of WOEG and not under Heading 7308 as tower. It was noted that towers meant for WOEG are designed solely and specifically for the purpose of WOEG and are not meant for any other purpose. Reliance was also placed upon the CBEC Circular dated 9-8-1997 holding that such towers are essential components of WOEG. [*Vestas Wind Technology India Pvt. Ltd.* v. *Commissioner* – 2014-TIOL-237-CESTAT-AHM]

**Drawback on re-exports available when goods only repacked:** Delhi High Court has allowed drawback on re-export in the case where importer-exporter was re-packing the imported goods before export. Central Government in this case was of the opinion that Section 75 of the Customs Act, 1962 and not Section 74, is applicable. Noting that the goods were verified both at the stage of import and export and that quantity and identity of goods remained unchanged, the court held that re-packing cannot be called an 'operation' or 'process' on goods. [*Groz-beckert Asia Pvt. Ltd.* v. *Union of India* – Delhi High Court Judgment dated 21-2-2014 in W.P.(C) 1198/2014]

**Refund – Section 27 when not applicable:** Delhi High Court has held that in cases where duty demand against an assessee is set aside by the Tribunal, it is the duty of the customs officer concerned to return the duty amount, if any, paid by assessee within 3 months of the order. In this case, the importer applied for refund after the lapse of one year from date of Tribunal's order. It was held that the claim of an individual, whose amounts are retained without authority of law, to seek refund cannot be rejected merely on application of Section 27 of the Customs Act. It was also held that in such circumstances, Article 265 of the Constitution of India would be applicable. [*Sheel Chand Industries* v. *Union of India* – 2014-TIOL-162-HC-DEL-CUS]

**Refund - Unjust enrichment not applicable on refund of security deposit:** Refund of security deposit made at the time of registration of a contract for import of raw materials, etc. under the Project Import Regulations will not be subject to provisions of Section 27 of the Customs Act, 1962. After finalization of assessment and payment of appropriate duty, the refund claim for this deposit, in this case, was rejected on the ground of unjust enrichment. The Tribunal however allowed assessee's appeal and granted refund relying on earlier order in the case of *IDMC Ltd.* wherein it was held that provisions of Section 27(2) would not apply to cash securities. [*Mahindra & Mahindra* v. *Commissioner* – 2014-TIOL-135-CESTAT-MUM]

**Re-export - Ownership of abandoned goods:** Delhi High Court has directed Commissioner of Customs to grant permission to re-export goods where import contract was cancelled after the goods landed in India and the importer abandoned the efforts in assisting foreign exporter to ensure re-export. Earlier anti-dumping duty was imposed on the goods shipped to India, leading to

importer becoming non-interested in the goods. The court in this regard noted that ownership continues with the supplier according to Apex Court order in *Sampat Dugar* and that there was no allegation of misdeclaration, misclassification or wrong valuation in the order impugned before it. It was also noted that RBI's permission was not required as per CBEC's circular and that Section 71 of Customs Act, 1962 visualized re-export while Section 74 also permitted drawback on re-exports. [*ZTE Corporation* v. *Commissioner* – Delhi HC Order dated 18-2-2014 in W.P.(C) 8229/2013]

# SERVICE TAX

## Notifications

**Input service credit distribution - Rule 7 of Cenvat Credit Rules amended:** Cenvat credit of input services shall now, with effect from 1-4-2014, be distributed by an Input Service Distributor (ISD) on the basis of turnover of preceding financial year. Presently, the credit is being distributed based on the ratio of the turnover of previous month/ quarter. Rule 7 of the Cenvat Credit Rules, 2004 has been amended in this regard by Notification No. 5/2014-C.E.(N.T.), dated 24-2-2014. The amended rule also provides that in case the assessee does not have turnover for some or all the units in the preceding financial year, the last quarter for which details of turnover of all the units are available shall be adopted. Further, Cenvat credit attributable to more than one unit shall be distributed on pro-rata basis to such units divided by the total turnover of all its units.

**Refund of service tax to those covered under partial reverse charge :** Notification has been issued under Rule 5B of the Cenvat Credit Rules, 2004 for refund of accumulated Cenvat credit available with service providers providing services on which partial reverse charge in respect of service tax is applicable. Notification No. 12/2014-C.E. (N.T.), dated 3-3-2014 issued in this regard prescribes a mechanism for claiming such refund. It may be noted that Rule 5B providing for refund to such service providers came into force in July 2012.

## Ratio decidendi

**Goods sold under composite contract – Proof need not be invoices alone:** The Bombay High Court has advanced a *prima facie* view that production of documentary evidence to prove sale of goods need not necessarily be in the form of invoices alone. As per Notification No. 12/2003-S.T., dated 20-6-2003, exclusion of value of goods and materials supplied while rendering service was admissible only upon producing documentary proof indicating the value of such goods. The court was asked to examine whether such documentary evidence can only be in the form of invoices. The court held that the requirement prescribed under the said notification did not mean that the goods had to be necessarily supplied by way of or under invoice. It is sufficiency of the documents that has to be examined. If the appellant is able to show from the documents i.e. contract read with other documents including R.A. bills and return filed with the sales tax authorities, the value of goods sold and supplied to the satisfaction of the authorities, it would be complying with the condition provided in the

said notification. The tribunal had earlier held that documents like contracts, running account statement, sales tax returns would not be sufficient proof of goods being sold while rendering service of erection, commission and installation. Granting relief to the assessee, the High Court directed the tribunal to consider the stay application afresh and examine sufficiency of evidence produced. [*Space Age Associates* v. *UOI* – 2014 (33) S.T.R 372 (Bom.)]

**Installation of distribution network for supply of electricity covered by exemption:** Opining that distribution of electricity cannot be effectively accomplished without installation of sub-stations and transmission towers, the Tribunal held that the services would be covered by the exemption notifications being 'in relation' to distribution of electrical energy. Notification No. 32/2010-S.T., dated 22-6-2010 read with Notification No. 45/2010-S.T., dated 20-7-2010 provides exemption to all the taxable services provided in relation to distribution of electrical energy from payment of service tax. Thus, service tax would not be chargeable on the charges recovered from consumers towards installation, erection and commissioning of transmission towers and connectors for transmission of electricity. [*Noida Power Co. Ltd.* v. *CCE, Noida* – 2014 33 STR 383 (Tri.-Del)]

**Sharing of expenses on promotion activity chargeable under Business Auxiliary Service:** The assessee, an authorised service station, incurred expenditure for organizing advertisements and road shows for promoting sale of cars and raised debit notes in the name of car manufacturer, also mentioning at times 50% share of the manufacturer. The lower appellate authority had held that there was no principal-client relationship and mere reimbursement of expenses was not consideration. The Tribunal held that though the sales promotion activity being undertaken may have benefited the business of both assessee and manufacturer and to the extent amount was recovered from manufacturer, he was to be treated a client and hence service tax would be payable under BAS. [*CCE* v. *Premier Motor Garage* – 2014-TIOL-226-CESTAT-DEL ]

**Time limit for claiming rebate under Notification No. 11/2005-S.T.:** The Tribunal observed that even though no time limit has been provided under Notification No. 11/2005-S.T., some reasonable time limit has to be read into law and held that time-limit of one year from the date of payment of tax for filing of the refund claim would apply in respect of service tax rebate. The assessee contended that time-limit prescribed in Section 11B of Central Excise Act, 1944 would not apply to rebate relating to export of services. On merits, the Tribunal, relying on its order dated 12-3-2013 [*Refer Tax Amicus October 2013 issue*] held that the services provided in India to international in-bound roamers would amount to export of service and unjust enrichment would not be applicable to such export transactions. [*Vodafone Cellular Ltd* v. *CCE* – 2014-TIOL-319-CESTAT-MUM ]

**Payment of pre-deposit by debit to Cenvat credit account:** Disagreeing with the lower appellate authority's stand that payment of pre-deposit cannot be by means of debit in Cenvat credit account, the Tribunal held that there is no bar on use of amounts lying in credit of Cenvat account for complying with order on pre-deposit. It

thus set aside the order of Commissioner (Appeals) dismissing the appeals for non-compliance of stay order wherein pre-deposit was ordered. [*India Gelatine & Chemicals Limited* v. *CST* – CESTAT Ahmedabad, Order No.A/10171-10174/2014, dated 11-2-2014]

**Services in relation to erection of temporary storage is input service:** Reasoning that erection of temporary sheds, clearing of vegetation, etc., within factory premises for storing of cement and steel could only be for purposes of setting up, modernisation of factory, etc., the Tribunal held that services in relation to such construction or erection of temporary storage would qualify as input services. The department had urged that a liberal view of input services should not be taken. [*Kitec Industries India ltd* v. *CCE & ST* – CESTAT Ahmedabad, Order No.A/10159/2014, dated 7-2-2014]

**No unjust enrichment if service tax refunded by credit notes:** Rejecting the contention of the department that duty once collected is always passed on or in case of service tax, credit may be taken, the Tribunal held that there is no unjust enrichment when service tax is refunded by way of credit notes. The assessee was therefore entitled to claim refund of service tax paid in excess of liability. Though both sides cited plethora of precedent decisions in their favour, the Bench chose to follow its own order in the case of *Poornima Advertising*. [*GAIL India* v. *CCE* – CESTAT Ahmedabad, Order No.A/10158/2014, dated 31-1-2014]

**Non-reflection of refund receivable in Balance Sheet not fatal to refund claim:** Ruling against rejection of refund claim on a technical ground, when the assessee was otherwise entitled to refund, the Tribunal granted relief to the assessee. In the instant case, the amount of service tax returned (along with advance) on termination of a contract was not shown in the balance sheet of the assessee as receivable. But, since no service was provided, service tax was not payable by the assessee, it was entitled to refund. [*Radico Khaitan* v. *CCE & ST* – CESTAT New Delhi, Order No. 50311/2014, dated 31-1-2014]

**Input credit admissibility when services availed under different name:** At issue was the denial of Cenvat credit by the department on the ground that the service tax registration was in the name of Vishal Devgan and the profession as actor was carried out in the name of Ajay Devgan. There was no dispute that the person was known as Ajay Devgan. The Tribunal held that since all services have been availed at the registered office (business premises), Cenvat credit cannot be denied once it was verified that both Vishal and Ajay were one and the same. The assessee would be entitled to credit on all qualifying services except club service which related to the personal activity of the person. [*Ajay Devgan* v. *CCE* – 2014–TIOL–244–CESTAT–MUM]

# VALUE ADDED TAX (VAT)

## Notifications

**Haryana VAT – Deductions in Civil works contracts:** Haryana Government has issued Memo No. 259/ST-1 dated 10-2-2014 through which an amendment has been made in Memo No. 952/ST-1 dated 7-5-2013 issued as an instruction regarding "civil works/ builders and developers – deductions allowable in computation of turnover and consideration

liable to tax", under the Haryana Value Added Tax Act, 2003. Para 3.1 of the 2013 Memo has been substituted in this regard. Major changes that have been brought are:

- It has been clarified that as per Section 9 of the HVAT Act read with Rule 49 of the Haryana Value Added Tax Rules, 2003, a builder or developer, who has opted for payment of tax on his turnover relating to transfer of property in goods involved in the execution of works contract under the composition scheme, shall be liable to pay a lump sum tax on the total valuable consideration receivable for the execution of the contract.
- Further, it has also been provided that no deduction will be allowed from the total value of consideration, even for the land.
- In light of Section 2(w) relating to input tax and Section 2(zs) relating to VAT dealer, such a composition dealer cannot claim the benefit of input tax paid on the purchase of goods used in the execution of works contract.

**Chhattisgarh VAT – Specified items notified as industrial inputs:** Industrial fuel oil (excluding petroleum products), Industrial L.P.G. and Rubber reclaim have been added as "Industrial Inputs" in Notification No. F-10-56/2006/CT/V(46), dated 28-4-2006 under Entry 60 of Part II of Schedule II of the Chhattisgarh VAT Act, 2005. These goods will now attract VAT at the rate of 5%. Notification No. F-10/40/2014/CT/V(33), dated 4-3-2014 issued in this regard takes effect from 1-4-2014.

**Chhattisgarh VAT – Tax reduced on specified construction equipment:** Rate of VAT under Chhattisgarh VAT has been reduced on specified construction equipment. Notification No. F-10/40/2014/CT/V(34), dated 4-3-2014 adds some 21 items in Notification No. F-10/10/2013/CT/V(12), dated 28-3-2013 which provides for reduction in rate of tax to 5% on machineries and equipments used in execution of civil works contract and road construction. This reduction shall take effect from 1-4-2014. Further, applicability of the original notification has also been extended till 31-3-2015 by Notification No. F-10-14/2014/CT/V(44), dated 4-3-2014.

## Ratio decidendi

**No sale when stent or valve implanted in patient during surgical procedure:** Allahabad High Court has held that no 'sale' takes place when a stent or valve is implanted in a patient in the course of a surgical procedure in a hospital. Department's contention that the contract between patient and hospital is a divisible contract where sale element involving the 'sale' of stent or valve to the patient is distinct from the surgical procedure and hence such transaction would be liable to tax, was rejected by the court. The court relying upon the Supreme Court decision in the case of *BSNL* [(2006) 3 SCC 1] and the decision of the Jharkhand High Court in the case of *Tata Main Hospital* [2008 NTN Vol. 36 149] held that there can be no doubt about the position that in the case of a patient entering a hospital for surgical procedure like

angioplasty, there is no intent between the parties to the agreement namely, the hospital and the individual, that there would be a sale of a stent or valve by the hospital to the patient. It was held that substance of the contract in this case is not a contract for sale of items used in the course of surgical procedure.

The court also noted Supreme Court's latest decision in the case of *Larsen and Toubro Limited* [(2014) 1 SCC 708] in which it was held that the dominant nature test has no application to contracts of the nature contemplated in Article 366(29A) of the Constitution of India and hence, where a transaction fulfils the description of one of the sub-clauses of clause 29A of Article 366, dominant nature of the transaction loses its significance since by a constitutional fiction the contract is rendered divisible. It was however held that the present case does not involve the application of one of the sub-clauses of Article 366(29A) and therefore, the deeming provisions of the clause 29A are not attracted. Clarifying that there is no element of sale in the instant transaction, the court held the fact that in the bill raised on the patient, the hospital recovers, apart from the cost of the surgery, charges towards drugs and other consumables, would not render the transaction of implantation of a stent or valve to be 'sale'. [*International Hospital Pvt. Limited* v. *State of UP* – 2014-VIL-48-ALH]

**Valuation – Amount collected separately not covered under 'turnover':** Madras High Court has held that the amount collected separately by the assessee, on the invoice, under the heads such as packing and forwarding charges, transport charges, loading and unloading charges will not form part of the turnover. The court in this regard noted that a combined reading of Section 2(p) of Tamil Nadu General Sales Tax, 1959 and Rule 6 of Tamil Nadu General Sales Tax Rules, 1959 provides that all amounts falling under the heads such as freight and charges for delivery when specified and charged for by the dealer separately shall be deducted without including them in the price of goods sold. [*State of Tamil Nadu* v. *West Asia Trading & Shipping* – 2014-VIL-44-MAD]

**Rate of tax on goods used in production:** In the instant case, the assessee receiving copper metal, was engaged in drawing wire and after insulating the same with enamel, fiberglass yarn and paper, returned it to the customer. The issue before the Karnataka High Court was the applicable rate of VAT on the transaction under Karnataka VAT Act. The assessee contended that the rate applicable shall be 4% as insulated copper wire was covered under scheduled goods. The court however rejected this contention holding that the assessee was not selling copper wire but converted it into insulated copper wire and delivered the finished product to the customer. Thus, what was sold was enamel, fiberglass yarn and paper used in the manufacturing process to convert copper wire into insulated copper wire. It was held that since these items were not being specifically mentioned in the Schedule, they would be chargeable at the residuary rate of 12.5%. It was observed that the period involved was before introduction of works contract. [*SCR Wire Products* v. *Commissioner* –2014-VIL-46-KAR]

# INCOME TAX

## Ratio decidendi

**Subsidiary dependent on parent for optimal functioning, constitutes PE:** In this case a non-resident company, Booz Australia provided technical and professional personnel to its Indian subsidiary namely Booz India. The Indian subsidiary was found to be integral to the business of parent company and also dependent on it. The department contended that Indian subsidiary constitutes a permanent establishment of Booz Australia. The AAR held that it creates a dependent agency PE of Booz Australia ('taxpayer') since Booz India could not optimally function without the expertise of the group entities in giving consultancy and was exclusively dependent on other group entities in getting the services of appropriate personnel from other entities and training of these personnel deployed to Booz India. Also employees of Booz India were under the overall control of the taxpayer. Thus, the income received from the Indian company was taxable as business profits and not fee for technical services. [*Booz & Company (Australia) (P.) Ltd.* – (2014) 42 taxmann.com 288 (AAR)]

**Leaving India 'for purpose of employment' can be for self-employment also:** In this case the taxpayer visited Saudi Arabia and other countries as a consultant for a project though he was not regularly employed there. In the year of going abroad he determined his residential status as non-resident applying 183 days time limit as applicable to persons leaving India for the purpose of employment. On these facts ITAT held that for determining residential status the meaning of term 'for the purpose of employment' used in the Section 6 of Income Tax Act, 1961, is not to be confined to the context of employer-employee relationship but extended to self-employed/professional work as well. [*K.Sambasiva Rao* v. *ITO*, Hyderabad – (2014) 42 taxmann.com 115 (Hyd Trib.)]

**Supervisory services may constitute PE but cannot be aggregated to calculate duration:** The taxpayer in this case undertook several projects in India and none of these exceeded the treaty threshold of creating a PE on standalone basis. On these facts having regard to the India-Japan DTAA, it was held that supervisory services can constitute a PE but time duration of different projects cannot be aggregated for determining threshold time where each project was based on an independent purchase order procured pursuant to competitive bidding on global tender having independent terms and conditions, having separate performance guarantee and to supply different equipments to be used in different stages of production by buyer and did not complement each other. [*Sumitomo Corporation* v. *DCIT* – ITAT, Delhi decision dated 27-2-2014]

**Production commenced prior to grant of approval – Availability of deduction under Section 10A:** The taxpayer in this case had commenced production in its unit much prior (6years) to its registration as an STP unit. It claimed deduction under Section 10A from the year of such registration. The court held that deduction

under Section 10A is available from the date of registration of unit in a Software Technology Park even if it had commenced production much before such registration. [*CIT* v. *Quantum Coders Ltd.* – TS-119-HC-2014(DEL)]

**No estoppel against taxpayer to choose comparable rejected earlier:** The taxpayer in this case had rejected some companies as comparables in its transfer pricing study. However in appeal before CIT (A) it proposed to include such companies as comparable to which the Department objected. Upholding the stand of the taxpayer the ITAT held that there is no estoppel against the taxpayer and it is entitled to bring fresh comparables for consideration during appellate proceedings even if it had rejected those comparables in its transfer pricing study. The taxpayer had also sought an adjustment on account of underutilisation of capacity. On this it was held that when the details regarding capacity utilisation are available for taxpayer as well as comparables, an adjustment on this count would enhance comparability. [*DCIT* v. *Panasonic AVC Networks India Co. Ltd.* – TS-55-ITAT-2014(DEL)-TP]