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Applicability of VAT on agreement to sell flats

By **Sonal Singh Baghel**

In a case where the builder of a fully constructed flat enters into an agreement to sell the same to a buyer, the same will be considered as a sale of immovable property and there is no controversy regarding imposition of sales tax on such a transaction. However, applicability of sales tax on an agreement to sell a flat that is still in the process of construction has lately been much under debate after the judgment of Bombay High Court in the case of *Maharashtra Chamber of Housing Industry* v. *State of Maharashtra*[1] which upheld the constitutional validity of the amendment to the definition of 'sale' in the Maharashtra Value Added Tax Act, 2002 (M-VAT). To appreciate this Bombay High Court decision and to understand its true implications it is important to trace the events that led to the said case.

States have been empowered to levy tax on sale or purchase of goods vide Entry 54 of List II of Seventh Schedule to the Constitution of India. The meaning and scope of Entry 54 was analyzed by the Supreme Court in *Gannon Dunkerley-I*[2], wherein the Supreme Court considered the indivisible nature of the building contract and held that in case of the indivisible contracts which are entire and cannot be disintegrated, no sales tax can be charged. To overcome the restriction on imposition of sales tax on such a contract, Article 366(29-A) was inserted, vide 46th amendment of the Constitution, to define the expression "tax on sale or purchase of goods" to, inter alia include, vide clause (b), a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract.

VAT legislations of certain states, such as Andhra Pradesh, Madhya Pradesh, and Maharashtra have provisions which have semblance of imposition of sales tax on an agreement to purchase a flat which is in the process of getting constructed.

The definition of 'sale' in M-VAT was amended to *bring "an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction…of any movable or immovable property",* within the ambit of 'works contract'. By way of amendment to Maharashtra Value Added Rules, 2005 (M-VAT Rules), Rule 58(1A) was added which provided that in case of a construction contract where immovable property, land or an interest in the land is transferred to the purchaser along with property in goods involved in the execution of the construction contract, then such a transfer will be chargeable to VAT. Also, by a notification dated 9th July, 2010, a scheme for payment of tax by way of composition, in lieu of the amount of tax payable on the transfer of goods whether as goods or in some other form, in execution of works contract under the M-VAT, was provided for the registered dealers who undertake

[1] (2012) 51 VST 168 (Bom)

[2] 1959 SCR 379

the construction of flats, and transfer them along with land or interest underlying the land.

In the case of *Maharashtra Chamber of Housing Industry (MCHI)* v. *State of Maharashtra*[3] the constitutional validity of the amendment to the definition of 'sale' was challenged before the Bombay High Court on the ground that the said amendment transgresses the limitations contained in Article 366(29A) of the Constitution. The petitioners contended that by way of the amendment, the state legislature has brought within the ambit and purview of the expression 'sale', an agreement for the building and construction of immovable property which is not a works contract as envisaged under Article 366(29A) of the Constitution. The court upheld the validity of the amendment and held that the effect is to clarify the legislative intent that a transfer of property in goods involved in the execution of works contract including an agreement for building and construction of immovable property would fall within the description of sale of goods within the meaning of the provision. Therefore, the amendment made by the state legislature does not transgress the limitations imposed by Article 366(29A) of the Constitution. A Special Leave Petition against this decision is pending before the Supreme Court.

It is noteworthy that, as a result of this decision, all the agreements that are entered into before the construction/ completion of flats will be chargeable to VAT as well as stamp duty after the construction is over. This amounts to dual taxation of the same transaction under two different legislations by the State.

To save these transactions from dual taxation the need is to classify them either as sale of immovable property chargeable to stamp duty or as works contract chargeable to VAT. Here, it is worth noting that, in a works contract, property gets transferred as a result of accretion during the course of execution of the contract and there is no transfer of immovable property simplicitor, whereas, in cases where there is transfer of a building by a deed of conveyance or transfer of immovable property, the intention is never to constitute a transfer of goods involved in the execution of such a contract. Therefore a contract involving sale of immovable property cannot be regarded as a works contract. Hence, such transactions are essentially one of sale of immovable property and should not be chargeable to VAT.

Now, it remains to be seen whether this decision given by the Bombay High Court will lead to increase in price of flats and will add to the burden of the purchasers or the position will be reversed by the Supreme Court.

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[3] (2012) 51 VST 168 (Bom).

CUSTOMS

Notifications & Circulars

Foreign currency for DTA units to procure services from SEZ: Authorised Dealers have been permitted to sell foreign currency to the units in the Domestic Tariff Areas (DTA) for making payment in foreign exchange to units in the Special Economic Zone (SEZ) for the services rendered by SEZ to a DTA unit. The A.P. (DIR Series) Circular No. 46, dated 23-10-2012 issued for this purpose is in furtherance to A.P. (DIR Series) Circular No. 105, dated 16-6-2003 whereunder DTA units were permitted to purchase foreign currency for making payment towards goods supplied to them by units in SEZ.

Electronic Bank Realization Certificate (e-BRC) system: DGFT has issued guidelines to banks on uploading of BRC data on DGFT website for BRCs issued manually from 1-4-2012 to 16-8-2012 for availability of complete BRC data for the entire financial year in e-form. The Policy Circular No. 6, dated 10-10-2012 issued for this purpose also requires uploading of the foreign exchange realised value without converting it into INR. The earlier Circular dated 18-6-2012 which prescribed furnishing of rupee equivalent has been replaced. Further, the circular also provides guidelines for the exporters regarding linking of the e-BRC data to their redemption applications.

Customs Gate Clearances to be under tighter surveillance: To put an end to clearances of imported goods without filing of bill of entry, the CBEC has decided to have stricter surveillance at the Customs Gate. The Commissioners concerned shall develop a proper gate management system wherein AC/DC (Docks/Import Shed) and AC/DC (SIIB) would carry out surprise checks at out gate and verify authenticity of the gate passes issued by the custodian. Other measures as stated in Customs Instruction dated 29-10-2012 include 'Manual' Out-of-Charge orders being allowed only in the rarest and genuine cases, Dock/Shed Officer's specimen signature being made available at the out gate for verification and official stationery and stamp etc. being kept in safe custody.

Ratio decidendi

DEPB benefit when goods exported after cut-off date: The Delhi High Court has held that a shipment made after the cut-off date for DEPB, would be eligible for benefit of DEPB if the export permission granted earlier by the Customs could not be taken advantage of because of the oppressive condition imposed by Customs. The Court noted that the condition of furnishing of 25% bank guarantee in relation to the declared goods, was held unjustified by the CESTAT in December, 2011 and hence denial of benefit would be unfair and unreasonable. The Department's contention that the Tribunal order did not constitute a valid reason warranting manual endorsement of LEO after 30-9-2011, was held as not correct by the High Court. The Court also noted that since the goods were neither detained nor subjected to proceedings culminating in assessment order, bank guarantee was not required. [*J.S. Designer* v. *Commissioner* – Delhi High Court Order dated 31-8-2012 in WP No. 744/2012].

Certificate of Disposition is a valid proof for re-exportation: Certificate of Disposition issued by United States Council for International Business

(USCIB) is a valid proof of re-exportation of goods imported from USA under ATA Carnet System without payment of customs duty. The system provided for duty free import subject to condition of re-export within six months from the date of import. While the show cause notice was issued by the Customs on the ground of non-submission of proof of re-exportation, the High Court held that the said certificate was a valid proof for re-exportation. [*FICCI* v. *UOI* - 2012-TIOL-824-HC-DEL-CUS].

Exports restrictions – Trademark violations: CESTAT, Delhi has held that export goods bearing markings 'suitable for Mercedes Benz' and 'SM products Mercedes Benz' are not liable for confiscation when records did not show indication of wrong trademark on the goods. The Tribunal noted that though it was indicated that they were 'suitable for Mercedes Benz', there was no indication that the goods were manufactured by Daimler Chrysler. It was observed that Notification No. 1/64-Cus. prohibited only imports with false trademark and not export of such goods and that the Department had no evidence to deny exemption under clause 5 of Notification SO 1272, dated 28-4-1962 issued under Section 117 of the Trade and Merchandise Marks Act while it claimed that the assessee was a trader and so the goods were not manufactured for export. [*Commissioner* v. *S.M. Exports* – 2012 (284) ELT 405 (Tri. – Del.)].

Application to CESTAT under Section 129D(4) is an appeal under Section 129A: The Supreme Court of India has held that where pursuant to review made by the Committee of Chief Commissioners, the adjudicating authority has been directed to make an application to CESTAT, the same shall be treated as an appeal under Section 129A of the Customs Act. The Court held that provisions of Section 129A (1) to (7) are *mutatis mutandis* applicable to Section 129D(4) and hence the CESTAT may condone delay in filing such application if reasonable cause is shown for not filing it within the prescribed time limit. The Tribunal had earlier rejected the application filed by Commissioner under Section 129D on the ground that it was not empowered to condone delay. [*Thakker Shipping P Ltd.* v. *Commissioner* - 2012-TIOL-105-SC-CUS].

Export goods conforming to DGFT criteria are not liable to confiscation: CESTAT, Delhi has held that export goods which conform to the export criteria prescribed by the DGFT are not confiscable. In the case in question, DGFT through Notification No. 57/2009-2012 dated 17-8-2010 had prescribed the length and length to breadth ratio for export of basmati rice which was said to have been satisfied as per the report of Basmati Export Development Foundation. The Department however had argued that since Customs Circular prescribed testing by AGMARK laboratories, AGMARK standards have to be applied to decide whether goods were basmati rice. The CESTAT however held that since the goods conformed to DGFT prescribed standards, they cannot be held as prohibited and liable for confiscation under Section 113(d) of the Customs Act. [*Global Agro Impex* v. *Commissioner* - 2012-TIOL-1408-CESTAT-DEL].

CENTRAL EXCISE

Notifications

Recovery from person who obtained duty credit scrip fraudulently: Newly inserted provisions of Section 28AAA of the Customs Act, 1962 have also been made applicable in respect of recovery of Central Excise duty. Notification No. 29/2012-C.E. (N.T.), dated 10-10-2012, issued under Section 12 of the Central Excise Act, also makes some modifications and alterations in Section 28AAA for the purpose of adaptation of said provisions. Section 28AAA, introduced this year, provides for recovery of duty from the person who had obtained duty credit scrip/authorisation by means of collusion or willful misstatement or suppression of facts, in those cases where the instrument was utilized by some other person. It seems the necessity for such an amendment arose after various duty credit scrips issued under Chapter 3 of the Foreign Trade Policy were made eligible also for payment of central excise duty, in this year's annual supplement to the FTP.

DVD ROMs containing educational books, journal, etc. exempted: DVD ROMs containing books of educational nature, journal, periodicals (magazines) or newspaper have also been exempted from central excise duty from 11th October, 2012 through an amendment by Notification No. 37/2012-C.E. Before this amendment, only CD-ROMs containing such matter were exempted.

Ratio decidendi

Refund when MRP reduced at depot: Refund is eligible when MRP on the goods removed from the factory to the depot is reduced at the depot. Commissioner (Appeals), Chennai in the said case while holding so, stated that Section 4A of the Central Excise Act cannot be read in isolation so far as the question of place of removal is concerned and that recourse for the said purpose has to be taken to section 4. Department's contention of absence of provisions to grant refund in section 4A in case of downward revision of MRP was rejected by the appellate authority noting that the department was demanding duty in case the MRP was enhanced at the depot. [*In Re: Tide Water Oil Co. (India) Ltd.* – 2012 (284) ELT 471 (Commr. Appl.)].

Combination pack of mosquito repellant refill and electro-thermic apparatus – Classification of: Combination pack of mosquito repellant refill and the electro-thermic apparatus is classifiable under sub-heading 3808.10 of the Central Excise Tariff Act and not under Heading 8516 ibid. CESTAT, Delhi while holding so relied on Rule 3(b) of the Interpretative Rules which states that classification in such matters is to be based on the material or component which gave it its essential character. The Tribunal noted that the electro-thermal apparatus was merely a delivery machine and that the real mosquito repellant was the liquid pesticide contained in refill bottle. [*Karamchand Appliances P. Ltd.* v. *Commissioner* – 2012 (284) ELT 692 (Tri. – Del.)].

Prasad and Mishri obtained from sugar, not manufactured goods: Prasad and mishri, both made from sugar and having more than 90% sucrose are correctly classifiable under 1701.10, 1701.20, 1701.31 and 1701.39 of the Central Excise Tariff in view of chapter note 2 of chapter 17 and are also not manufactured goods. While observing that C.B.E.& C. Circular No. 879/17/2008-CX though stated that making of Bura, Mishri, Batasha, Hardas etc. from sugar would amount to manufacture, the Tribunal held that the character and usage of

Prasad and Mishri remained the same as sugar from which they were made. It was noted that while Mishri was form of sugar with bigger crystals, Prasad was amorphous form of sugar and that just because by subjecting a material to some processes a product with different name emerged, the process would not become manufacture. The goods were hence held as not liable to duty. [*Commissioner* v. *Nagad Narayan Food Products* – 2012 (284) ELT 628 (Tri. – Del.)].

DTA clearance by EOU – Definition of 'manufacture' under Central Excise Act to be considered: CESTAT Delhi has held that for the purpose of availability of exemption under Notification No. 2/95-C.E. to DTA clearances by the EOU, definition of 'manufacture' under the Central Excise Act, 1944 has to be considered. The Tribunal held that since duty on the DTA clearances has to be paid under proviso to Section 3(1) of the Central Excise Act, process undertaken has to be 'manufacture' within the meaning of the term as defined under Section 2(f) of the said Act. It was noted that definition of manufacture, as given under the EXIM Policy, is relevant only for duty free acquisition of goods by the EOU. [*Commissioner* v. *Moonlight EXIM Pvt. Ltd.* – 2012 (284) ELT 213 (Tri. – Del.)].

SERVICE TAX

Ratio decidendi

Refund admissibility on export of service when consideration not received in foreign currency: CESTAT, Ahmedabad has held that where amount towards export of service has been received in foreign currency and converted into Indian currency by the bank and paid to the service provider, the condition to receive consideration in foreign currency has been met and assessee could claim refund. The assessee produced a certificate from the collecting bank stating that the amount has been collected from the foreign service recipient and converted into Indian currency and submitted that RBI instructions do not permit foreign currency to be paid in India to an Indian firm. [*Sterling Hoffman Software Consultant P Ltd* v. *CCE,* 2012 (28) S.T.R. 253 (Tri. – Ahmd).]

Storage and warehousing of non-saleable goods, not taxable: Holding that saleability of 'goods' is a relevant criteria to decide taxability under the service of 'storage and warehousing', CESTAT, Mumbai has held that no taxable service is rendered when the goods stored are old records such as discharged cheques , vouchers and books of account. During the material period, as per Section 65(50) of Finance Act, 1994, goods have the meaning as assigned in Sale of Goods Act, 1930 and hence must satisfy the criteria of saleability. [*Commissioner of Service Tax, Mumbai* v. *CP.N Writer & Co. Ltd.,* 2012(28) S.T.R. 264 (Tri.-Mumbai)]

Permission to use intellectual property rights in perpetuity is a taxable service: Resolving an interpretational issue on whether a non-temporary transfer of intellectual property rights would constitute sale and thus not exigible to service tax, the CESTAT, Delhi held that when property in goods is not transferred, sale cannot result. In the instant case, the right to use certain trademarks in perpetuity was transferred to the appellant subject to certain conditions. The appellant contended that only temporary transfer of rights

would fall within purview of Intellectual Property service and that even if a service was involved, the entire consideration represented sale value and was exempt. However the Tribunal found that, read as a whole the contract was one of transfer of rights which would be permitting use or enjoyment of the same and hence taxable under Intellectual Property service. [*Eicher Good earth Ltd* v. *Commissioner,* 2012(28) S.T.R. 279 (Tri.- Del).]

Service used in business of manufacture of final products can qualify as input service: The Tribunal examined the eligibility of various services like transporting staff to and from work place, waste management, repair of fan and garden maintenance in respect of a chemical company for availing Cenvat credit. Observing that earlier decision had held a number of services to be qualifying as input service, the Tribunal held that the definition of input service is very wide and covers services used in or in relation to manufacture of the final products as well as service used in business of manufacture of final product. Thus, the assessee could claim Cenvat credit of service tax paid on the relevant services. [*Commissioner* v. *Lupin Ltd.,* 2012 (28) S.T.R. 291 (Tri.- Mumbai)]

Insurance premium for 'captive power plant' located away from factory – Service tax credit admissible: In a dispute regarding admissibility of Cenvat credit on service tax on insurance policies pertaining to a power plant which supplied the entire production to the appellant, CESTAT, Delhi held that the said power plant was a captive power plant and insurance pertaining to safety of the plant would be eligible as an input service. The department contended that the plant, located about 50 kms from the appellant's unit and not registered as part of the same would be separate premises and insurance premium relating to the plant was not eligible for availing service tax credit. However, relying on definition of 'Captive generating plant' as defined under Section 2(8) of Electricity Act, 2003, the Tribunal held that it was a captive unit and that the insurance premium was essential for the final product concerned. [*Hindalco Industries Ltd* v. *Commissioner,* 2012-TIOL-1444-CESTAT-DEL]

GTA service for transporting raw materials to job worker's premises directly is an input service: GTA service used for offloading billets directly at the jobworker's place to manufacture MS angles is an input service for manufacture of galvanised parts (final product). The Tribunal held that merely because the billets are not unloaded at the appellant's factory to save on transportation, credit cannot be denied. It reasoned that the billet would have been raw materials for the final product if they had been brought to the appellant's factory and then sent to the job workers. It agreed with the finding of the lower authority that payment to the said service was an ingredient of cost of the final product. [*Commissioner of Central Excise* v. *KEC International*, 2012-TIOL-1427-CESTAT-DEL]

Cenvat credit on construction service utilizable for renting service: The Tribunal held that definition of 'inputs' and 'input service' are *pari materia* as far as service providers are concerned. Relying on the above principle read with decision of Hon'ble High Court of Andhra Pradesh in *Sai Sahimita Storages* wherein it was held that TMT bars for construction of warehouse could be said to have been used in providing storage & warehousing service, credit on input services used in construction of mall which in turn was used for providing taxable renting of immovable property service was allowed. [*Navaratna S.G. Highway Prop. Pvt. Ltd.* v. *Commissioner,* 2012 (28) S.T.R.166 (Tri-Ahmd.)]

VALUE ADDED TAX (VAT)

Notifications

Form T-2 under Delhi VAT Act effective from 1-1-2013: Dealers in Delhi would be required to submit online details of invoices and Goods Receipt Notes in respect of all goods purchased/ received as stock transfer from outside Delhi. Form T-2 which was notified in this regard by Delhi govt. on 5-9-2012 shall be effective from 1st January 2013 as per amendments by Notification No. F.7 (433)/Policy-II/VAT/2012/785-795, dated 23rd October, 2012.

No entry tax on wire rods in Uttar Pradesh: Wire rods have been excluded from the levy of entry tax in Uttar Pradesh, with effect from 11th October, 2012. Entry 14 of the Schedule to the Uttar Pradesh Tax on Entry of Goods into Local Areas Act, 2007 has been amended by notification dated 10th October, 2012, to this effect.

Works contract completed prior to 1-4-2012 in Assam - No change in tax rate under composition scheme: In an order dated 16th October, 2012 issued by Commissioner of Taxes, Assam, it has been clarified that the notification dated 31-3-2012 issued under Assam VAT Act, 2003, whereby the rate of tax on works contract was enhanced from 4% to 5%, for works contractors opting for composition scheme, with effect from 1st April, 2012, will not apply to a work completed prior to 1st April, 2012 even if the bill for the same was raised and the payment was made in the financial year 2012-2013. In other words, works completed prior to 1st April, 2012 will be taxable at the rate of 4%. As regards running bills, it was clarified that the bills raised against works completed up to 31st March, 2012 shall be taxable at the rate of 4% under the composition scheme and for works completed after 1st April, 2012 the rate of tax shall be 5%.

Ratio decidendi

Mango pulp based juice is not classifiable as 'food article': The issue before the Delhi High Court was whether the appellant's fruit pulp based drink known as 'Slice' was classifiable as a 'food article' under Entry 47 of First Schedule, taxable at 12% under Section 4(1)(a) or is taxable under the residuary entry attracting 8% sales tax under Section 4(1)(d) of the Delhi Sales Tax Act, 1975 ('Act'). The court placed reliance on Supreme Court judgment of *S. Samuel* v. *UOI* [2003(134) STC 610 SC] to analyse the definition of 'food' and applicability of common parlance test. It held that the Tribunal's approach in seeking recourse to the definition under the Prevention of Food Adulteration Act was misplaced and observed that the predominant contents of the mango pulp drink in this case was water (70%) and mango pulp was only 17% and the product was not a fruit juice and the Department cannot say that it had minimal nutritive properties. The product was an instant energy giver and thirst quencher, and therefore it could not be called a 'food article' by applying the common parlance test. The said product was held as classifiable and taxable under the residuary entry. [*Varun Beverages Ltd.* v. *Commissioner,* 2012-VIL-86-Del]

Recharge cards not liable to VAT: The assessee was engaged in rendering services of mobile

telephones to its subscribers and was permitted to maintain and operate such service upto the subscriber's terminal connection in Karnataka. The issue before the court was whether the consideration received for supply of recharge cards, recharge pins and recharge double scratch to its distributors for supply to the customers was liable to sales tax. The assessee contended that the items were not goods taxable under the Karnataka VAT Act and the consideration received from the customers and sale of these recharge cards would be for the purpose of service rendered and hence, liable to service tax. The court held in favor of the assesee placing reliance on the Supreme Court's decision in the *Idea Mobile Communication Ltd.* [*Bharti Televentures Ltd.* v. *State of Karnataka,* 2012-VIL-91-Bang]

Inter-state sale – Claim therefor to be considered based on movement of goods when written agreement absent: The assessee was effecting sale of goods to buyers in Warora in Maharashtra, under an unwritten agreement and the goods were moving from Tamil Nadu to Warora. The price of the goods sold was ex-godown and the buyer had insured and moved the goods outside the State himself. The Madras High Court, relying upon various Supreme Court decisions, held that in a transaction which was not governed by written agreement the only ground on which the claim of interstate sale could be considered was the fact of movement of goods pursuant to the contract of sale. Looking at the facts of the present case, the court held that transport and insurance made by the buyer were not the indicators of sale being a local sale and the sale in question would amount to an inter-state sale because the sale and the movement of goods outside the State were inextricably connected and the movement of goods was a consequence of sale. [*Aspick Engineering (P) Ltd.* v. *The State of Tamil Nadu,* 2012-VIL-89-MAD]

Dominant intention whether sale or service in job work: In this case, the assessee used to carry on the job work of plate making wherein the customers used to supply the plates on which the assessee would form the image using various chemicals. In the end, lacquer and ink were applied to the plate so that the images on the plates do not get disturbed by constant use. The Bombay High Court held that, there was a transfer of property in ink and lacquer, used in the process of plate making on job work basis and hence it amounted to works contract under the Bombay Sales Tax Act, 1959. The court relied upon its decision given in the case of *Matushree Textiles Ltd.* [132 STC 539], where the issue was whether there was a transfer of property in materials used for dying, bleaching and printing of grey fabrics on job work basis. The court also negated the assessee's contention that, to constitute transfer of property in goods the dominant intention of the parties must be to transfer goods and since the dominant intention in the present case was to render service and supply of any goods was only incidental, the transaction was not in the nature of works contract. Hence, it was held that property in ink and lacquer, used in the process of plate making on job work basis, got transferred by way of works contract. [*The Commissioner of Sales Tax* v. *Ramdas Sobhraj,* 2012-VIL-93-BOM]

INCOME TAX

Ratio decidendi

Loss incidental to carrying on business deductible – Assessee can claim under alternative section: The Bombay High Court answered a reference on whether an amount which was not deductible as a bad debt under Section 36(2) of the Income-tax Act, 1961 (the Act), could be considered as an allowable business loss. It held that there is no bar in claiming a loss as a business loss, if the same is incidental to carrying on a business. In the instant case the assessee, a stock broker, sought to write off an amount which was a loss sustained due to breach by 3 members of the Bombay Stock Exchange. The amount had not been offered to tax in an earlier previous year and hence was not considered allowable as bad debts. The assessee argued that deduction provided in Sections 30 to 43 of the Act was not exhaustive and the loss sustained could be claimed as business loss and the same was accepted by the High Court. [*Harshad J Chokshi* v. *CIT, Bombay,* Income Tax reference 43/1997, Bombay High Court decision dated 14-8-2012]

Determination of PE: Deciding on various types of permanent establishment (PE) and taxability of income, ITAT Delhi held, inter alia, that a project office established to undertake the entire project and engaging in pre-bid survey and negotiations cannot be said to engage in mere ancillary functions. The assessee, engaged in fabrication and installation of on-shore and off-shore oil facilities, had itself stated that it was a PE for the earlier years (prior to the dispute). The ITAT also held that the shipping agent which coordinated with the project office and carried out core marketing activities and assisted in finalisation of contract was a dependent agent PE.

Further the duration of an installation PE would run from the date the contractor establishes an office for the purpose. As per the relevant Article 5 of the DTAA between India and UAE, PE would include a building site or construction or assembly project or supervisory activities in connection therewith, where such site, project or activity continues for a period of more than 9 months. The assessee contended that from the date on which the fabricated materials entered India, the duration of the installation work was only for 4 1/2 months. However, the ITAT held that PE existed from the date the contract was awarded and the site was available to the assessee for surveys at various stages of progress of work.

As regards taxability of income, the ITAT held that though it may be viewed as an umbrella contract involving erection and fabrication outside India and installation and commissioning in India, the contract was divisible since consideration for various activities was paid separately. As the assessee did not have a PE in respect of erection and fabrication of the platform completed in Abu Dhabi, the profits attributable to erection and fabrication were not taxable. [*National Petroleum Construction Company* v. *ADIT (International Taxation),* ITA 5168/2012, ITAT, Delhi decision dated 5-10-2012]

Activity which brings a commercially new product constitutes production: Reasoning that 'production' is a wider term than 'manufacture', the ITAT, Mumbai held that in the bottling plant LPG is

filled in the cylinders for domestic and non-domestic kitchen use involving various specialised processes and the same is an activity of manufacture/ production. The Department had denied deduction under Sections 80HH and 80IA/80I of the Income-tax Act, 1961 stating that no manufacturing activity was carried out at the bottling plant. It contended that filling the gas cylinder for use by domestic customers was only a mode of supply and marketing and the property of gas remained the same. The Tribunal observed that LPG produced at the refinery cannot be directly supplied for domestic use. It held that the activity which brings a commercially new product into existence constitutes production and need not amount to manufacture. [*HPCL* v. *DCIT,* ITA 2124/1999 & others, ITAT, Mumbai decision dated 31-7-2012]

Determination of ALP at 'nil': In the instant case, the assessee had adopted TNMM for expenses pertaining to (i) management fee (ii) professional fee; and (iii) SAP implementation fee. The TPO applied CUP method and arrived at NIL ALP. The ITAT held that application of TNMM in such a case subsidises the shortfall in one transaction with excess of another and affirmed the applicability of CUP. On the aspect of NIL ALP, the Tribunal held that the assessee had not discharged its obligation of evidencing that it had benchmarked the international transactions with ALP. Further, there was no evidence to show that the assessee was willing to pay any amount for such services, if it were so provided by an independent enterprise or if the same would have been performed in-house. These services were not found to be beneficial for the recipient assessee so as to be chargeable services. It thus concluded that there could neither be any cost contribution or cost reimbursement nor payment for such services to the AE. The TPO, therefore, was held to have rightly adopted nil value for benchmarking the arm's length price in respect of both these services. [*Knorr-Bremse India Ltd* v. *ACIT*, ITA 5097/Del/2011, ITAT Delhi decision dated 31-10-2012]