Lakshmikumaran & Sridharan tax

TAX amicus

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

October 2014 / Issue – 40

Contents

October
2014

Article

Time limit for availment of credit – Limitless issues

By **Mahesh Raichandani**

The following proviso has been added to sub-rule (1) of Rule 4 of Cenvat Credit Rules, 2004 ["CCR, 2004"], as amended by Notification No.21/2014-C.E. (N.T.) dated 11-7-2014 (effective from 1-9-2014):

> "Provided also that the manufacturer or the provider of output service shall not take CENVAT credit after six months of the date of issue of any of the documents specified in sub-rule (1) of Rule 9."

An identical proviso extracted as above has been added to sub-rule (7) of Rule 4 of the CCR, 2004, which deals with input services.

One query which comes to mind is whether the proviso would apply to the invoices issued prior to 1-9-2014. A similar issue arose in the case of *Osram Surya (P) Ltd.* v. *CCE, Indore* [2002 (142) ELT 5 (SC)]. On 29-6-1995, second proviso to Rule 57G was introduced prescribing a time limit of six months from the date of document for availing credit. The appellant had taken credit on some inputs six months after the date of issue of the documents and the same was disallowed by the department. The appellant argued that the credit could not be denied by introduction of a limitation because it was a vested right accrued to them. The Supreme Court rejected the contention holding that the vested right continued and what was restricted was the time within which the manufacturer had to enforce that right and that in the absence of challenge to the validity of Rule 57G time limit shall apply to the invoices raised prior to 2-6-1995.

At this point, it will be of interest to discuss a recent decision in the case of *Baroda Rayon Corporation Limited* v. *Union of India* [2014 (306) ELT 551 (Guj)]. The brief facts in this case were thus. From 1-4-1994 gate pass was replaced with invoice as the proper document for availing credit on inputs. As per the amendment in Rule 57G which prescribed the procedure for availing credit, a manufacturer could avail of Modvat credit on the basis of gate passes issued prior to 31-3-1994 subject to the condition that credit was taken before 30-6-1994. The assessee availed credit after 30-6-1994 on the basis of gate passes.

Validity of the amendment was challenged by the assessee. The High Court agreed with the contention of the assessee and held that while exercising the powers under Rule 57G of the Central Excise Rules, the Central Government had no power to curtail any right conferred under Rule 57A of the Central Excise Rules. The High Court further held that the Central Government was not empowered to frame a rule providing for time limit within which credit had to be taken which result in lapsing of the credit already accrued in favor of the assessee. The High Court has not referred to the decision of the Supreme Court in case of *Osram*.

In *Osram* since the legality/validity of the rule was not under challenge, the Supreme Court did not consider the argument of the assessee relating to disallowance of credit which had already accrued in favor of the assessee. This

was not the case in *Baroda Rayon*. In the said case, the assessee challenged the vires of the rule under which time limit for availing credit was introduced. Thus, the Gujarat High Court's non-consideration of the decision in the case of *Osram* to this extent can be justified. If an assessee challenges the vires/validity of the newly added proviso, the decision of the Gujarat High Court in the case of *Baroda Rayon* could be of help to argue that time limit of six months would not apply to inputs or input services received prior to 1-9-2014 but credit availed after 1-9-2014 on the basis of invoices dated prior to 1-3-2014.

The time limit prescribed for availing credit has given rise to many other issues which are discussed in the following paragraphs.

Whether time limit of six months would apply even while re-availing credit?

- As per the sixth proviso to Rule 4(7) of the CCR, 2004, which reads as under:

  "Provided further that in case the payment of the value of input service and the service tax paid or payable as indicated in the invoice, bill or, as the case may be, challan referred to in rule 9, except in respect of input service where the whole of the service tax is liable to be paid by the recipient of service, is not made within three months of the date of the invoice, bill or, as the case may be, challan, the manufacturer or the service provider who has taken credit on such input service, *shall pay an amount equal to the CENVAT credit availed* on such input service and in case the said payment is made, the manufacturer or output service provider, as the case may be, shall be entitled to take the credit of the amount equivalent to the CENVAT credit paid earlier subject to the other provisions of these rules:"

  - As per Rule 4(5)(a) of the CCR, 2004?
  - In terms of Rule 3(5B) of the CCR, 2004?

Delayed receipt of goods after job work

In terms of Rule 3(1) of the CCR, 2004 a manufacturer or producer of final products would be eligible for credit of excise duty paid on any inputs used in the manufacture of intermediate products manufactured by a job-worker availing the benefit of exemption under Notification No. 214/1986-C.E. dated 25-3-1986 provided the intermediate products manufactured by the job-worker are received by the manufacturer for use in or in relation to manufacture of final products. What would be the fate of credit if the processed inputs or the intermediate product is received after a lag of six months?

SSI unit crossing exemption limit

As per Rule 3(2) of the CCR, 2004, Cenvat credit can be taken in respect of the inputs lying in stock, contained in work in progress and final product lying in stock as on the date on which any goods manufactured by the said manufacturer or producer cease to be exempted goods or any goods become excisable. Where a manufacturer availing SSI exemption, crosses the exemption limit, whether transitional credit is available if the invoices under which the above category of inputs were purchased are beyond six months from the date of taking credit?

Credit on goods received after re-conditioning, etc.

Under Rule 16 of the Central Excise Rules, 2002, where any goods on which duty had been paid at the time of removal are brought to any factory for being re-made, refined, re-conditioned

or for any other reason, the assessee shall state the particulars of such receipt in his records and shall be entitled to take Cenvat credit of the duty paid as if such goods are received as inputs under the Cenvat Credit Rules and utilize this credit according to the said rules. Whether the newly added proviso to Rule 4(1) of the CCR, 2004 which talks about inputs would apply to credit taken on finished goods received by the manufacturer in the factory?

It is apparent that the law makers have not taken the above potential situations into consideration while framing the above amendment. The above matters require suitable clarification.

[The author is a Senior Associate, Lakshmikumaran & Sridharan, Mumbai]

CENTRAL EXCISE

Circulars

Pre-deposit provisions in Excise, Customs & Service tax laws clarified: Central Board of Excise & Customs has clarified some of the provisions relating to mandatory pre-deposit for filing appeals and refund thereof in case of favorable order, which were brought into force from 6-8-2014 by Finance (No. 2) Act, 2014. Circular No. 984/8/2014-CX, dated 16-9-2014 issued in this regard specifies simple procedure for making pre-deposit and for claiming refund. It states that pre-deposit made at the time of filing appeal is required to be refunded along with interest within 15 days of receipt of a simple letter seeking such refund. This refund will have to be made even in cases of remand and irrespective of whether the order is proposed to be challenged by the department. It has also been clarified that such refund would not be subject to the provisions of Section 11B of Central Excise Act as pre-deposit is not duty. Further, amount paid during investigation or audit is to be considered as pre-deposit though date of filing appeal shall be taken as date of deposit in such cases. This detailed circular covering various points also holds that earlier Circular No. 967/1/2013, dated 1-1-2013 calling for recovery of the amounts due to the Government during the pendency of stay applications or appeals, would not be applicable to appeals filed under the new provisions. It directs officials not to take coercive measures to recover balance amount i.e., the amount in excess of 7.5% or 10% deposited as per new provisions during the pendency of appeal.

Audit by Central Excise officers: CBEC has clarified that there is adequate statutory backing for audit by the Central Excise Officers and hence Delhi High Court judgment in the case of *Travelite (India)* quashing Rule 5A(2) of the Service Tax Rules, 1994, would not be applicable to Central Excise audit. Circular No. 986/10/2014-CX, dated 9-10-2014 issued for the purpose holds that the expression "verification" used in Section 37(2) of the Central Excise Act, 1944 would include within its scope, audit by the departmental officers, as the procedure prescribed for audit is essentially a procedure for verification.

Ratio decidendi

CESTAT can extend stay beyond 365 days: Larger Bench of CESTAT has held that CESTAT has the power to extend stay of recovery of dues beyond 365 days, where appeal could not be disposed for reasons not attributable to assessee. The Tribunal

in this regard noted the difference in phraseology of Section 35C(2A) of Central Excise Act, 1944 and that of Section 254(2A) of the Income Tax Act, 1961, in as much as the latter has withdrawn the discretion available to ITAT to grant extension beyond 365 days even if delay in disposing the appeal is not attributable to the assessee. Thus, relying upon the ratio of the Supreme Court in the case of *Kumar Cotton Mills Pvt. Ltd.*, and following Gujarat High Court decision in the case of *Small Industries Development Bank of India,* the Larger Bench held that stay can be extended by the Tribunal by passing a speaking order. [*Haldiram India Pvt. Ltd.* v. *Commissioner* - Order No. IO/864-884/2014-EX(DB), dated 30-9-2014]

Aluminium dross excisable after amendment to definition of 'excisable goods' in 2008: Larger Bench of CESTAT has held that excise duty will be payable on aluminum dross after amendment to Section 2(d) of the Central Excise Act, 1944 which widened the scope of the definition of 'excisable goods' in 2008. The Tribunal observed that mention of specific entries in the Central Excise Tariff for waste and scrap shows the intention of the legislature to tax such goods. It was also held that twin tests of marketability and manufacture were also satisfied here in the case of aluminium dross and skimmings which would be liable to excise duty from 10-5-2008. [*Hindalco Industries Ltd.* v. *Commissioner* - Order No. M/1721/14/EB/C-II, dated 19-8-2014]

Area based exemption in the absence of declaration: Filing of declaration as per condition of Notification No. 50/2003-C.E. (area based exemption) is a formality to put the department on notice as also to enable them to find out as to whether any assessee is manufacturing excluded items as detailed in Annexure I of the notification and still availing the exemption. Holding so, Delhi Bench of CESTAT has allowed assessee's appeal on merits, setting aside the demand raised denying benefit of notification for the period when assessee had not filed such declaration. It was observed that assessee was satisfying other conditions of the notification and that by not filing the said declaration it was not in a better condition. [*Surya Polypack Pvt. Ltd.* v. *Commissioner* - Order No. FO/53827-53828 /2014-Ex(Br), dated 30-9-2014]

Valuation – Part of expenses recovered from dealers for staff training, passport program and for sending anniversary cards, not includible: CESTAT Delhi has held that training of staff of the dealers is not a consideration for sale of goods (motorcycle here) to the dealers. The Tribunal noted that such training was optional. Further, in respect of amount collected under passport scheme, where customers were given free accidental insurance cover for one year, monthly newsletter of the company, updating of the maintenance of the motorcycles as also invitation to events, musical nights and carnivals, etc., the Tribunal again noting that said scheme was optional, held that same was not a consideration towards the sale of goods inasmuch as in lieu of said collection, the assessee was providing various other facilities to the buyer and that the expenses incurred were much more than the amount collected in this regard. Similarly, part of expense recovered from dealers for sending anniversary cards to customers was also held to be not part of transaction value. [*Hero Honda Motocorp Ltd.* v. *Commissioner* - Final Order No. 53662-53665/2014, dated 19-9-2014]

Refund of Cenvat credit on exports clarified: Bangalore Bench of CESTAT has clarified several issues relating to refund of Cenvat credit under Rule 5 of the Cenvat Credit Rules, 2004 which is available to assessee exporting goods or services. The Tribunal has held that,

- Place of removal in case of export shall be port/airport/land customs station and all the services utilized up to the stage would become eligible for refund under Rule 5;
- Refund shall be available even for period prior to 14-3-2006, though there was no notification prescribing safeguards, conditions and limitation during such period;
- Refund under Rule 5 shall be available even for supplies made to EOU [following *NBM Industries*, 2011-TIOL-677-HC-Am-CX, and *Shilpa Copper Wire Industries*, 2011 (269) ELT 77 (Guj.)].
- Proof of payment of service tax by service provider is not required;
- Provisions of Section 11B of Central Excise Act, 1944 shall be applicable for computing limitation.

[*Apotex Research Pvt. Ltd.* v. *Commissioner* - 2014-TIOL-1836-CESTAT-Bang.]

Cenvat credit reversal when inputs removed to EHTP unit: The Karnataka High Court has held that inputs can be removed as such against CT-3 certificate to an EHTP unit from a DTA unit, without reversal of Cenvat credit taken on them, after following procedure prescribed under Notification No. 22/2003-C.E. The High Court distinguished the judgment of Larger Bench of Tribunal in the case of *Lakshmi Automatic Loom Works Ltd.* [2008 (232) ELT 428], wherein it was held that removal of inputs as such without reversal of credit to 100% EOU under CT-3 certificate was not permissible as the notification exempting excise duty on EOU supplies required direct procurement of goods from the factory of manufacture. [*Commissioner* v. *Solectron Centum Electronics Ltd.* - 2014-TIOL-1652-HC-KAR-CX]

Exemption to bulkers/tanks fitted on trailers attached to prime mover: CESTAT Mumbai has granted unconditional waiver from pre-deposit of dues in the case where assessee had claimed exemption under Notification No. 6/2006-C.E. (Sl. Nos. 39) on bulkers/tanks fitted on trailers attached to prime mover, the chassis of which is supplied by customers. Tribunal in this regard noted that since the assessee was mounting or fitting bulkers on chassis falling under Heading 8706, he would be deemed as manufacturer of motor vehicles, and since the said vehicle was being used in transportation of goods, the assessee would be a manufacturer of goods falling under Heading 8704. It also noted that assessee had not taken any Cenvat credit and hence condition in the said notification was *prima facie* satisfied. [*Meher Trailers Pvt. Ltd.* v. *Commissioner* – 2014 (307) ELT 715 (Tri. – Mumbai)]

Valuation – Training or training aids in relation to goods cleared: Training or training aids cannot be considered as an activity undertaken in relation to sale of goods being valued, according to Bangalore Bench of CESTAT. It was held that such activity undertaken in relation to supply of missiles by the assessee to the Indian army, was a post-sale activity as unless the missile was ready, produced and was ready to fire, there cannot be any training. The value of such activity was hence held to be not includible in the value of missiles supplied. [*Brahmos Aerospace Pvt. Ltd.* v. *Commissioner* – 2014 (307) ELT 795 (Tri. – Bang.)]

CUSTOMS

Notifications & Public Notices

Focus Product Scheme – Benefit revised for specified products: Rate of benefit available on export of glass envelops for cathode ray tubes, safety matches, dried-egg albumin, microphones, loudspeakers, headphones, earphones, etc., under Focus Product Scheme (FPS) has been revised. DGFT Public Notice No. 70/2009-14, dated 19-9-2014 issued as corrigendum to Public Notice No. 52, dated 25-2-2014 revises the benefit to 5% instead of 2% as mentioned in earlier public notice in respect of above mentioned goods.

SFIS – New form notified: New form ANF3 B-1 for claiming benefit of Served From India Scheme (SFIS) for foreign exchange earnings in the year 2013-14 has been notified. DGFT Public Notice No. 71(RE 2013)/2009-14, dated 30-9-2014 issued in this regard also states that existing form ANF 3B can be filed for benefits up to 2012-13.

Pulses, BCD exemption extended till 31-3-2015 – Chickpeas, exemption to last till 31-12-2014: Benefit of nil BCD available to pulses till 30-9-2014 has been further extended till 31-3-2015, except that for chickpeas (garbanzos) classifiable under TI 0713 20 00 of the Customs Tariff Act, 1975. BCD exemption to chickpeas has been limited to 31-12-2014 only as per new Sl. No. 21A inserted by Notification No. 29/2014-Cus., dated 25-9-2014 in Notification No. 12/2012-Cus.

Cereals - Import policy revised: Import policy for various agricultural items falling under Chapter 10 of Schedule I to ITC (HS) such as meslin, maize, rye, oats, etc., has been revised from "State Trading Enterprises" to "Free". Restriction on import of such goods only through FCI has, therefore, been removed now. DGFT Notification No. 93 (RE-2013)/2009-2014, dated 29-9-2014 has been issued in this regard.

Food products – SION notified for Namkeens, etc.: Standard Input-Output Norms (SION) for export product namkeens / mixtures / savouries have been notified by addition of an entry at Sl. No. E-132 in the Handbook of Procedures, Vol.II (2009-14). DGFT Public Notice No. 69/2009-14 dated 16-9-2014 issued in this regard includes packing material, as per packing policy, in the list of import items.

Ratio decidendi

Status holder not required to furnish bank guarantee for advance authorization in excess of entitlement: Para 4.7.3 of the Handbook of Procedures Vol. I providing for submission of bank guarantee to customs authorities by an applicant for obtaining an Advance Authorization in excess of its entitlement, is not applicable in respect of status holders (export/trading houses). Delhi High Court has held that by virtue of Para 3.10.4 of the Foreign Trade Policy, status holders are not required to give bank guarantee for such advance authorizations. The court in this regard held that the repugnancy between Clause 4.7.3 of the HoP and Paragraph 3.10.4(v) of the FTP must be resolved in favour of the Foreign Trade Policy. [*BRG Iron & Steel Co. Pvt. Ltd.* v. *Union of India* - 2014-TIOL-1526-HC-DEL-CUS]

Valuation – Inclusion of profit margin: CESTAT, Chennai has reduced the quantum of addition

of profit margin in the value of goods supplied by the principal company to its affiliated group companies. The Tribunal in this regard took note of the fact that though the supplier and the importer were related persons in terms of Customs Valuation Rules, the supplier was not buying and selling the imported goods but was procuring them on global basis, in order to maintain standard and quality and then supplying same to its group companies around the globe. It was also noted that there was no case of supply of similar goods to other parties by the supplier at higher prices. The loading was reduced from 10% to 1%, also considering the fact that the importer was an STPI unit importing goods for development of software for export. [*Google India Pvt. Ltd.* v. *Commissioner* - Final Order No. 40636/2014, dated 29-9-2014]

Assessment order cannot be challenged by filing refund application: In this case benefit of an exemption notification, which was not claimed at the time of filing the bill of entry, was sought to be claimed by filing a refund application. The Tribunal rejected the refund application and held that in the light of the judgments of the Supreme Court in the cases of *Flock (India)* & *Priya Blue Industries*, the assessee cannot claim a refund and try to reopen the assessment by means of a refund claim, without challenging the order of assessment. Noting absence of any accidental slip or omission in a case involving non-grant of benefit of exemption notification, and hence no case for invocation of Section 154 of the Customs Act, 1962, the Tribunal by its majority order dismissed assessee's appeal. [*Nicholas Piramal India Ltd.* v. *Commissioner* - 2014-TIOL-1716-CESTAT-MUM]

Vessels and other floating structures imported into India for breaking not liable to CVD: Additional duty of customs (CVD) shall not be levied on vessels and other floating structures, classified under Heading 8908 of Central Excise Tariff, that have been imported into India for breaking, according to Gujarat High Court. The Supreme Court judgment in the case of *Hyderabad Industries* [1999 (108) ELT 321] holding that central excise duty and CVD can be levied only if the article has come into existence as a result of production or manufacture and not otherwise, was relied upon by the court in this regard. [*Shivam Engineering Company* v. *Union of India - 2014*-TIOL-1563-HC-AHM-CUS]

Liability on expiry of warehousing period: An importer is required to pay applicable customs duty along with all penalties, rent and interest, as may be payable, under Section 72(1)(b) of the Customs Act, 1962, once the warehousing period has expired. Holding so, the Mumbai Bench of CESTAT further held that the goods in such cases are deemed to be improperly removed from warehousing and hence cannot be considered as warehoused goods. The Tribunal in this regard upheld the duty liability irrespective of the fact that the importer wanted to abandon or relinquish the title of the goods. [*Allied Fibres Ltd.* v. *Commissioner* - 2014-TIOL-1783-CESTAT-MUM]

No liability on EOU utilizing imported inputs in R&D activity: CESTAT Mumbai has held that no duty is liable to be paid in respect of inputs imported by an Export Oriented Unit (EOU), which were imported without payment of applicable customs duty and were utilized for

research and development activity in the EOU. The department had in this case denied benefit of exemption available to EOU alleging non-use of goods in the manufacture of finished goods. The Tribunal however allowed the appeal finding absence of any allegation of diversion or non-use within the EOU. [*Serum Institute of India Ltd.* v. *Commissioner* - 2014-TIOL-1887-CESTAT-MUM]

Micropipette is an accessory to auto analyser: Madras High Court has upheld Tribunal's finding that a micropipette is an accessory to the auto analyser and therefore entitled to the benefit of Notification No. 23/98-Cus. The argument of the department that micropipette should not be treated as an accessory to the auto analyser as it was imported and invoiced independently was found to be not worthy of consideration by the High Court, as it noted that Commissioner (Appeals) had observed that the purchase order reflected the micropipette as accessory of auto analyser. [*Commissioner* v. *Transasia Bio-Medicals Ltd.* - 2014-TIOL-1506-HC-MAD-CUS]

Finalisation of provisionally assessed bills of entry – Natural justice to be followed: Bombay High Court has held that principles of natural justice including issuance of speaking order under Section 17(5) of the Customs Act, 1962 are required to be followed in cases where provisionally assessed bills of entry are finalised contrary to the claim of the assessee. Objection of the department that Section 17(5) would not be applicable in the case where assessment was made provisional under Section 18(1) and being finalized under Section 18(2), was held by the court as unsustainable. Earlier, Customs authorities finalised provisionally assessed bills of entry by endorsement and raised duty demand by way of a letter followed by a demand notice. [*Zuari Agro Chemicals Ltd.* v. *Union of India* – 2014 (307) ELT 874 (Bom.)] *[For similar decisions from different forums, please see March 2014 and June 2014 issues of Tax Amicus.]*

SERVICE TAX

Circular

Joint ventures – Service tax liability in specified situations, clarified: C.B.E.C. has clarified applicability of service tax on taxable services provided by members of a joint venture (JV) to the JV and *vice versa* and *inter se* between the members of the JV. According to the Board, taxable services provided for consideration, by the JV to its members or *vice versa* and between the members of the JV are taxable. In respect of cash calls which are capital contributions made by the members of JV to the JV, the circular [No. 179/5/2014-ST, dated 24-9-2014] clarifies that if such cash calls are only a transaction in money, they are excluded from the definition of service provided in Section 65B(44) of the Finance Act, 1994 and whether a 'cash call' would be considered as 'merely a transaction in money' would depend on the terms of the JV agreement.

Ratio decidendi

Technical certification is an input service for pharma industry: The issue involved

was whether Cenvat credit of service tax paid on technical testing & analysis and technical inspection & certification services would be admissible to the appellant, a manufacturer of drugs. The department had assailed credit on the ground that the products for which inspection & certification services were provided were yet to be manufactured but this was rejected by the Tribunal holding that the provisions do not stipulate such one-to-one correlation. Relying on Gujarat High Court ruling in *Cadila Healthcare* [2013 (30) STR 3 (Guj.)] wherein it was held that checking of instruments and certification thereof was mandatory for pharma industry, the Tribunal held that credit would be admissible on the impugned services. [*Intas Pharmaceuticals* v. *Commissioner* – Order No. A/11696/2014, dated 25-9-2014, CESTAT, Ahmedabad]

Cenvat credit on outward freight - Admissibility on FOR destination sale: Relying on evidences like certificates issued by customers and precedent decisions, the CESTAT held that sale was effected based on FOR basis by the assessee and therefore, Cenvat credit of service tax paid on outward freight would be admissible. The period involved was from May 2008 to January 2012. The Tribunal also noted that on facts, the assessee was selling the goods on FOR destination sale basis, excise duty was paid after including transportation charges and transit insurance was borne by the assessee and that property in the goods passed to customers on delivery at their premises. [*Ultra Tech Cement* v. *Commissioner* – Final Order No. 53497/2014 dated 3-9-2014, CESTAT, Delhi]

Cenvat credit on common input services – Quantum of reversal: CESTAT, Mumbai has held that in the formula prescribed under Rule 6(3A) of the Cenvat Credit Rules, 2004, for determining the amount of Cenvat credit availed on the input services that need to be finally reversed, "P" denotes the total Cenvat credit taken on input services during the financial year and not the total of the Cenvat credit taken on common input services. The same principle applies in the case of determination of provisional credit required to be reversed every month. [*Thyssenkrupp Industries (I) Pvt. Ltd.* v. *Commissioner* – 2014-TIOL-1825-CESTAT-MUM]

Premium paid to lessor for transfer of interest in property not liable to service tax: Service tax cannot be levied on the 'premium' or 'salami' paid by the lessee to the lessor for transfer of interest in the property from the lessor to the lessee, according to Delhi Bench of CESTAT. It observed that one time premium was the price paid for obtaining the lease of an immovable property, while rent was the payment made for use and occupation of the immovable property leased. Since taxable event under Section 65(105)(zzzz) read with Section 65(90a) of the Finance Act, 1994 (as it stood during relevant period) was renting of immovable property, service tax would be chargeable only on the rent whether charged periodically or at a time in advance. [*Greater Noida Industrial Development Authority* v. *Commissioner* – 2014-VIL-182-CESTAT-DEL-ST]

Input service credit – Admissibility in respect of passive telecom infrastructure: The appellants were providing 'Passive Telecom Infrastructure'

to the cellular telecom operators and were paying service tax under the category of 'Business Auxiliary Service'. Show cause notices were issued denying input tax credit on towers and the cabins used by the appellant as 'passive telecom infrastructure' for providing output service. The Tribunal opined that Rule 2(k)(i) of Cenvat Credit Rules would not apply to service providers and, distinguishing the case of *Bharti Airtel Ltd.* [2012-TIOL-209-CESTAT-MUM] held that input service credit would be admissible on towers and cabin under Rule 2(k)(ii) of the Cenvat Credit Rules. [*GTL Infrastructure Ltd.* v. *Commissioner* – 2014-TIOL-1768-CESTAT-MUM]

Onsite ITSS services provided abroad is not export of service: The appellants had entered into direct contract with their overseas customers for rendering the Information Technology Software Service wherein it was required to perform both offshore and onsite activities. However, the onsite activities were undertaken by the subsidiaries of the appellant located outside India for which appellant paid consideration on cost plus model. The issue before the High Court was whether the onsite services provided at the customer's premises abroad prior to 27-2-2010 qualified to be export of service when the relevant rules provided that to qualify as export of service the service shall be provided from India and used outside India. The High Court held that the situs of onsite service and its provision were both abroad and appellants being in India cannot be said to be involved and therefore, there was no export of taxable service. [*Tech Mahindra Limited* v. *Commissioner* – 2014-VIL-268-BOM–ST]

VALUE ADDED TAX (VAT)

Notification & Circular

Delhi VAT – No reversal of ITC for specified credit notes: Circular No. 11 of 2014-15, dated 8-9-2014 has been issued with respect to reversal of input tax credit (ITC) under Section 10 of the Delhi Value Added Tax Act, 2004 in respect of credit note / debit note related to discounts. This circular issued in supersession of Circular No. 30 of 2013-14 clarifies that on issuance of credit notes by the seller to the purchaser in certain specified situations, the seller will not reduce the output tax paid and the same would not require reversal of ITC by the buyer. The noteworthy situations are:

- Consideration for other facilities offered by the purchaser, such as, rent for window display, sign-boards, lease rental of premises, other establishment expenses, etc.
- Reimbursement of expenses incurred by purchaser on behalf of the seller.

Punjab VAT rates enhanced for specified commodities: Rate of VAT under Punjab VAT provisions, has been increased on specified commodities vide Notification No. S.O. 163/P.A.8/2005/S.8/2014 dated, 1-10-2014, Schedule "E", appended to the Punjab Value Added Tax Act, 2005. The increase which is effective from 1-10-2014 is as follows:

- Diesel other than premium diesel, covered under S. No. 1 of Schedule E – Rate increased from 8.75% to 9.75%.

- Cold Drinks, aerated drinks and soda, covered under item number 3 of S. No. 15 of Schedule E – Rate increased from 22.5% to 27.5%.
- Cigarette and Cigar, covered under item number 25 of S. No. 15 of Schedule E – Rate increased from 20.5% to 30%.

It may be noted that the commodities covered under serial number 15 (item numbers 3 and 25) of Schedule E, are taxable at the first point of sale i.e. manufacturer or first importer's stage.

Ratio decidendi

License fees and airtime charges not includible in value of pager sold: Bombay High court has held that airtime charges and license fees charged under a contract of selling activated pager do not form a part of sale price within the meaning of Section 2(29) of the Bombay Sales Tax Act, 1959. The importer and reseller of radio pagers had collected sales tax only on value of the hardware, *viz.* the pagers without including the amount of license fees or airtime charges. Analyzing the definition of 'sale price' the court noted that the respondent did not do anything to the radio pager "at the time of or before its delivery" but only collected airtime charges and license fees pro-rata and that airtime charges were paid in respect of airtime radio paging services which was activated after the pager was purchased and/or after delivery of the pager. Noting that what was done was to authorize radio frequency network to access the pager after it was sold to the subscriber, the court held that license fee payable was a necessary corollary and neither the collection of airtime charges nor license fees would constitute "anything done" in respect of the pager. It was held that sale price hence would be restricted to that of the hardware, namely, pager units and would not include the cost of airtime and license fees. [*Commissioner* v. *Page Point Service (P) Ltd.* - 2014-VIL-279-Bom]

Starch whether edible or not – Classification of: Revive Instant Starch containing 97% tapioca starch and about 3% of other additives is liable to be charged under Entry 118 of Schedule II Part A of U.P. VAT Act, 2008 and is not to be treated as unclassified item chargeable to tax at 12.5%. Entry 118 covers starch, sago and sabudana. The court in this regard held that the word 'Starch' as used in Entry 118 of Schedule II Part A of the U.P. VAT Act, 2008 has not been referred to as edible or inedible and therefore 'Revive Starch' must be held to be falling within the meaning of word 'Starch' as used in said entry. It was also held that principle of *ejusdem generis* was not applicable here to include only edible starch, as it was not shown that sago and sabudana do not exist in inedible form. [*Marico Ltd.* v. *Commissioner* - 2014-VIL-260-ALH]