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Income Tax content has not been included in this issue. It will be covered in Direct Tax Amicus to be brought out from this month.

Articles

Compulsory pre-deposit and complete withdrawal of discretion to grant stay – A retrograde step

By **Iype Mathew**

One of the important changes made as part of the amendments brought by Finance (No. 2) Act, 2014 is the amendment to the provisions relating to pre-deposit and grant of stay in Customs, Excise and Service Tax laws. Earlier, though pre-deposit of the full disputed amount was prescribed yet the appellate authority was vested with the discretion to waive pre-deposit and to grant stay in deserving situations. This position is now amended by introducing a compulsory pre-deposit of a part of the disputed amount along with no discretion to the appellate authorities to consider any waiver or to grant stay.

A pre-deposit must serve a purpose. It will be worthwhile to try and understand what could be the purpose that is meant to be served. Typically a quasi-judicial process ends with an adjudication order. The different stages leading upto the passing of such an order provide for presentation of facts and evidence, both for and against the issues under consideration. Thus an adjudication order is normally expected to be fair and just in the light of the facts and circumstances of the case. It would therefore be natural to presume that adjudication orders are normally correct and that the parties involved should therefore have no problem in accepting them.

The issues that need to be examined in the context of the above amendment are:

- If pre-deposit of the disputed amount as now prescribed is made, does it mean that recovery action for the remainder is automatically stayed?
- Will the Tribunal still continue to have the power to grant stay of the enforcement of the impugned order?

Payment of a disputed amount of duty or tax is enforceable as a result of an order lawfully passed by a competent authority. Therefore staying enforcement of such an order or waiving pre-deposit of the disputed amount, cannot be seen as two distinctly different reliefs. They are addressing the same concern namely hardship caused by an allegedly wrong order. Therefore when a provision is created to entertain an appeal subject to pre-deposit of a part of the disputed amount, it would certainly imply that the impugned order is automatically stayed till the appeal is disposed of. This position is maintainable in spite of the absence of a direct mention of such a position in the amended Section 129E of the Customs Act and Section 35F of the Central Excise Act. The above view finds support in the judgement of the Kerala High Court in *Ashoka Rubber Products* v. *CCE* [1989(43) E.L.T. 605(Ker)].

The Tribunal is always vested with the inherent power and authority to grant stay of orders brought before it by aggrieved parties, as part of its natural responsibility to render justice. This position is now well settled vide judgement of the Supreme Court in *I.T.O* v. *M.K. Mohammed Kunhi* [1969 (71) ITR 815 (SC)]. Therefore the

amendments under examination will not make any difference to this settled position.

Let us now understand the ground reality in Union Indirect Taxes viz., Customs, Excise and Service Tax. It is now openly acknowledged that many show cause notices are issued either when there is no case at all or on the basis of wrong interpretation of the provisions of law or on the basis of weak evidence; and that such show cause notices are generally upheld and confirmed by the quasi-judicial adjudicating authorities. This strange phenomenon is endemic and prevalent across the length and breadth of the country. The fact that a vast majority of the orders so passed is set aside or annulled at Tribunal, High Court and Supreme Court levels, is a firm proof of this malady existing at lower levels. In this context therefore compulsory pre-deposit and withdrawal of discretion to grant stay, are steps retrograde in nature, which will result in hardship to the assessees. In other words, the present amendment is not a step aiding and promoting a system for quick and fair dispensation of justice.

Apparently an important reason for making this amendment is - A lot of time of the Tribunal and Commissioners (Appeals) is taken up to dispose of waiver of pre-deposit and stay applications filed by the aggrieved parties. If this time can be used for hearing appeals proper, final orders can be passed faster resulting in quicker rendering of justice. Growth in litigation and steady increase in pendency of cases in Tribunals and Courts are only symptoms and not the causes for this malady. The root causes for the present problem are: complicated tax laws, lack of accountability at the decision making levels, and inadequate number of benches in Tribunals and Courts to handle the heavy inflow of cases. Unless these causes are seriously addressed and tackled there will be no real improvement in the tax justice system. The present amendment is short sighted and adds to the miseries of the assessees.

[The author is a Director, Lakshmikumaran & Sridharan, New Delhi]

Coal is still burning - The issue of classification of coal

By **Karthik S. Nair**

The CESTAT, Bangalore Bench passed a final order [No. 20998-21002, dated 20-6-2014] on the issue classification of imported coal – whether bituminous or steam coal. Steam coal is being imported and consistently classified, for decades, under the heading "other coals" in the First Schedule of Customs Tariff Act, 1975.

Facts of the case

In the Budget 2012-13, in view of high price of coal, full exemption from basic customs duty and a concessional CVD @1% was extended to imported steam coal. On investigation, the DRI concluded that the coal imported is not classifiable as steam coal but as bituminous coal in view of sub-heading note 2 to Chapter 27 of the Customs Tariff. This resulted in issue of innumerable number of show cause notices. The Finance Minister, in Budget 2013-14, addressed this issue as a "rampant mis-classification" and sought to rectify the situation by making the duty rate same for both steam coal and bituminous coal.

The Tariff Items (TI) that are relevant for the purpose the issue at hand are 27011200- Bituminous coal and 27011920 - Steam coal. As per the definition, bituminous coal means coal having a volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg. As per the HSN, coal is classified on the basis of metamorphosis i.e. as 'Anthracite', 'Bituminous coal' and 'Other coal'. There is no other classification of coal in the scheme of the HSN.

The entry for steam coal was introduced in the Indian customs tariff in the year 2003 which was a deviation from the HSN in as much as classification of coal as steam coal is not based on the metamorphosis of coal but on the end use of coal. Prior to 2003, imported steam coal was always classified under the heading 270119 viz. Other coal. Once the entry for steam coal was inserted in the tariff in the year 2003, the importers started classifying the imported steam coal under the sub-heading i.e. 27011920 based on trade parlance.

Bituminous coal has been defined in sub-heading note 2 to Chapter 27. As per Rule 1 of General Rules of Interpretation classification of goods must be done in accordance with the headings read along with relevant section note/ chapter note and therefore, the department alleged that coal must be classified under the heading 27011200 as Bituminous coal. It was also stated that whether steam coal has been defined in the tariff or not is irrelevant, as steam coal is not a heading comparable to the heading of Bituminous coal.

The importers explained the historic background of the relevant headings. It was argued that if the Department's stand is accepted, the entry for 'Coking coal' under 27011910 would be rendered redundant. It was submitted that the interpretation which renders a heading redundant should be avoided and therefore, classification of coking coal as well as steam coal must be governed only by the trade parlance meaning of the said goods. It was further argued that considering sub-heading note alone in isolation is not correct.

Findings of the Tribunal

- It was observed by the Tribunal that classification cannot be determined on the basis of history of taxation and trade parlance when a product is defined in the tariff.
- Bituminous coal and steam coal are not comparable headings as they are at different levels i.e. "two dash" (--) "three dash" (---) respectively.
- Coking coal, Bituminous coal and steam coal can be segregated and one type of coal will not fall under another heading.
- The heading coking coal will not get redundant as coal which is agglomerating and whose calorific value is less than 5833 Kcal/kg will get covered under the said heading.

Analysis of the Order

The observation of the Tribunal is that in view of GRI 6, Bituminous coal and Steam coal are not comparable, being not at the same level. However, in the case of the headings steam coal and coking

coal, India has made a deviation from the scheme of the HSN and such deviation necessitates that an exception to GRI 6 be carved out. This could be done by the Courts. It was observed by the Tribunal that Coking coal, Bituminous coal and steam coal can be segregated and one type of coal will not fall under another heading. It was also held that the heading for coking coal will not be rendered redundant as coal having agglomerating character and whose GCV is less than 5833 Kcal/Kg will get covered under the said heading. These observations are technically not sound. The Tribunal, it appears, has omitted to appreciate that the property of agglomeration will be found only in Bituminous coal and that the GCV of Bituminous coal will always be more than 5833 Kcal/Kg. The fact that steam coal/ coking coal are end-use based classification and bituminous coal is a rank based classification and that these are not mutually exclusive categories has not been appreciated by the Bench.

It was also held that classification cannot be determined according to the history of taxation. However, when the heading is unique to the Indian Tariff, it was pertinent to examine why the Parliament had opted to make such an entry. Only such a comprehensive analysis could have revealed the real purpose and scope of the entry. The trade is left with no alternative except to litigate the issue further.

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Finance (No. 2) Act, 2014 comes into force

Certain statutory changes in various provisions of Central Excise Act, 1944, Customs Act, 1962 and Finance Act, 1994 (Service Tax), as proposed by the Budget 2014 through Finance (No. 2) Bill, 2014 have come into force with effect from 6-8-2014 as the Bill got enacted into Finance (No. 2) Act, 2014 (25 of 2014) *[Please refer Tax Amicus – July 2014 issue]*. While passing the Finance (No. 2) Bill, new Section 129E of the Customs Act and Section 35F of the Central Excise Act as proposed to be substituted at the time of introduction of the Bill, were also amended. According to the provisions now brought into force, pre-deposit is required only to the extent of 7.5% / 10% of duty in cases where both duty and penalty are disputed. Pre-deposit of 7.5% / 10% of penalty is however required in cases involving penalty alone. Further, Section 129EE and Section 35FF of the Customs Act, 1962 and Central Excise Act, 1944 respectively have been substituted to provide for interest on amount pre-deposited, from the date of payment till the date of refund, if the same is required to be refunded consequent to order in favour of assessee. The rate of interest has been notified as 6% as per Notification Nos. 24/2014-C.E. (N.T.) and 70/2014-Cus. (N.T.), both dated 12-8-2014.

CENTRAL EXCISE

Ratio decidendi

Valuation – Cylinder rental charges not includible: CESTAT, Delhi has held that cylinder rental charges in case of supply of gases in own cylinders, are not includible in the assessable value of gases sold for the purpose of calculating Central Excise duty. Period involved in the

dispute was after 1-7-2000 i.e. when concept of transaction value was in place. It was held that ratio of judgments of the Apex Court in the cases of *Bombay Tyre International, Hindustan Polymers* and *Indian Oxygen*, which are with regard to provisions of Section 4 as it stood prior to 1-7-2000 (normal price), would be applicable even in respect of the Section 4 as the same stands w.e.f. 1-7-2000 (transaction value). It was held that the cost of only that packing which is necessary to make the goods marketable and in which the goods are generally sold at the place of removal, would be includible and hence, if the goods are marketable as such without being packed or put into containers or cylinders, the cost of rental for such cylinders would not be includible. [*Commissioner* v. *Ajmer Industrial Gases Pvt. Ltd.* - Final Order No. 52124/2014, dated 23-4-2014, CESTAT Delhi – *See also Order in case of Goyal M.G. Gases Pvt. Ltd. decided on same day by Final Order No. 52299-52301/2014]*

Exemption to cement cleared in 50kg bags to builders & RMC manufacturers: CESTAT, Mumbai has allowed the benefit of exemption under Notification No. 4/2006-C.E. (Sl. No. 1C) to cement cleared in 50 kg bags to bulk consumers where there is no requirement to declare MRP on the packages. It was noted that in respect of second category of exclusion from Legal Metrology (Packaged Commodities) Rules, 2011, i.e. in respect of industrial consumers or institutional consumers, there is no restriction in respect of quantity of goods contained therein. Exemption was allowed further noting that sale to ready mix concrete (RMC) manufacturers would be covered under sale to industrial consumers while builders and developers would come under "institutional consumers" as construction activity is a service activity attracting service tax levy. [*Heidelberg Cement (India) Ltd.* v. *Commissioner* – 2014-TIOL-1433-CESTAT-Mum.]

Cenvat credit on capital goods - Balance 50% credit available even if goods not actually being put to use: Gujarat High Court, while affirming the Tribunal's order, has held that remaining 50% credit on capital goods in the subsequent financial year can be availed if the capital goods are in possession of the manufacturer and there is no condition under the Rules ***(during relevant time)*** that for taking credit, goods must have been put to use for the purpose of manufacture of final product. During the period of dispute, Rule 4(2)(b) of the Cenvat Credit Rules, 2002 provided that *balance Cenvat credit may be taken in any subsequent financial year, if the capital goods are in the possession & use of the manufacturer of final products in such subsequent years.* With regard to mention of the words "use" under Rule 4(2)(b) of the Rules, the Tribunal had held that 'use' has to be treated 'as available for use of the manufacturer'. [*Commissioner* v. *Indian Oil Corporation Ltd.* - 2014 (305) ELT 507 (Guj.)]

Interest – Relevant date for demand of interest: In a dispute as to whether the interest under Section 11AA of the Central Excise Act, 1944 is payable from date of adjudication order or from the date of order of Tribunal which confirmed the demand also reducing it to some extent, CESTAT, Chennai has held that interest would be payable from three months from date of Tribunal's order. It was noted that since the Commissioner (A) had set aside the adjudication order confirming the demand, the order impugned therein was non-existent. Tribunal in this regard also relied upon

an earlier order in the case of *Lucas TVS Ltd.* [*Madura Coats* v. *Commissioner* – 2014-TIOL-1425-CESTAT-Mad.]

Cenvat credit on moulds and dies sent to vendors prior to 27-2-2010: CESTAT, Mumbai has held that Cenvat credit on moulds and dies sent to vendors would be admissible in a case pertaining to the period before 27-2-2010 if such moulds were used in his factory also by the manufacturer. The department had denied the credit as procedure for sending moulds to other manufacturer who was not a 'job worker' was not envisaged in the Cenvat Credit Rules till 27-2-2010. The Tribunal however remanded the matter for *denovo* consideration observing that since the manufacturer was also utilizing the same moulds and dies, which was also occasionally sent to the vendors, benefit of Cenvat Credit could not have been denied. It was noted that only penalty for procedural infraction could have been imposed rather than deny credit. [*JBM MA Automotive Pvt. Ltd.* v. *Commissioner* – 2014-TIOL-1393-CESTAT-Mum.]

Appeal by partner of partnership firm in case of personal penalty: Terming insistence of appeal by the partner of a partnership firm as hyper technical, the Bombay High Court has set aside Tribunal's order which held that individual partner must also impugn the directions for imposition of penalty on him/her in case where the partnership firm has filed the appeal against imposition of penalty on the firm. Noting that the partner in this case had signed memo of appeal of the firm as partner thus affirming its contents, it was held that insisting on partner to file an appeal in every matter would not be just, fair and proper. It was also noted that a partnership firm cannot have independent existence without its partners. [*Benu Ramesh Agarwal* v. *Commissioner* – 2014 (305) ELT 375 (Bom.)]

Refund – No unjust enrichment where duty paid after clearance at insistence of Department: Bombay High Court has upheld the concurrent finding of the authorities below that there cannot be any unjust enrichment in the case of refund of duty paid at the insistence of the department after clearance of the goods. The court in this regard distinguished the judgements of the Apex Court in the cases of *Sahakari Khand Udyog Mandal* and *Allied Photographics India Ltd.* while it held that burden of duty was not passed in the present case to the customers. [*Commissioner* v. *Rocket Eng. Corp.* – 2014 (306) ELT 33 (Bom.)]

CUSTOMS

Notification & Public Notices

Pharmaceuticals and drug exports - Bar coding on mono cartons deferred: Effective date of affixing bar-codes on mono-cartons as secondary level packaging of pharmaceuticals and drug exports has been deferred to 1st April, 2015. It may be noted that mono cartons were brought under the ambit of secondary level packing from 26-6-2014. Public Notice No. 68(RE-2013)/2009-14, dated 6-8-2014 has been issued in this regard.

Skimmed Milk Powder - Benefits of VKGUY Scheme withdrawn: DGFT has withdrawn benefit of Vishesh Krishi and Gram Udhog Yojana (VKGUY) Scheme on export of Skimmed Milk Powder. This benefit was introduced on said product in 2012 by DGFT Public Notice No. 3,

dated 5-6-2012. Public Notice No. 67/2009-14 (RE 2013), dated 15-7-2014 has been issued for this purpose.

Sugar – Quantity restrictions on export of organic sugar removed: Quantity ceiling for export of organic sugar has been removed till the time export of sugar is permitted "Freely". Hitherto only 10,000 MT of such sugar was allowed for export. Further, as per DGFT Notification No. 88 /2009-2014 (RE – 2013), dated 4-7-2014 issued in this regard, such export is allowed subject to registration of quantity with the DGFT and certification by Agricultural and Processed Food Products Export Development Authority (APEDA).

Ratio decidendi

Seizure – Issuance or dispatch of notice does not complete 'giving' of notice: Delhi High Court has held that mere issuance or dispatch of notices to assessee would not amount to 'giving' of notice under Section 110(2) of the Customs Act, 1962 and as contemplated in ordinary sense and in law. Noting that in case of seizure, person concerned has to be informed of grounds of confiscation and hence notice has to be received by such person, it was held that word 'given' in Sections 110(2) and 124(a) actually meant received by person or deemed to be received by person from whom goods were seized. It was also held that Section 153 only defined mode and manner of service and not time of service or when notice was 'given'. Delhi High Court in this regard agreed with the views of Gujarat HC in the case of *Ambalal Morarji Soni* but observed that Calcutta HC in the case of *Kanti Tarafdar* was not correct. Further Section 27 of the General Clauses Act was found to be not applicable in the present case where the court finally ordered release of seized currency as SCN was not given to the party within the prescribed time. [*Purushottam Jajodia* v. *Directorate of Revenue Intelligence* - WP(C) 416/2014, 417/2014 & 3379/2014, decided on 24-7-2014, Delhi High Court]

Valuation – Royalty, technical know-how when not includible: CESTAT, Chennai has held that technology for manufacture of finished goods cannot be considered as a condition of sale of capital goods imported from related group company. Tribunal in this regard noted that there was no clause in agreement for any assistance in respect of imported capital goods. Supreme Court's Order in the case of *Toyota Kirloskar Motors* was relied on by the Tribunal while distinguishing the order in the case of *Matsushita Television & Audio*. [*Saint Gobain Glass India Ltd.* v. *Commissioner* - Final Order No. 40426/2014, dated 28-7-2014, CESTAT Chennai]

Re-assessment - Obligatory upon assessing officer to pass speaking order within 15 days: Calcutta High Court has held that under Section 17(5) of the Customs Act, 1962 a statutory duty has been cast upon the assessing officer to pass speaking order within fifteen (15) days from the date of re-assessment of the bill of entry or shipping bill, which is not dependent upon an application to be made by the importer or exporter. [*Durgesh Merchandise Pvt. Ltd.* v. *Union of India* - 2014 (304) ELT 439 (Cal.)]

Conversion of shipping bill: CESTAT, Mumbai has upheld the denial of conversion of shipping bill from DEEC scheme to drawback scheme when the exporter had surrendered the DEEC license before. Tribunal in this regard placed its reliance on CBEC Circular No. 4/2004-Cus., dated 16-1-

2004 which stated that conversion of shipping bill from DEEC scheme to duty drawback scheme is allowed only in cases where the benefit of DEEC scheme has been denied by the DGFT or the customs authorities and not otherwise. [*Manwat Plastics Pvt. Ltd.* v. *Commissioner* - 2014-TIOL-1283-CESTAT-MUM]

CESTAT Ahmedabad however allowed such conversion from DFIA scheme to drawback scheme in case where the exporter's DFIA licence was cancelled, in the absence of imports thereunder, by the DGFT upon his request while exports before that were made under DFIA. Tribunal in this case noted that Para 4.28(e) of the Handbook of Procedures Vol. 1 allowed cancellation of DFIA and further allowed assessee to approach Customs for conversion of shipping bills. Rule 12 of the Drawback Rules and Section 149 of the Customs Act, 1962 were also considered by the Tribunal in this regard. [*VRA Cotton Mills Pvt. Ltd.* v. *Commissioner* – Order No.A/11457/2014, dated 1-8-2014, CESTAT Ahmedabad]

CHALR - Department cannot appeal against order passed by Commissioner: CESTAT, Mumbai has held that Customs House Agents Licensing Regulations, 1984 (CHALR) do not provide for filing an appeal by the department against an order passed by the Commissioner under the said regulations, either revoking the CHA licence or dropping of proceeding under CHALR. It was noted that Section 129D of the Customs Act does not provide for filing of appeal against order passed under CHALR and that such order of Commissioner is not an order passed as adjudicating authority. Dismissing Department's appeal it was held that only a CHA aggrieved by a decision or order could appeal to the Tribunal under Regulation 23(8) of the CHALR, 1984. [*Commissioner* v. *Thakkar Shipping Agency* - 2014-TIOL-1250-CESTAT-MUM]

Oil/Fuel contained in vessels imported for breaking up, freely importable: Appellate Tribunal at Ahmedabad has held that restriction under ITC (HS) on import of fuel under Customs Tariff Heading 2710 will not be applicable to surplus fuel imported as part of ship/vessel which is imported for breaking up. It was held that such fuel or oil will be considered as an integral constituent of the vessel. Tribunal in this regard relied on DGFT clarification issued under F. No. IPC/4/5(684)/97/82/PC-2(A), dated 26-6-2013 stating that surplus fuel stored in the fuel room (whether inside or outside the engine room) forms a part of the ship/vessel imported for breaking up and should be considered as integrated part of the vessels and is classifiable under Customs Tariff Heading 8909. It was further held that clarifications issued by the DGFT will be binding on the customs authorities so far as ITC (HS) restrictions under the Foreign Trade Policy are concerned. [*AG Enterprise* v. *Commissioner* - 2014-TIOL-1268-CESTAT-AHM]

Refund claim filed with wrong authority - Limitation when claim filed later with correct authority: CESTAT, Delhi has held that refund claim filed with the department, though with the wrong authority, has to be treated as having been filed on the first date and hence such refund claim filed subsequently before the correct authority cannot be rejected on the grounds of being time barred. In this case refund claim was filed before the wrong authority within the limitation period

of one year. On being pointed out, refund claim was filed before the appropriate authority after the limitation period of one year. The claim was rejected by such authority as being time barred. [*Rathi Steel and Power Ltd.* v. *Commissioner* - 2014-TIOL-1401-CESTAT-DEL]

EOU - Depreciation on capital goods when export obligation not fulfilled: CESTAT, Delhi has held that depreciation on capital goods is admissible, in case of debonding of EOU, once export obligation is discharged even partly. Revenue's plea that full duty foregone was to be deposited as only 300 pieces of finished product was exported instead of one lakh pieces, was hence rejected by the Tribunal holding that quantum of exports is not relevant. It was held that quantum of depreciation was to be calculated considering Circular No. 14/2004-Cus. [*Commissioner* v. *Advance Components Engg.* - Final Order No. 52850/2014, dated 15-7-2014, CESTAT Delhi]

Blanket containing blowers to warm patient's body is not thawer equipment: CESTAT, Chennai has held that a blower draped in a blanket to warm the blood of a patient after an operation would not constitute a thawer equipment as the patient's blood is not frozen. Exemption under Sl. No. 363A & B (Sr. No. 54 of List 37) of Notification No. 21/2002-Cus., dated 1-3-2002 was hence found to be not available. Tribunal in this regard noted that a thawer equipment is an ice-melting apparatus used for melting frozen substances and for medical purposes, it is used in warming frozen blood in blood banks. [*Sheth Impex* v. *Commissioner* - 2014 (305) E.L.T. 156 (Tri.-Chennai)]

SERVICE TAX

Ratio decidendi

Cenvat credit on CHA service and shipping agents & container services: Gujarat High Court has allowed Cenvat credit on Customs House Agent service and shipping agents & container services used by the exporter in export of goods. Noting that exporters cannot do business without these services, it was held that any service availed by the exporters until the goods left India from the port are services used in relation to clearance of final products upto the place of removal. Precedent decision in the case of *Cadila Healthcare*, pertaining to C&F services was also relied on by the court in this regard. Credit in relation to services of overseas commission agent was however denied by the court. [*Commissioner* v. *Dynamic Industries Ltd.* - Tax Appeal No. 912 of 2012, decided on 25-7-2014, Gujarat High Court]

Audit - Rule 5A(2) of Service Tax Rules declared ultra vires: The Delhi High Court has held that Section 72A of Finance Act, 1994 requires audit of assessees records only in special circumstances and no substantive provision exists for probing records, giving sweeping powers to authorities, under conditions contemplated by Rule 5A(2). Holding Rule 5A(2) ultra vires the Finance Act, 1994, the High Court held that Section 72A provides for special audit and hence Parliament did not intend to provide for subjecting every assessee to general audit. Further, the court quashed CBEC Instruction dated 1-1-2008 on the ground that it attempts to widen scope of

law and is patently contrary to statute. [*Travelite (India)* v. *UOI – W.P.* (C) 3774/2013, decided on 4-8-2014, Delhi High Court]

Refund claim by service recipient when allowable: The assessee purchased natural gas and paid transmission charges according to tariff fixed by the relevant regulatory body. Upon downward revision in charges the service provider credited the excess amount paid. The recipient-assessee applied for the refund of the differential amount of service tax collected and remitted by the service provider. The department was of the view that service-recipient is not eligible for claiming refund and service provider alone was entitled to do so. Upholding the decision of the Tribunal, the High Court held that the recipient-assessee could apply for refund, particularly when burden of tax had not been passed on. It noted that the department had not challenged the finding of fact that unjust enrichment did not arise as the price of the final product was fixed by the government and the same was exempted from excise duty. [*Commissioner* v. *IFFCO Ltd* -2014-TIOL-1157-HC-Allahabad]

Cenvat credit on GTA services from factory gate to customer's premises when excise duty charged on specified rate: Reversing the findings of CESTAT, New Delhi in the case of *Ultratech Cements* [2014-TIOL-478-Cestat-Del], Chhattisgarh High Court has held that the presumption by the Tribunal that the place of removal would be factory gate of the manufacturer if excise duty is charged on specified rate [read MRP], is incorrect. Noting that if the legislature wanted the 'place of removal' to be the factory gate in case of payment of excise duty on specified rate, then they would have defined it so in the Act or rules or in any of the circulars, the court held that since the same has not been done, there can be no presumption of factory gate being a place of removal in such cases. Further, placing reliance on an earlier order of the court in the case of *Lafarge India Ltd.*, it was held that 'place of removal' has to be decided on the facts and circumstances of each case. [*UltraTech Cement Ltd.* v. *Commissioner* - Tax Case Nos. 8, 9 and 23 of 2014, decided on 5-8-2014, Chhattisgarh High Court]

Appearance at promotional events covered under Brand Promotion Service and not under BAS: Examining whether the service of promotion of clients products or service by way of using a person's celebrity status or fame falls under Business Auxiliary Service or Brand Promotion Service, the Tribunal held that despite the language of the contracts, the services rendered amounted to promotion of the brand as such. The Tribunal held that appearance at promotion events and advertisements in print and audio visual media was not merely for promotion of certain products or services but of the brand as a whole. [*Commissioner* v. *Ms. Shriya Saran*, 2014-TIOL-1290-CESTAT-Delhi]

Sole selling agent is not necessarily recipient of IPR services: At issue was the nature of activity undertaken by the appellant, a manufacturer of country liquor, who had appointed a sole selling agent for certain branded liquor. The department argued that the minimum amount retained by the agent out of sale proceeds collected was in fact royalty for use of the brand name. However, the

Tribunal concluded that the arrangement was merely for the purpose of ensuring maximum production and to maximise profits for both parties and the minimum guarantee of profit assured by the agent to the appellant was misunderstood as 'royalty'. It held that Intellectual Property Service was not provided in this case. [*Y.M. Krishna SSK Ltd* v. *Commissioner*, 2014-TIOL-1299-CESTAT-Mumbai]

Services between units of entity not incorporated separately – Service tax liability: The rival contentions revolved around commissioning, installation and repair services rendered by one unit of the company to another. The department argued that, tenders were floated for the process, the two units had separate PAN based service tax and Central Excise registration number and that the arbitration clause in the agreement indicated separate legal personality of the two units. The assessee sought to support its stand stating that income tax compliance has been made by head office for both units and there was no separate incorporation under the Companies Act. Based on a *prima facie* view that, services rendered between two divisions of an entity would not attract service tax, the Tribunal granted stay against pre-deposit of dues. [*Tata Steel Ltd. (Growth shop)* v. *Commissioner*, 2014 (35) S.T.R. 374 (Tri. – Kolkata)]

Refund not deniable when deposit mistakenly made under wrong code: The Tribunal upheld that order of the lower authorities that mistake of depositing service tax in the wrong code would not disentitle the assessee from refund which is due to him. The assessee had deposited service tax under the code of the erstwhile partnership firm. Subsequent to the dissolution, he had taken separate registration for service tax in individual capacity. The Tribunal held that money deposited in the firm's code would have to be treated as money deposited in the assessee's registered code. [*Commissioner* v. *K.K.Kedia* , 2014 (35) S.T.R. 374 (Tri. – Kolkata)]

Cenvat credit not deniable when registration number absent on invoices: The department sought to deny Cenvat credit on the ground that invoices issued by the service provider do not bear its registration number. Holding this to be a rectifiable defect, when there was no dispute on raising of invoice and payment of service tax, the Tribunal set aside the impugned order denying credit. [*Bharat Sanchar Nigam* v. *Commissioner*, 2014 (35) S.T.R. 397 (Tri.- Del)]

ISD cannot be proceeded against for recovery of wrongly availed credit: Granting relief to the appellant-Input Service Distributor (ISD), the Tribunal held that demand for recovery of Cenvat credit cannot be raised against ISD and if there is any wrong availment of credit the same should be recovered only from the manufacturer or provider of output service. [*Indian Oil Corporation* v. *Commissioner,* 2014 (35) S.T.R. 411 (Tri. –Del.)]

VALUE ADDED TAX (VAT)

Notifications

Haryana VAT – TDS rate for works contract increased: The rate of TDS on works contract in Haryana has been increased from 4% to 5% under the Haryana Value Added Tax Act, 2003.

Notification No. S. O. 67/ H.A. 6/2003/S. 24/ 2014, dated 20-6-2014 issued in this regard, and effective from 24-6-2014, supersedes Notification No. S. O. 53/ H.A. 6/ 2003/ S. 24/ 2003, dated 7-4-2003. Hence, every contractee shall at the time of making payment, whether by cash, adjustment, credit to the account, recovery of dues or in any other manner, deduct from the payment made to a contractor for execution of a works contract in the State involving transfer of property in goods, whether as goods or in some other form, tax in advance calculated at the rate of 5% of the amount paid in any manner.

Rajasthan VAT Rules, 2006 amended: Rule 22A has been inserted in Rajasthan Value Added Tax Rules, 2006, providing for the determination of taxable turnover in case of transfer of property in goods involved in the execution of a works contract. Notification No. S.O. 31, dated 14-7-2014 has been issued in this regard. According to new Rule 22A, a dealer who undertakes construction of flats, dwellings or buildings, premises and transfers them in pursuance of an agreement along with the land or interest underlying the land, then after deductions under sub-rule (1) and (3) of the said Rule from the total agreement value, the sale price shall be determined depending upon the stage at which the agreement with the purchaser is entered, according to the limits laid down in the table given below:

S. No.	Stage at which the developer enters into a contract with the purchaser	Amount to be determined as value of agreement
1.	Up to completion of plinth level	95%
2.	From plinth level to completion of 100% RCC framework	85%
3.	From completion of RCC framework to Occupancy Certificate	55%
4.	From Occupancy Certificate till the completion of construction	Nil

Rajasthan VAT – Amendment with respect to developers: Developers/builders, who as works contractors, undertake construction of flats, dwellings or buildings or premises and transfer them along with goods and land or interest underlying the land in pursuance of an agreement have been exempted from payment of tax under the Rajasthan Value Added Tax Act on the amount of consideration received up to 31-3-2014 with regard to the agreements made by them for the construction of flats, dwellings or buildings or other premises. Notification No. S.O. 110, dated 30-7-2014 has been issued in this regard. In respect of consideration received after 31-3-2014, developers may opt to pay lump sum in lieu of tax at Rs. 1300 for every Rs. 2 lakh or part thereof, of the consideration received in the relevant period subject to the following conditions as mentioned in Notification No. S.O. 40, dated 14-7-2014 issued in this regard,

- The dealer shall purchase goods used in the execution of the works contract from a registered dealer of the State.

- In case the developer purchases or procures goods from a dealer other than a registered dealer of the state, such dealer shall in addition to the lump sum amount be liable to pay an amount equal to the amount of tax that would have been payable had the goods been purchased in Rajasthan from a registered dealer.

Rajasthan VAT Act, 2003 amended: Schedule V of the Rajasthan Value Added Tax Act, 2003 has been substituted by Notification No. S.O. 36, dated 14-7-2014. After the substitution, in addition to the residuary Entry 78, Schedule V contains 77 other entries covering various products which are chargeable to VAT at the rate of 14% in Rajasthan.

Rajasthan VAT – Tax on used motor vehicles: Notification No. F.12 (84) FD/Tax/2009-46 dated 30-7-2009 which provided for rate of tax in respect of the sale of used motor vehicles where the engine capacity is up to 1000cc, light motor vehicle where the engine capacity is more than 1000cc and heavy motor vehicle, has been rescinded with effect from 14-7-2014 by Notification No. S.O. 42, dated 14-7-2014. Further, Notification No. S.O. 37, dated 14-7-2014, Schedule VI appended to the Rajasthan Value Added Tax Act, 2003 has been issued to insert serial number 14 covering "All types of used motor vehicles" chargeable to VAT at the rate of 2.5%.

Ratio decidendi

Supply of food and drinks in canteen covered under 'business' and 'sale': Karnataka High Court has held that running of canteen falls under the definition of 'business' and also 'sale' and hence the assessee is liable to pay tax under Karnataka Value Added Tax Act, 2003. The appellant-assessee supplied food and non-alcoholic beverages to its employees and guests at subsidized rates for a consideration through the canteen run by the company but was of the view that no VAT is payable as they are statutorily obliged to establish and run the canteen as a welfare measure under the Factories Act. The court, noting that the supply of articles of food and drink to the employees was connected with the main business of the assessee, held that any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern is a 'business'. Supreme Court's judgement in the case of *Burmah Shell Oil Storage and Distributing Co. of India Ltd.* [1973 AIR 1045], where the Court examining similar charges under the Andhra Pradesh General Sales Tax Act, 1957 had held that the proof of profit-motive is unnecessary to constitute a business and that such transaction of supply of food and drink to the workers in the canteen maintained by the assessee in pursuance of the Factories Act and Rules were sales and constituted business for the purpose of the Act, was relied on by the Karnataka HC in this regard to reject assessee's appeal. [*TVS Motors Company Ltd.* v. *State of Karnataka* - 2014-VIL-185-KAR]

Discounts not shown in trade invoices – Admissibility of deduction: Deduction towards discounts is not available when discounts are given after completion of sale by means of credit note and were not mentioned in the tax invoices. Karnataka High Court while holding so, relied on its earlier decision in the case of

Southern Motors decided on 3rd April, 2013, wherein it had held that once the sale invoice is issued (without discount being mentioned there) and the sale price is collected along with the tax, the aggregate of such sale constitutes the total turnover and sales tax is payable on such taxable turnover. However, noting that the relied upon judgment is under challenge before the Supreme Court in SLP Nos. 28309-28325/2013, it was ordered that in the event of judgment of the Apex Court being in favour of the assessee, the assessee would be entitled to the benefit, otherwise the consequences of present order would follow. [*State of Karnataka* v. *Samsung India Electronics Ltd.* - 2014-VIL-184-KAR]