Lakshmikumaran & Sridharan tax

TAX

amicus

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

August 2013 / Issue–26

Contents

August
2013

Article

Industrial/ Institutional Consumers – Complicating the uncomplicated

By **Sagar Singhal & Shweta Kathuria**

The great Chinese philosopher Kong Qiu, famously known as Confucius, once said - *"Life is really simple, but we insist on making it complicated"*. This has exactly happened after the recent amendment made in the Legal Metrology (Packaged Commodities) Rules, 2011 ("PC Rules") regarding packages supplied to "industrial consumers" and "institutional consumers".

Before we understand the provisions, a brief overview of the same will be helpful. The PC Rules were enacted to safeguard the interest of the consumers by ensuring that the dealers can't dupe an innocent consumer by selling a commodity in hidden packaged form. The said rules covered retail packages as well as wholesale packages which were meant for consumption by the customer. In the present amendment, changes have been made in Chapter II of the PC Rules which deals with packages intended for retail sale i.e. retail packages.

Rule 3 under Chapter II of the PC Rules specifies the list of packaged commodities to which provisions of Chapter II do not apply. There has been a consistent dispute with regard to applicability/ non-applicability of Rule 3 to various packaged commodities. To overcome such disputes, the Central Government recently issued Notification No. GSR 359(E) dated 6-6-2013 for making amendment in the placement & definition of "industrial consumer" and "institutional consumer" earlier given under Rule 3 of the PC Rules. Further, the definition of "retail package" as given under Rule 2(k) of the PC Rules was also amended. Through this article, we will discuss the implications of the above amendments.

Placement of definition of industrial consumer & institutional consumer - Implications

Prior to the amendment, the terms were defined under Explanation to Rule 3. Post amendment, the said definitions have been omitted from the Explanation to Rule 3 and have been inserted under the definition clauses as Rule 2(bb) & 2(bc) to PC Rules. Earlier, besides Rule 3 of the PC Rules, the terms 'industrial consumer' and 'institutional consumer' were also used in the proviso to definition of 'retail package' under Rule 2(k) of the PC Rules. There was always a dispute as to whether the said definition given under Explanation to Rule 3 would apply only to Rule 3 as the Explanation started with the phrase *"For the purpose of this Rule"* or would also apply to proviso to the definition of 'retail package'. There have been contradictory High Court decisions in the past on this issue.

The Bombay High Court in the case of *Larsen & Toubro Ltd.* v. *UOI* [2012 (275) ELT 153] had held that the definitions given under Rule 2A of *erstwhile* Standards of Weights and Measures (Packaged Commodities) Rules, 1977 ("SWMPC Rules") {*predecessor of Rule 3 of the PC Rules*} would also be read into proviso to Rule 2(p) of the SWMPC Rules {*predecessor of Rule 2(k) of the PC Rules*}. However, the Karnataka High Court in the case of *EWAC Alloys* v. *UOI* [2012 (275) ELT 193] had held exactly to the contrary.

As a result of change in placement of the definitions of industrial consumer & institutional consumer, the

definitions would now apply to the whole of the PC Rules and would not be restricted to Rule 3 of the PC Rules. This amendment has set to rest the disputes arsing due to conflicting High Court decisions.

Change in the definition of industrial consumer

Earlier as per the definition, "industrial consumer" meant an industrial consumer who buys packaged commodities directly from the manufacturer for use by that industry. Thus, there was always an anomaly regarding the meaning of industrial consumer as the definition of industrial consumer also referred to the term industrial consumer. The said anomaly has been removed vide recent amendment wherein the term 'industrial consumer' in the definition has been replaced by the term 'consumer'.

Change in the definition of institutional consumer

Earlier "Institutional consumer" was defined to mean institutional consumers like transportation, airways, railways, hotels, hospitals or any other service institutions who buy packaged commodities directly from the manufacturer for use by that institution. Thus, earlier, all the service institutions including transportation, airways, railways, hotels, hospitals, etc. who bought packaged commodities directly from the manufacturer for their use were included in the definition of institutional consumer. Further, all packaged commodities bought by such institutions fell under Rule 3 of the PC Rules and were not subjected to provisions of Chapter II of the PC Rules.

After amendment, "Institutional consumer" is defined to mean any institution which hires or avails of the facilities or service in connection with transport, hotels, hospitals or such other service institutions which buy packaged commodities directly from the manufacturer for use by that institution.

Thus, the definition of institutional consumers now refers to three parties: (i) the *institution; (ii)* the *intermediary service providers* viz. the transporters, hotels, hospitals and such other service institutions; and (iii) the *manufacturer* selling goods directly to the intermediary service providers.

As per the new definition, the institution should avail the services of the intermediary service provider who has purchased the packaged commodities directly from the manufacturer for being used by it during provision of its service by supplying the same to end consumers. Let us now discuss certain issues which may arise due to change in definition of institutional consumer.

How the term 'institution' has to be construed?

The term 'institution' given in the definition can be construed in two ways. First, it can be read liberally to include all persons whether institutions or individuals receiving the above services. Secondly, we can give it strict interpretation to include only institutions. Generally, recipients of the above intermediary services are individuals. Thus, the term "institution" should be read liberally as its strict interpretation may make the definition redundant. However, the Department will always try to apply the strict meaning of the term 'institution' in the definition of institutional consumer and we will have to wait for clarifications or judicial pronouncements in this regard.

Which service institutions may be covered as intermediary service providers?

The term "such other service institutions" being a general term used after the specific terms viz. transport, hotels, hospitals has to be understood applying the principles of *ejusdem generis*. As per the

said principle, such other service institutions should include only those institutions which provide services of a similar nature as are provided by the institutions specifically mentioned in the definition.

Thus, there will always remain an open question as to whether a service institution is providing service similar in nature to that provided by hotels/ hospitals/ transporters. Until this question is clarified by the Government or decided in any court of law, there will be unending disputes between the assessees and the department about inclusion of their institution under the term '*such other service institution*'.

Packaged commodities excluded from Chapter II of the PC Rules

Rule 3 of the PC Rules provides that provisions of Chapter II do not apply to packaged commodities meant for institutional consumers. The way new definition of institutional consumers is worded, only those packaged commodities which are bought by intermediary service institutions for providing service to institutional consumers i.e. institution and are also supplied to those consumers during the course of providing service would fall under Rule 3 of PC Rules and would not be subject to the provisions of Chapter II. The same will have to be examined by the assessees in detail on case to case basis.

Commodities supplied in unpacked form – Coverage under 'institutional consumer'

The main requirement under the definition of institutional consumers is that the commodities should be supplied to the end consumers. It is not specified as to whether the commodities should be supplied in the packaged form or unpackaged form.

Generally the service institutions like hotels, transports etc. supply commodities to the end consumer both in packaged form i.e. in the form in which they are purchased and in the unpacked form without any modification/ alteration i.e. when the same is served to the consumer. Thus, as per the practice prevalent in a service sector, it would be logical to say that till such time same products i.e. without any modification/ alteration/ changes are supplied to end consumers, those products should get covered under the definition of institutional consumers irrespective of whether they are supplied in the packaged or unpacked form.

It is to be noted that Rule 3(b) of the PC Rules provides that the Chapter II provisions shall not apply to packaged commodities meant for institutional consumers. Thus, forming such a view may be prone to litigation from the department.

As can be seen from the above, though the Central Government intended to overcome the disputes by making the aforesaid amendments, the outcome has not been as desired. As a matter of fact, the aforementioned changes have opened a Pandora's box of more confusion and leaving scope for divergent interpretations.

[The authors are, respectively, Senior Associate and Principal Associate, Lakshmikumaran & Sridharan, New Delhi]

CUSTOMS

Notifications & Circulars

Multi-function speakers – Classification clarified: Multi-function speakers have to be classified on the basis of 'principal function' of the speaker. Classification of different types of speakers will be as below as per Circular No. 27/2013-Cus., dated 1-8-2013 issued by the Central Board of Excise and Customs:

S. No.	Speaker with specific features	Tariff Heading	Reasoning
1.	Without USB playback facility and FM radio	8518	By application of Rule 1 of the General Rules of Interpretation of Customs Tariff Act, 1975
2.	With USB playback facility but without FM radio	8519	USB playback facility is the principal function of the product
3.	Without USB playback facility but with FM radio	8527	Radio facility is the principal function of the product
4.	Speakers with both USB playback facility and FM radio	8527	Rule 3(c) of the General Rules of Interpretation provides that the heading which is last in numeric order is to be preferred.

Focus Product Scheme – List of notified products enlarged: Benefit of Focus Product Scheme has been extended to more than 150 additional products falling under Chapters 30, 53, 63, 84, 85, 88, 90 and 93 of the ITC(HS). DGFT Public Notice No. 19 (RE:2013)/2009-2014, dated 10-7-2013, issued for the purpose, amends Appendix 37D of the Handbook of Procedures Vol.1 which now covers 1048 products.

SFIS – Goods imported/procured under SFIS made 'alienable': DGFT has amended Para 3.12.7 of the FTP allowing the goods imported under SFIS scheme to be 'alienated' after expiry of three years from the date of import or procurement. Prior to this amendment by DGFT Notification No. 30(RE-2013)/2009-2014, dated 1-8-2013, goods imported/procured against SFIS scrips were non-transferable except within group companies and managed hotels.

Personal Hearing by DGFT – Procedure prescribed: Para 2.49.2 of the FTP, as amended by Notification No. 8(RE-2013)/2009-2014 dated 22-4-2013, provides for personal hearing by DGFT, subject to fulfillment of the conditions specified therein. DGFT Trade Notice No. 5/2013, dated 19-7-2013 now lays down the procedure and format for making an application to DGFT for personal hearing which is to be granted on every second Tuesday of the month between 3.00 P.M. and 4.00 P.M. To avail this facility of personal hearing, conditions to be fulfilled are: (a) exporter/importer is aggrieved by any decision, except an adjudication order (b) he/she continues to be aggrieved in spite of a review of such decision.

Advance Authorisation Scheme – Use of alternative inputs restricted: Use of alternative inputs has been restricted under the Advance Authorisation Scheme. DGFT Notification No. 31(RE-2013)/2009-2014, dated 1-8-2013 issued in this regard, inserts Para 4.1.15 in the FTP and provides that out of the alternative inputs, as listed in Standard Input Output Norms for manufacture

of export product, the input actually used by the authorisation holder in the manufacture of export product shall only be allowed for duty free import under the Advance Authorisation Scheme and DFIA scheme. Policy Circular No. 30, dated 10-10-2005 on importability of alternative inputs has also been withdrawn by DGFT Policy Circular No. 3(RE-2013)/2009-2014, dated 2-8-2013.

Ratio decidendi

E-waste Management Rules not applicable to import of hazardous waste or e-waste: E-waste (Management and Handling) Rules, 2011 are not applicable to import of hazardous waste or e-waste. CESTAT, New Delhi while holding as above noted that the said rules are applicable to producers, consumers or bulk consumers involved in manufacture, sale or purchase and processing of specified electrical or electronic goods and not in case of import, where Hazardous Waste Rules, 2008 alone are applicable. The case involved import of old and used Datagraphic Display Tubes which were held, by the Tribunal, as covered under Sl. No. 1110 of Part B of Schedule III to the Hazardous Waste Rules, 2008 and imports having been made without permission from Environment Ministry, the order confiscating such goods, was held as sustainable. [*Eastron Overseas Inc.* v. *Commissioner* – 2013 TIOL 1037 CESTAT Del.]

Valuation – Quantum of discount when sole distributor is related: CESTAT, Mumbai has held that a discount of 35% given to the only distributor in India by the foreign related exporter was correct when the same discount was being extended to unrelated buyers before appointment of related person as distributor. Contention of the department that there was no import by any unrelated buyer during the period of said imports by the distributor and hence there cannot be any comparison of prices for the appellant-distributor vis-à-vis unrelated buyers, was rejected by the Tribunal holding that with the appointment of the distributor it is obvious that there will not be any sales to unrelated buyers. Further, the Tribunal also held that grant of territorial commission/ discount is not arbitrary or discriminatory as it does not affect the normal trade discount given to buyers. [*Autonics Automation India Pvt. Ltd.* v. *Commissioner* – 2013 TIOL 1035 CESTAT Mum.]

Interest when duty paid due to violation of post-import conditions: Delhi High Court has held that Rule 8 of the Customs (Import of Goods at Concessional Rate of duty for Manufacture of Excisable Goods) Rules, 1996 does not make the pre-conditions mentioned in Section 28AB of the Customs Act, 1962, part and parcel of the said rules. It was held that the importer was liable for payment of interest, as interest for short levy of duty is prescribed by Rule 8 itself and not because of Section 28AB. Here, the petitioner had contended that separate notification should have been issued under Rule 8 and that rate of interest prescribed under Section 28AB should not be applied for computation of interest. [*Pioneer Soap and Chemicals* v. *Union of India* – 2013 TIOL 574 Del. HC]

No time limit for filing stay application: CESTAT, Mumbai has held that there is no time limit in filing stay application when appeal has been filed within the prescribed time. The Tribunal in this regard noted that the Customs Act, 1962 did not prescribe any time limit for filing stay application. The appellants in this case had filed stay application after 118 days of the receipt of order in original

though they had filed appeal within the prescribed time period. [*G Shoe Export* v. *Commissioner* – 2013 TIOL 1036 CESTAT Mum.]

Dual SIM mobile phones having one IMEI number are not prohibited goods: Consignment of imported dual SIM mobile phones was confiscated by Customs on the ground that such goods had only one IMEI number. Department, placed reliance on DGFT Notification 112(RE-2008)/2004-2009 and was of the view that these phones must have two IMEI numbers. Mumbai bench of CESTAT, however, held that the handsets were not prohibited as at the time of import, they were having single IMEI number which was not zero IMEI and thus satisfied the condition in the DGFT notification. [*Current Systems* v. *Commissioner* - 2013-TIOL-1151-CESTAT-MUM]

Department cannot retain any amount, unless demand is crystallized: The Punjab & Haryana High Court has held that Department cannot retain any amount unless a demand is finalized and is existing which is liable to be discharged. In this case various petitioners had approached the High Court seeking refund of deposits made in the course of investigations by the Department. The court directed refund of such deposit as there was no specific provision in the Customs Act, 1962 for retention of such amount. Further, on the issue of maintainability of the petition, the High Court held that writ petition for refund/return of the amount is not barred under Article 226 of the Constitution. [*Century Knitters (India) Ltd.* v. *Union of India* - 2013-TIOL-580-HC-P&H-CUS]

CENTRAL EXCISE

Notifications & Circulars

Automobiles known as Sedans liable to excise duty applicable for large segment cars: CBEC has clarified that Maruti SX4, Honda Civic, Toyota Corolla Altis etc., not commonly known as Sports Utility Vehicles (SUVs), shall remain liable to excise duty at the rate of 27%. Circular No. 972/06/2013-CX, dated 24-7-2013 issued for this purpose considers trade and common parlance in this regard. The rate of excise duty on cars which were motor vehicles of engine capacity exceeding 1500 cc and popularly known as SUVs was increased to 30% by Notification No. 12/2013-C.E., dated 1-3-2013. The explanation defined SUVs as motor vehicle of length exceeding 4000 mm and having ground clearance of 170 mm and above. Prior to issue of this circular, there was doubt about the rate of excise duty applicable on cars which satisfied all the three conditions, but which were otherwise not popularly known as SUVs.

Exemption to pharmaceuticals subjected to specified processes for compliance with DPCO: Goods classifiable under Chapter 30 of the Central Excise Tariff Act, 1985, on which the activity of re-printing, re-labeling, re-packing or stickering is undertaken have been granted exemption from excise duty. This exemption under Notification No. 22/2013-C.E., dated 29-7-2013 is available if the abovesaid activities are undertaken to comply with the provisions of Drugs Price Control Order (DPCO), 2013. Further, said activities carried out

in respect of scheduled formulations should result in downward revision of the MRP. Exemption to unregistered premises solely used for said activity of re-printing, re-labeling, re-packing or stickering has also been granted under Notification No. 11/2013-CE (N.T.), dated 2-8-2013.

Ceramic Building bricks – Rate of excise duty reduced: The rate of duty on Ceramic Building Bricks (Tariff Item 6904 10 00 of Central Excise Tariff) has been reduced from 2% to Nil. Notification No. 1/2011-C.E. and Notification No. 12/2012-C.E. have been amended by Notification No. 23/2013-C.E., dated 31-7-2013 in this regard. It may be noted that bricks falling under TI 6901 00 10 were also fully exempted in May this year.

Packing material bearing brand name of another – Exemption under Section 11C: Plastic containers and plastic bottles and all packing material, other than specified, have been granted exemption under Section 11C of the Central Excise Act, 1944. Notification No. 10/2013-C.E.(N.T.), dated 2-8-2013 grants exemption from duty payable, but not paid by the manufacturers availing benefit of Notification No. 8/2003-C.E., on the goods manufactured affixing brand name of another and which were meant for use as packing material by or on behalf of the person whose brand name they bear. While plastic containers and plastic bottles have been granted exemption for the period from 16-6-2003 to 26-2-2010, all packing material (other than printed cartons of paper or paper board, metal containers, high density polyethylene woven sacks, adhesive tapes, stickers, pilfer proof caps, crown corks, metal labels, plastic bags, printed laminated rolls) have been exempted for the period from 16-6-2003 to 28-4-2010.

Ratio decidendi

Cenvat credit on capital goods for production of electricity: Cenvat credit on capital goods used for production of electricity has been allowed by CESTAT, New Delhi in the case before it where the department had contended that major portion of such electricity produced was sold to the State Electricity Board. The Tribunal noted that the assessee was in the process of enhancing their production capacity of iron & steel products for which they required more electricity. It was held that just because during the intervening period of installation of power generation machinery and the machinery for manufacture of iron product, excess power was sold outside, Cenvat credit available on capital goods (power generation machinery) cannot be denied. [*Commissioner* v. *Jindal Steel and Power Ltd.* – 2013 TIOL 1100 CESTAT Del.]

Writ remedy against adjudication order when appeals there against dismissed on technical grounds: Gujarat High Court has quashed the adjudication order in a case where the said order was also appealed against before the Commissioner (Appeals) who dismissed the appeal on the ground that the same was time barred and that Commissioner (Appeals) was not competent to condone the delay beyond statutory limit. Further, appeal against such order-in-appeal was dismissed by the Tribunal. The High Court however observed that as the matter had not been decided by Commissioner (Appeals) and Tribunal on merits, but had only been dismissed on the ground of limitation, the order of the adjudicating authority had not merged with the subsequent appellate orders. The High Court hence, noting that the assessee also had a good case on merits, accepted the writ petition against the order of the original authority and quashed the same. [*Texcellence Overseas* v. *Union*

of India - 2013 (293) ELT 496 (Guj.)]

Transfer of accumulated credit without transfer of inputs: Madras High Court has permitted transfer of accumulated credit, after taking single registration for two units, in case where the actual inputs were not transferred. The High Court noted that the two units were in the same premises and belonged to the same management. The court rejected the department's arguments that by taking one registration, there was merger or amalgamation or transfer of units. Proviso to sub-rule (12) of Rule 57F of the erstwhile Central Excise Rules, 1944 was relied on by the court to reject Department's appeal. [*Commissioner* v. *Rajshree Sugars & Chemicals Ltd.* – 2013 TIOL 577 MAD HC]

Exemption to goods intended for specific use – No end use certificate required: CESTAT, New Delhi has held that no end use certificate is required where the exemption is being granted on the ground that the goods cleared by the assessee are intended for use in the manufacture of specified goods. On the facts of the case, the Tribunal held that as long as there is intention to use the copper sheets and circles in the manufacture of utensils and handicrafts, benefit of Notification Nos. 4/97-CE and 5/98-CE is to be extended without actually verifying such use. The Tribunal also held that the Department cannot legislate and introduce a new condition in the notification on its own and call for end use certificates. [*Sri Durga Mills* v. *Commissioner* – 2013 (293) ELT 744 (Tri.-Del.)]

Exemption to goods supplied to contractors executing projects: Madras High Court has held that exemption under Notification No. 108/95-CE, for goods supplied to projects financed by United Nations or International Organisations, would be available even if the goods were supplied to contractors and not to the project implementing authority. The Tribunal in this regard had, in its order, noted that the Department did not place material alleging misuse of the goods and that the project itself was fully executed by the contractors. [*Commissioner* v. *Caterpillar India Pvt. Ltd.* – 2013 TIOL 562 Mad. HC]

SERVICE TAX

Circular

Amnesty Scheme (VCES) clarified: CBEC has, by Circular No. 170/5/2013-ST, dated 8-8-2013, clarified certain issues relating to the amnesty scheme introduced through this year's budget – Voluntary Compliance Encouragement Scheme or VCES. The bar on applicability of this scheme to those against whom summons have been issued or investigation is pending has been clarified as not applicable where only information has been sought from potential tax payers even if Section 14 of Central Excise Act has been quoted in the relevant communication. If inquiry, investigation or audit has been initiated after the cut-off date of 1-3-2013, declaration under VCES can be made. If the tax payer has two units having separate registration, the unit which not been issued SCN will be eligible to avail VCES. Service tax paid by wrongly utilizing Cenvat credit is also covered under 'tax dues'. This scheme has been clarified as not applicable to those who have paid the tax but not filed their return. Dues paid in part before VCES was notified but where remaining part is covered under VCES, will not be covered for immunity under this scheme.

Amendment to incorrect declaration may be allowed

by the Department if the same is discovered by the tax payer himself and amended declaration is filed before the cut-off date of 31-12-2013. Even if the declaration under VCES is not acknowledged by Department within 7 days, tax dues may be paid. The CBEC instructs the designated authority to issue a notice of intention to reject the declaration within 30 days of the date of filing of the declaration stating reasons and provide opportunity of hearing before passing order. The circular also clarifies that this scheme has no provision for filing appeal against order rejecting declaration.

Ratio decidendi

Cenvat credit – Quantum of credit when amount withheld in part by service recipient: Rule 4(7) of the Cenvat Credit Rules, 2004 provides that credit in respect of input service shall be allowed, on or after the day on which payment is made of the value of input service and the service tax paid or payable as is indicated in the invoice. In a recent order, CESTAT has held that Rule 4 (7) would be applicable only in a situation where though the service provider has issued the invoice, he has not paid the service tax but where there is no dispute that service tax has been paid by the service provider on the full invoice value, even though he has not received full payment from the service recipient and part of the payment due to him has been withheld by the service recipient due to some reason, this rule would not be applicable. Based on this reasoning, the Tribunal rejected Department's contention that credit shall be availed proportionately in the case before it as the respondent had withheld part amount towards performance guarantee. [*Commissioner* v. *Hindustan Zinc,* CESTAT, New Delhi, Final Order No. 56583/2013 dated 15-5-2013 in Excise Appeal No. 992 of 2011 (SM)]

Trade secrets not covered under IPR Service: There is no law governing trade secrets/confidential information in India. Based on this reasoning the Tribunal held that the rights obtained in relation to such trade secrets do not constitute intellectual property right as defined in law and hence, the consideration paid cannot be made liable to service tax under IPR Service. The Tribunal also noted that as per CBEC's Circular 80/2004-ST dated 17-9-2004, permanent transfer of IPR does not amount to rendering of service and in the case before it, the appellant had become co-owner of the intellectual property which would mean that the transfer was permanent. [*Thermax Ltd.* v. *Commissioner,* 2013-TIOL-1092-CESTAT-MUM]

Valuation – Includibility of notional interest on interest free deposit: Notional interest on security deposit taken for premises rented out can be considered as additional consideration for renting of immovable property for payment of Service Tax only if it is shown that such interest free security deposit has influenced the rent received. The Tribunal granted stay in the present case as the Department did not prove the above but had only proceeded based on presumption. [*Magarpatta Township Development & Construction* v. *Commissioner*, 2013-TIOL-1068-CESTAT-Mum]

Service tax on restaurants & accommodation struck down: The Kerala High Court has struck down the levy of service tax on restaurants and on service of providing short term accommodation. It was held that the levy is beyond the legislative competence of the Indian Parliament, as the sub-clauses (zzzzv) and (zzzzw) to Clause 105 of Section 65 of the Finance Act, 1994 as amended by the Finance Act 2011 are covered by Entry 54 and Entry 62 respectively of List II of the Seventh Schedule of the Constitution which are within the exclusive

competence of the State Legislature. In respect of services provided by restaurants, the court held that when food or alcoholic beverages are supplied as part of any service, such transfer is deemed to be a sale. It was noted that the transfer is during the course of a service and when the deeming provision in Article 366(29-A) permits State Governments to impose a tax on such transfer, there cannot be a different component of service which could be imposed with service tax using the residuary power vested with the Central Government under Entry 97 of List I of the Constitution of India. According to the court, State Government alone will have the legislative competence to enact law imposing tax on the service element forming part of sale of goods as well.

On the validity of service tax levy on short-term accommodation, the court while relying on the definition of luxury as explained by the Supreme Court in *Godfrey Philips,* held that service tax levy trenches upon the legislative function of the State under Entry 62 of List II. It was noted that the State Legislature had enacted the Kerala Tax on Luxuries Act by exercising its legislative power under Entry 62 of List II. [*Kerala Classified Hotels and Resorts Association* v. *Union of India,* 2013-TIOL-533-HC-Kerala-ST]

Runway is different from roads – Exemption to road repair not available to runway: Roads and runways are not one and the same and, therefore, the benefit of exemption available to maintenance or repair of roads will not apply to runways. The Tribunal, while holding so, relied on dictionary meanings to note that road is a path or way between two different places but runway is a specially prepared surface on airfield and while road is a means of travel from one place to another, runway is not used for travel. It also observed that runways need not be constructed on land but may also be built on ship for aircraft to take off and land. [*D.P. Jain Co. Infrastructure* v. *Commissioner,* 2013-TIOL-1029-CESTAT-MUM]

Refund of Cenvat credit not admissible when goods cleared to SEZ unit: The Tribunal relying on the judgment of *CCE* v. *Tiger Steel Engineering (India) Pvt. Ltd* held that supplies to SEZ cannot be treated as export for the purpose of claiming refund of cenvat credit under Rule 5 of the Cenvat Credit Rules, 2004. It held that export means physical export out of the country envisaged under the Customs Act and therefore, supply to SEZ would not qualify as export and hence, refund of credit of inputs / input services used in the manufacture of goods supplied to SEZ unit, will not be admissible. [*Everest Industries* v. *Commissioner,* 2013 (31) STR 189 (Tri. Del.)]

Sponsorship service of sports events organized by registered society – Service Tax liability: In the present case, Hero Honda sponsored the IPL matches and claimed immunity under the exclusion clause of erstwhile Section 65(105)(zzzn) of the Finance Act, 1994 which excludes services in relation to sponsorship of sports events. The department contended that IPL league matches are not sports events since such matches are commercial in nature and per se are not sports events. The Tribunal held that cricket is a sport and the IPL tournament is a sporting event. Even though IPL league is commercial in nature, it would not take away the very nature of it being a sports event and payments made to BCCI/IPL for sponsorship would get squarely covered in the exclusion. It held that such sponsorship would get covered under the expression 'services in relation to sponsorship of sports events'. [*Hero Honda Motors Limited* v. *Commissioner,* 2013 (31) STR 162 (Tri-Del.)]

VALUE ADDED TAX (VAT)

Notifications

Delhi VAT Rules amended: Delhi VAT Rules, 2005 have been amended to make certain changes in determination of taxable turnover of sales by residential hotels, while also amending various VAT forms and including two new forms as well. Delhi Value Added Tax (Second Amendment) Rules, 2013 have been notified by Notification No. F.3(4)/Fin. (Rev-I)/2013-14/DS-VI/519, dated 9-7-2013 in this regard. Major amendments made are as under:

1. *Taxable turnover for hotels charging composite fees:* Amendment has been made in Rule 4A of the Delhi VAT which prescribes the percentage of composite charges in determining the taxable turnover of sale of goods made by residential hotels charging a composite fee for lodging and boarding. The amendment can be summarized as under:

Rule 4A	Earlier Provision	Amended Provision
(a) Where the composite charges include the charges for breakfast	5% of the composite charges	10 % of the composite charges
(d) Where the composite charges include the charges for breakfast and lunch	15 % of the composite charges	20 % of the composite charges
(e) Where the composite charges include the charges for breakfast and dinner	20 % of the composite charges	25 % of the composite charges
(g) Where the composite charges include the charges for breakfast, lunch and dinner	30 % of the composite charges	35 % of the composite charges

2. Following forms have been amended:

a) Form DVAT-04: Application for Registration under Delhi VAT Act, 2004

b) Form DVAT-06: Certificate of Registration for under Delhi VAT Act, 2004

c) Form DVAT-07: Application for Amendment(s) in Particulars subsequent to Registration under Delhi VAT Act, 2004

d) Form DVAT-16: Delhi VAT Return

e) Form DVAT-17: Composition Tax Return Form under the Delhi VAT Act, 2004

f) Form DVAT-48: Form of Quarterly Return by the Contractee

g) Form DVAT-52: Declaration of Permanent Account Number/Importer and Exporter under Section 95

3. Following new forms have been inserted:

a) Form DVAT-45A: Application for Cancellation/

Amendment(s) in particulars subsequent to allotment of Tax Deduction Account Number (TAN) under Delhi VAT Act, 2004.

b) Form DVAT-56: Return Verification Form

Retail invoices under Composite Scheme:

Department of Trade and Taxes, Delhi has, through Notification No. F.3(356)/Policy/VAT/2013/412-423, dated 11-7-2013, notified that the retail invoice issued by all dealers electing to pay tax under Section 16 of Delhi VAT (Composition Scheme) and issuing invoice under sub-section (4) of Section 50 of Delhi VAT Act shall in addition to the particulars specified in sub-section (5) to Section 50 of Delhi VAT contain the words at the top of the invoice: "Composition Dealer" (Not eligible to charge VAT on Bill).

Form T-2 – Notifications kept in abeyance:

Commissioner, VAT, Delhi has sought suggestions from all the dealers till 30-9-2013, to improve the process of seeking of information regarding receipt of goods, for the purpose of filing of information in Form T-2. Notification No. F.7(433)/Policy-II/VAT/2012/530-541 dated 29-7-2013, issued in this regard also states that till issuance of any further orders, Notification No. F.7(433)/Policy-II/VAT/2012/180-190, dated 17-5-2013 and other notifications prescribing the modalities concerning filing of Form T-2 are being kept in abeyance.

Ratio decidendi

Time period for claiming Input Tax Credit – Section 19(11) of Tamil Nadu VAT, constitutionally valid:

Madras High Court has upheld the constitutional validity of Section 19(11) of the Tamil Nadu Value Added Tax Act, 2006, which was challenged on the grounds of being inconsistent with Section 3 and the general scheme of TN-VAT as well as being in violation of Article 265 of the Constitution of India. Section 19(11), which provides that where a dealer has failed to make a claim for Input Tax Credit ("ITC") in any month, he shall make the claim before the end of the financial year or before 90 days from the date of purchase, whichever is later, was challenged as being irrational, as it fixed time in an arbitrary manner.

The court held that the benefit of ITC was not a vested right, its availment is a creature of statute and the State has the right to provide for conditions and restrictions on the same. Further, the modalities and the time frame provided under Section 19(11) state the manner in which ITC can be availed and are a precondition to such availment. Also, the use of the word "shall" in Section 19(11) makes it mandatory in nature and not merely directory. It was also stated that a provision conferring the benefit of exemption from tax must be construed strictly. Further, it was observed that Section 19 was not a mere machinery provision providing for the manner of assessment, rather it is substantive in nature, qualifying a person for entitlement of credit. It was also held that Section 19(11) did not operate as an embargo for claiming ITC and hence is not against the scheme of the Act.

Holding that the State had the legislative competence to regulate the claim of ITC, the court held that the intention of the legislature in enacting Section 19(11) was to ensure that ITC is availed within the prescribed time, thereby safeguarding the interest of the Department as well as to prevent the burden of cascading effect of tax on the ultimate consumer. [*USA Agencies* v. *Commercial Tax Officer* - 2013-VIL-55-Mad]

Ink-jet cartridge and toner cartridges – Rate of duty under TN VAT: Madras High Court has held that ink-jet cartridge and toner cartridge were classified under Entry Nos. 22 & 24 of Notification No. G.O. Ms. No. 3, No. II(1)/CTR(a-6)/2007 and are taxable @ 5% under the Tamil Nadu VAT Act, 2006. The question before the court was whether ink jet cartridge and toner cartridge are an "accessory" or "part" of a printer and taxable @ 5% under Serial No. 68 of Part B of the First Schedule of the TN VAT, or are they liable to taxation under Part C of the First Schedule that provides the residuary entry. The High Court relied upon the judgments in the case of *Symphony Enterprises* [2007 INDLAW DEL 1301] and *Hewlett Packard India Sales (Pvt.) Ltd.* [(2012) 56 VST 472 (Gauhati)] holding that ink cartridges and toner cartridges are essential parts of the printer. Reliance was also placed on Supreme Court Order in the case of *CMS Computers Pvt. Ltd.* [2005-TIOL-57-SC-CX-LB] holding that a printer is a peripheral to a computer system. The Madras High Court hence held that since it is clear that ink-jet cartridge and toner cartridges are parts and accessories of a printer which in turn is a peripheral to a computer system, these parts and accessories should also attract the same rate of tax i.e. 5%. The High Court also held that Information Technology products shall be one which are notified by the Government and not as per the definition of such products given in the lexicon. [*Hewlett Packard India Sales Private Limited* v. *Assistant Commissioner of Commercial Taxes* - 2013-VIL-53-MAD]

INCOME TAX

Circulars

Expenditure on skill development - Guidelines for weighted deduction: The CBDT has, by way of Press Release dated 18-7-2013, issued guidelines for weighted deduction @ 150% of the expenditure incurred on skill development under Section 35CCD of the Income-tax Act, 1961. A company engaged in the business of manufacturing (other than alcoholic spirits and tobacco products) or engaged in providing specified services will be eligible. The project should be undertaken in separate facilities in a training institute set up by the government/local authority/vocational training institutes. National Skill Development Agency (NSDA) will be the nodal agency for scrutiny of applications. As per the release, all expenses (otherwise than on land or building) incurred for the said project shall be eligible for deduction. The guidelines also require that the project shall provide training to potential/ newly recruited employees.

Deductions under Section 10A clarified: CBDT by Circular No. 7DV/2013, dated 16-7-2013 has clarified that the Section 10A, 10AA and 10B of the Income-tax Act are 'deduction' provisions and not 'exemption' provisions. Resultantly, if the assessee has a non-eligible undertaking incurring loss, the same has to be first set off against the profit of eligible undertaking for the purpose of allowing deduction under Section 10A.

Ratio Decidendi

Commission / brokerage paid to MF distributors covered under specific exclusion in Section 194H: The assessee, an Asset Management Company paid commission/brokerage

to its mutual fund distributors without deduction of tax at source. AO disallowed the expenditure holding that tax under Section 194J of the Income-tax Act relating to managerial or professional services was required to be deducted since such payments fall under the category 'fees for professional/ technical services'. On these facts, it was held that the provisions relating to TDS on commission and brokerage are contained in Section 194H of the Act and the impugned commission/brokerage is specifically excluded from the applicability of the said provision. The Tribunal allowing appeal of the assessee rejected Department's contention of applicability of Section 194J on the ground that services rendered by mutual fund brokers are neither professional services nor technical services as such brokers do not require any special qualification. [*Sundaram Asset Management Co. Ltd.* v. *DCIT*, ITA No. 1774/MDS/2012 (Chennai), Order dated 19-7-2013]

Discount on issue of ESOPs is an allowable expense: The taxpayer granted ESOPs to its employees at Rs. 10 while the market price of such shares was Rs. 919 and therefore the total discount per option of Rs. 909, being the difference between the alleged market price and the exercise price, was claimed as compensation to the employees to be spread over the vesting period. The said discount was claimed as deduction on account of employee compensation cost on the strength of the SEBI Guidelines and under Section 37(1) of the Income-tax Act. On these facts, it was held that by granting options, the company assures that its key employees are retained during the vesting period and such a discount is generally construed as a part of package of remuneration and as quid pro quo for services of employees. Such a discount can neither be a shortfall of capital receipt or a capital expenditure. The undertaking to issue shares at a discount to the employees tantamount to 'incurring' of an obligation and provisions reveal that the 'expenditure' not only means 'actual paying out' but also 'incurring'. A definite business liability arising in one year though may have to be discharged at a later date yet qualifies for a deduction. [*Biocon Limited* v. *DCIT*, ITA No. 368-371/Bang/2010 (Bang.), Order dated 16-7-2013]

Nil TDS Certificate under Section 195(2) issued by AO is non-est in law: The AO had issued a Nil TDS certificate on assessee moving an application under Section 195(2) of Income-tax, 1961 accepting the argument that issue of shares against transfer of technology would be in nature of capital contribution and such payment was not 'royalty'. The assessee had entered into a joint venture agreement (JV) with CIMAB SA (Cuba) as part of which CIMAB SA was to provide technology to the JV and be allotted 49% of the capital of the JV and the assessee would incur cost of setting up a biotechnological plant and securing circulating capital for the JV. Agreeing with the subsequent view of the AO that the allotment of shares in consideration of the technology transfer was chargeable to tax, the ITAT also held that in an application made under Section 195(2), the AO cannot assume jurisdiction to hold that the entire payment is not chargeable to tax and no tax is required to be deducted tax at source. [*Biocon Biopharmaceuticals Private Limited* v. *ITO (Intl. Tax)*, ITA No. 507-510/Bang/2009 (Bang.), Order dated 19-4-2013]

Disallowance under Section 40(a)(ia) is to be made only on amounts remaining 'payable' as at the end of year: The company Mercator Lines Limited ('MLL') had performed ship management work on behalf of the assessee Vector Shipping Services ('VSS'). MLL had deducted TDS on salaries paid by it on behalf of the assessee. The assessee did not deduct TDS on reimbursement being made by it to MLL on the ground that the MLL had already deducted the TDS on the said payments being made to its employees. On these facts, the High Court held that the tax was deducted from the salaries of the employees paid by MLL and the circumstances in which such salaries were paid by MLL for the assessee were sufficiently explained. Further, the High Court reiterated that for disallowing expenses from business and profession on the ground that TDS has not been deducted, the amount should be 'payable' and not which has been 'paid' by the end of the year. [*CIT* v. *Vector Shipping Services (P) Ltd.*, ITA No. 122/2013 (All.), Order dated 9-7-2013]