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Article

Will compliance costs actually go down with introduction of GST?

By **V. Sivasubramanian**

A Goods and Services Tax (GST) is on the anvil. From the kind of discussions I see around in the media and Government circles, the only issues which are holding back its rollout is the lack of consensus on the compensation mechanism for the expected loss of some States on account of its implementation, inclusion or exclusion of specific products from scope of GST and the threshold limit. Even these issues are said to have more or less been sorted out.

So the all round expectation is that slightly beyond one year down the line, a dual GST structure will be in place across India with two different levies namely the Central GST (CGST) to be levied and collected by the Centre on all supplies beyond the threshold limit and the State GST (SGST) to be levied and collected by the States. There will also be an inter-State GST (IGST) equivalent to CGST plus SGST, to be levied and collected by the Centre on inter-State supplies, which will be transferred to the destination State using the GST Network.

The tax base for both CGST and SGST would be identical. Except for the tax rate, all other parameters of levy such as classification, valuation, place of supply, point of levy and the documentation requirements would be the same for both these levies. So once the tax base for the levy gets determined for say the CGST, it would get automatically determined for IGST and SGST as well.

In such a situation, is it necessary to have two tax administrations one at the Centre and another at the States to implement the CGST and SGST separately? For the trade, two administrations would mean two of everything for the same supply - two returns, two assessments, two refund claims, two audits, etc., though some of it would be information technology (IT) based. This may also imply say two demands, two hearings, two adjudications, two appeals, etc., and hence double the compliance cost!

So the question which should actively be agitating the minds of the trade is: will there be an administrative overhaul on introduction of the GST or will it be only a rehash of the existing administrative set up? If the latter, will GST actually reduce compliance cost for them at all? Tax administration, as they say, is the tax policy!

Is there a lesson to learn from other countries which also have dual GST systems? Let us look at Canada and Brazil which also have a federal structure and a dual GST.

Canada has a complex GST-HST-QST-RST ‘system’ wherein, in all cases involving a common tax base for both the federal and provincial levies, the tax administration is federal except in Quebec where it is provincial. So there is no duality in tax administration though there is dual levy on a common tax base.

As regards Brazil, it has one Value Added Tax (VAT) namely the IPI for the Federal Government and one VAT each namely the ICMS, for each of the state governments. Brazil has been facing complex technical and administrative

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problems as to how to apply different VATs in different states in addition to the Federal VAT and is still grappling with key questions relating to integrating the IPI and ICMS and developing a system for interstate transactions. I am not sure there is any case to follow Brazil as even under the existing structure, as per a study, VAT compliance time in India is lesser than in Brazil!

So we may not have much of a precedent to go by from other countries. Not much has also been heard from the Government so far on the administrative set up to be put in place for implementation of the GST. What has been indicated is that the problem of dual control will be addressed through a compounding scheme as well as administrative simplification for small dealers through measures such as registration by single agency for both SGST and CGST without manual interface, no physical verification of premises, simplified return format, electronic return filing, risk assessment based audit in 1-2% cases and lenient penal provisions. Will the trade be comfortable with only these measures?

The fact is that the GST story has not fully been told as yet. But this does not mean that we should not also take proactive action. It is perhaps the right time for the trade to study the likely impact of GST on their compliance costs, and represent to the Empowered Committee and the Government before it is too late!

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CUSTOMS

Notifications, Circulars & Notices

Drawback – Brand rate not available if AIR opted: Once duty drawback is claimed under All Industry Rate (AIR) as per Rule 3 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, application for grant of brand rate of duty drawback under Rule 7 in respect of such consignment cannot be made. Rule 7 of the Drawback Rules has been amended to this effect by Notification No.109/2014-Cus. (N.T.), dated 17-11-2014.

Drawback brand rate - Figure "9801" to be indicated in Shipping bill: Exporters opting for brand rate of duty drawback are required to declare the figure "9801" in the shipping bill under the drawback details on the basis of which they may subsequently apply to the Central Excise authorities for determining 'brand rate' of duty drawback. CBEC Circular No. 13/2014-Cus., dated 18-11-2014 issued in this regard also covers some of the salient features of the new drawback rates as applicable from 22-11-2014.

Iron Ore, fines and pellets – Procedure notified for valuation of exports: Valuation of iron ore, fines and pellets exported from India shall not be made on the average of test reports of load port and port of discharge. According to CBEC Circular No.12/2014-Cus., dated 17-11-2014 all assessments are to be kept provisional and when variation between the load port test report and discharge port test report is within the tolerance limit agreed between the exporter and foreign buyer, goods are to be assessed on the price contracted between the parties. If such variation has an effect on the price, then value has to be

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re-determined as per the Customs Valuation (Determination of Value of Export Goods) Rules, 2007.

Electronic products – New products included for BIS registration: Schedule to Electronics and Information Technology Goods (Requirement for Compulsory Registration) Order, 2012 has been amended to include various electronic products, which shall be subject to BIS registration requirements in India. Such new products *inter alia* include UPS/invertors of specified rating, mobile phones, point of sale terminals, copying machines, smart card readers, etc. By virtue of Para 2A to General Notes to ITC (HS), such products when imported into India shall be subject to BIS registration requirement. Notification SO 2905(E), dated 7-11-2014 issued in this regard vide F.No. 37(1)/2013-IPHW(Pt.) by the Department of Electronics & IT shall come into force after six months. For sealed secondary cells or batteries, this requirement will apply after 9 months from the date of publication of this notification.

Organic products – Export procedure revised: DGFT has notified a new procedure for export of certified organic products. According to DGFT Public Notice No. 73/(RE-2013)2009-2014, dated 18-11-2014, for any product to be exported as an organic product it must be accompanied with a Transaction Certificate issued by a Certification Body accredited by the National Accreditation Body (NAB) for Organic Products under the National Programme for Organic Production of the Department of Commerce. Further, such certification will be provided only if the product is produced, processed and packed as per the standards laid down in the document "National Programme for Organic Production (NPOP)". This new procedure will be applicable from 18-12-2014 as per Public Notice No. 77 (RE-2013)/2009-2014, dated 1-12-2014.

SCOMET – Import of specified chemicals to be informed to authorities: Consignment wise details of import of certain chemicals listed in Category 1A, 1B, and 1C of Appendix 3 (SCOMET list) to Schedule 2 to ITC(HS) should be provided to the DGFT, National Authority, Chemical Weapons Convention (NACWC) and Department of Chemicals and Petrochemicals within 30 days from the date of such import, according to DGFT Notification No. 98 (RE-2013)/2009-2014, dated 19-11-2014.

USA's unilateral export control items - Import and export policy specified: Import of certain Crime Control (CC) Items and Regional Security (RS) items as specified in Appendix 31(iia) and Appendix 31(iib), from USA, will now be allowed by the DGFT on submission of specified documents by the importer. Export of such imported items will also require authorization from the DGFT. Paras 2.11(d), 2.11(e), 2.11(f), Appendix 31(ia), Appendix 31(ib), Appendix 31(iia) and Appendix 31(iib) have been added in the Handbook of Procedure Vol.1 by DGFT Public Notice No. 74(RE-2013)/2009-2014, dated 19-11-2014 to provide for import and export policy for USA's unilateral export control items.

Bunker fuels - Exemption: Bunker fuels namely IFO 180 CST and IFO 380 CST when imported for use in ships or vessels registered under Merchant Shipping Act, 1958 and flying Indian

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flag only, have been exempted from BCD and CVD till 10-5-2015, subject to other conditions. S.No. 121A has been inserted in Notification No. 12/2012-Cus., by Notification No. 31/2014-Cus., dated 11-11-2014 in this regard.

Intensified Malaria Control Project – Specified goods exempted: Specified goods falling under the category of anti-malarial drugs and diagnostics and medical products, required for Intensified Malaria Control Project under the National Vector Borne Disease Control Program (NVBDCP) have been exempted from payment of basic customs duty (BCD) and additional duty of customs (CVD). Notification No. 32/2014-Cus., dated 21-11-2014 issued in this regard grants exemption till 30-9-2015 if the project is funded by 'Global Fund to fight AIDS, TB and Malaria'. Similar exemption in respect of excise duty has also been granted by way of Notification No. 23/2014-C.E., dated 21-11-2014.

Manual filing of bills of entry temporarily permitted for limited schemes: Filing of manual bills of entry has been temporarily permitted with the approval of AC/DC, Assessing Groups, in respect of Annual EPCG Licence (zero duty and 3% duty), Annual DEEC Licence, Notification No 43/96-Cus. and Notification No. 25/2011-Cus. According to Facility Notice No. 6/2014, dated 13-11-2014 issued by the Additional Commissioner of Customs, ACC Sahar, Mumbai, bills of entry may be filed manually until these schemes are operational in ICES 1.5 version.

Ratio decidendi

Mandatory pre-deposit – Tribunal grants time to follow new provisions: Considering the fact that provisions relating to mandatory pre-deposit before the appellate authority are new, CESTAT Bangalore has granted time of 10 weeks to the assessee to make good the omission (non-deposit of 7.5% pre-deposit), so as to hear the appeal. The Tribunal in this case also noted that after the enactment of the Finance (No. 2) Bill, 2014, procedure of grant of waiver of pre-deposit and stay is no longer required to be followed. Further, it was also observed that fixed deposit receipt in the name of Commissioner of Customs cannot be considered as pre-deposit in terms of the provisions of the Customs Act, 1962. [*MBG Commodities Pvt. Ltd.* v. *Commissioner* – 2014 (310) ELT 302 (Tri.-Bang.)]

CESTAT Bangalore expressed similar views in another case also decided on the same day wherein it was held that after enactment of Finance (No. 2) Bill, 2014, stay application is not required to be filed. [*ITC Infotech India Ltd.* v. *Commissioner* – 2014 (310) ELT 304 (Tri.-Bang.)]

FTP – Power to amend provisions retrospectively, not available: Delhi High Court has held that neither the Central Government, nor the DGFT has the power to amend the Foreign Trade Policy or withdraw any export benefit with retrospective effect. DGFT Policy Circular No. 42 (RE-2010)/2009-14, dated 21-10-2011, curtailing benefit available under Focus Product Scheme to "Technical Textiles" to only 33 items with retrospective effect from 1-4-2011, was hence set aside by the court further observing that interpretation of words "Technical Textiles" was never doubted and its interpretation cannot be called in question to decide the case. The court in this regard also noted that said circular

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did not clarify any doubt on interpretation of the expression "technical textiles - woven fabrics of synthetic filament yarn" but curtailed the number of products eligible for availing the export incentive and hence was in the nature of substantive amendment. [*Malik Tanning Industries* v. *Union of India* – 2014 TIOL-2197-HC-DEL-CUS]

Penalty when goods abandoned: Section 23(2) of the Customs Act, 1962 does not bar imposition of penalty on the importer. Madras High Court while holding so has observed that Section 23(2) confers the right on the importer to abandon the goods and seek exemption from payment of duty, but does not absolve him of his liability to be proceeded against under the provisions of the Customs Act for any violation which renders the improperly imported goods liable for confiscation, including imposition of penalty. [*Commissioner* v. *Baburam Premchand* - 2014-TIOL-1971-HC-MAD-CUS]

Re-exports – Benefit of Notification No. 158/95-Cus. when delay attributable to Customs: Benefit of Notification No. 158/95-Cus. was denied to the appellant on account of delay beyond permissible time period of six months from the date of import, in re-export of goods imported into India for repairs. CESTAT Delhi however held that benefit is not deniable when there was delay on part of the customs authorities in clearance of imported goods and when no decision was taken on the application made by the appellant for extension of time limit of six months. The Tribunal in this regard also held that date of import is the date on which entry inward is granted in respect of the goods and not the date of IGM. [*Talbro Forgings* v. *Commissioner* - 2014-TIOL-2329-CESTAT-DEL]

Drawback on re-exports – Relevant date: Date on which export goods are placed under the Customs control is to be relevant for duty drawback under Section 74 of the Customs Act, 1962. CESTAT Mumbai has held that for the purpose of determining whether the assessee has entered the goods for re-export within the time period prescribed under Section 74 of the Customs Act, the relevant date for consideration would be the date on which the goods are brought within the customs area for export and not the date of the Let Export Order. [*Oil and Natural Gas Corporation Limited* v. *Commissioner* - 2014-TIOL-2235-CESTAT-MUM]

Export benefit when not deniable by invoking Foreign Trade (Regulation) Rules, Rule 7(f): By applying Rule 7(f) of the Foreign Trade (Regulation) Rules, 1993 a public limited company was refused duty credit scrip under the Focus Market Scheme on the ground that its Directors were also Directors in a private company currently involved in an ongoing dispute involving penal liability. Kerala High Court however held that said Rule 7(f) is invocable when the applicant itself is acting in the capacity of a Director of a private limited company against which action is pending. In this case the applicant which is a public limited company is a separate legal entity from its Director, therefore the benefit cannot be denied by invocation of this provision. [*GTN Textiles Limited* v. *Union of India* - 2014-TIOL-1988-HC-KERALA-CUS]

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Application for change in classification not permissible under Section 154: The petitioner sought writ of mandamus for directing the customs authorities for allowing its application made under Section 154 of the Customs Act, 1962 for change of classification of the imported goods in the Bill of Entry. The Madras High Court however rejected the petition and held that the importer should have challenged the Bill of Entry by virtue of an appeal and that Section 154 cannot be invoked in this case. [*Neoteric Informatique Ltd.* v. *Asst. Commissioner* - 2014-TIOL-1998-HC-MAD-CS]

Anti-dumping duty and Safeguard duty applicable on imports against DFIA after 18-4-2013: The issue for determination was whether goods imported, post issuance of Notification No. 24/2013-Cus., dated 18-4-2013 amending Notification No. 98/2009-Cus., against a DFIA transferred prior to such date will be subject to payment of applicable anti-dumping duty and safeguard duty. CESTAT Mumbai in this regard, by its Majority Order, relying upon Section 15 of the Customs Act, 1962, held that the applicable rate of duty on imported goods shall be determined in accordance with the notification prevalent at the time of import and not on the basis of date of transfer of DFIA. Thus, it was held that in this case the importer will be liable to anti-dumping duty and safeguard duty. [*Global Exim* v. *Commissioner* - 2014-TIOL-2259-CESTAT-MUM]

Directorate of Revenue Intelligence (DRI) officers are 'proper officers' for Section 28: Relying upon Notification No. 19/89-Cus. (N.T.), and retrospective amendments made by the Parliament by inserting sub-section 11 to Section 28, the Bombay High Court has dismissed a writ petition, holding in favour of the department, that for period prior to April 8, 2011, DRI officers were 'proper officers', in terms of Section 2(34) of the Customs Act, for the purpose of issuing show cause notice under Section 28 of the Act. [*Sunil Gupta* v. *Union of India* - 2014-TIOL-1949-HC-MUM-CUS]

Catalyst – Exemption under Notification No. 16/2000-Cus. not available: CESTAT Mumbai has held that a catalyst, which is a chemical required for initiating a chemical reaction, cannot be considered as a machinery, instrument or appliance or a raw material or part required for the manufacture of final product i.e. fertilizers. Accordingly, it was held that benefit of Notification No. 16/2000-Cus. (Sl. No. 182) cannot be extended to a catalyst. [*Rashtriya Chemicals & Fertilizers Ltd.* v. *Commissioner* - 2014-TIOL-2218-CESTAT-MUM]

CENTRAL EXCISE

Circular

Time limit for availing Cenvat credit not applicable for re-credit: CBEC has clarified that time limit of six months for availing Cenvat credit, as introduced this year in respect of inputs and input services, is not applicable in cases of re-credit under Rule 4(7), Rule 3(5B) or Rule 4(5)(a) of Cenvat Credit Rules, 2004. CBEC Circular No. 990/14/2014-CX-8, dated 19-11-2014 issued for the purpose while holding so observes that purpose of the amendment is to

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ensure that after the issue of a document under sub-rule (1) of Rule 9, credit is taken for the first time within six months of the issue of the document and that once this condition is met, such limitation has no further application.

Ratio decidendi

Cenvat credit utilization during default period – Erstwhile Rule 8(3A) set aside: Gujarat High Court has held that erstwhile sub-rule (3A) of Rule 8 of the Central Excise Rules, 2002 providing for payment of excise duty for each consignment at the time of removal without utilizing the Cenvat credit, in case of default in payment of duty beyond prescribed time from due date, is unconstitutional and not a reasonable restriction. The court in this regard noted that the rule did not make any distinction between the willful defaulter and the others while the reasons for non-payment of excise duty can be manifold and not necessarily willful default despite availability of funds. It was also held that the rule prevented an assessee from availing Cenvat credit of the duty already paid and thereby suspended his right to take credit of the duty already paid to the government. It may be noted here that presently this rule provides for penalty at the rate of 1% per month on delayed payment of duty. [*Indsur Global Ltd.* v. *Union of India* – SCA No. 3344 of 2014, decided on 26/27-11-2014, Gujarat High Court]

Manufacture – Fixation of glass and rubber/ metal fitments in doors and windows is not manufacture: CESTAT Delhi has held that fixing glass in the duty paid doors and windows does not amount to manufacture as the products do not acquire a different name, character or use. Appeal by department contending that subsequent fixation of glass and also use of rubber or metal fitments at site amounted to manufacture, was hence rejected by the Tribunal finding no infirmity in the impugned order observing that the goods had become immovable property after such fixation. [*Commissioner* v. *Crystal Corporation* – 2014 (310) ELT 377 (Tri.-Del.)]

Cenvat credit – Application of Rule 11(3) when part of final product subsequently exempted: CESTAT Delhi has held that Rule 11(3) of the Cenvat Credit Rules, 2004, requiring the assessee to pay an amount equal to the Cenvat credit involved on the input in process and the input contained in the final products lying in stock on the date when exemption was granted to the final product, is not applicable in the case where out of common Cenvat credit availed inputs, more than one final product are manufactured and while some final products have become exempt, others have remained dutiable. The Tribunal in this regard held that manufacturer's right to utilize credit for payment of duty on products which are still dutiable cannot be taken away just because out of several final products, one final product has become exempt. Department's reliance on Rule 6 was also rejected by the Tribunal noting that the exempted goods were exported out of India under bond/LUT. [*Shree Baba Exports* v. *Commissioner* - Final Orders Nos. 54234-54235/2014, dated 10-11-2014, CESTAT Delhi]

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Remission claim – Reconsideration of, when same filed again with supporting documents: There is no review of own order by Commissioner when remission claim is entertained by him filed with supporting documents subsequent to obtaining insurance claim, where initially the refund claim was returned on account of deficiency of documents. Department's contention that Commissioner has no power to review his own order was hence rejected by CESTAT Mumbai. The Tribunal further allowed the remission of duty on inputs which had gone into manufacture of goods lost in fire. [*Commissioner* v. *Videocon Communications Ltd.* – 2014 (310) ELT 392 (Tri.-Mumbai)]

No unjust enrichment when goods removed to own unit: There can be no question of unjust enrichment where the goods were removed to own unit and Cenvat credit, which was earlier wrongly availed but reversed subsequently, was reversed again mistakenly. The Bangalore Bench of CESTAT in this regard held that assessee's action amounted to passing of burden to one self. Allowing refund, the Tribunal also observed that the unit to which the goods were transferred could not take credit as it was working under area based exemption. [*Pearl Polymers* v. *Commissioner* - Final Order No. 21972/2014, dated 7-11-2014, CESTAT Bangalore]

Valuation of MRP goods cleared in bulk for free distribution by buyer covered under Section 4A: Valuation of goods which are sold on the basis of MRP (goods notified for MRP) but where in a particular case such goods were cleared in bulk to a particular customer and meant for free distribution by such customer, is required to be made under Section 4A of the Central Excise Act, 1944. CESTAT Chennai in this regard rejected the contention of the department that Tamil Nadu Civil Supplies Corporation (TNCSC) to whom the goods like mixies and grinders were cleared for implementing the scheme of free distribution, is 'institutional consumer'. The Tribunal relied on its earlier order in the case of *PG Electroplast Ltd.* and noted that TNCSC is not service industry and that the goods are sold to TNCSC not for their consumption or for retail sale. [*Butterfly Gandhimati Appliances Ltd.* v. *Commissioner* - Final Order Nos. 40783-40788/2014, dated 19-11-2014, CESTAT Chennai]

Cenvat credit – Shortage of raw material, presumption of: CESTAT Ahmedabad has set aside demand of Cenvat credit based on alleged shortage of raw material based on input-output ratio. The Commissioner (Appeals) also in the said case had held that the calculation arrived on the basis of input/output ratio can only be relied in case where there is fixed ratio between input and output and not where there is variable ratio. It was also noted that there was no allegation or finding of clandestine removal of such inputs or use in manufacture of goods removed clandestinely. [*Commissioner* v. *Gujarat Cylinder (P.) Ltd.* - Order No. A/12014/2014, dated 20-11-2014, CESTAT Ahmedabad]

In a similar case, Delhi Bench of CESTAT has also held that mere reliance on RTO's report that vehicles stated to have been used were capable for transporting a small amount only, not enough to prove non-receipt of inputs in the absence of any other evidence. [*Commissioner* v. *TST Pipes Ltd.* – 2014 (309) ELT 560 (Tri.-Delhi)]

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SERVICE TAX

Notification & Circular

Audit by officers of department and CAG – Service Tax Rules amended: Rule 5A(2) of Service Tax Rules has been amended by Notification No. 23/2014-S.T., dated 5-12-2014 to provide that every assessee shall provide for scrutiny specified documents to the officer empowered under relevant provision or the audit party deputed by the Commissioner or the Comptroller and Auditor General of India (CAG), or a cost accountant or chartered accountant nominated under Section 72A of the Finance Act, 1994.

This amendment has also been clarified by the CBEC vide its Circular No. 181/7/2014-S.T., dated 10-12-2014. The circular states that scrutiny of records by the audit party deputed by the Commissioner in terms of new rule 5(A)(2) essentially constitutes audit by the audit party consisting of departmental officers and the expression "verified" used in Section 94(2)(k) of the Finance Act, 1994 is of wide import and would include within its scope, audit by the departmental officers. The Board also points out that the Delhi High Court in the case of *Travelite (India)* [2014-TIOL-1304-HC-DEL-ST] had quashed Rule 5A(2) on the ground that the powers to conduct audit envisaged in the rule did not have appropriate statutory backing and such backing is now available under Section 94(2)(k). The Board also directs the departmental officers to audit the service tax assessees as provided in the departmental instructions.

Ratio decidendi

Expenditure incurred as pure agent not includible in value of taxable service: Examining the nature of transaction wherein the assessee had received reimbursement of payment made to various retailers for achieving the sales quota, the Chhattisgarh High Court held that the activity was of a pure agent of the manufacturer and was not taxable. The assessee promoted various products of manufacturer and had paid certain amounts on behalf of him to retailers. This amount was reimbursed by the manufacturer and the department had contended that the receipt should be taxed. [*Union of India* v. *Raj Wines*, 2014 (36) S.T.R. 1002 (Chhattisgarh)]

Unconfirmed demand cannot be adjusted against refund: After sanctioning the amount claimed as refund, the department adjusted an amount towards Cenvat credit availed by the assessee which it contended was inadmissible. However, the Tribunal upheld the stand of the assessee that there was no legal authority to adjust an unconfirmed demand. The assessee was not asked to show cause as to why the credit should not be denied. The department had issued an SCN as to why refund should not be denied and a corrigendum merely stating that credit appeared to be inadmissible. [*Bharat Sanchar Nigam Limited* v. *Commissioner*, 2014 (36) S.T.R. 1054 (Tri.- Del)]

Adjustment of excess tax paid towards tax payment for other months: No monetary limit is applicable as regards adjustment of excess service tax paid when the excess payment is not on account of reasons involving interpretation of law, taxability, classification, valuation or applicability of exemption notification

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and is purely on account of inability of the assessee to exactly determine the total amount collected during a month. In the instant case, the department alleged short payment of tax and contended that the assessee could not adjust the excess amounts of earlier months since it did not have centralised registration. The Tribunal held that the assessee could adjust such amounts, the payment being in nature of an advance there was no unjust enrichment involved and that centralised registration was not required. [*General Manager (CMTS)* v. *Commissioner*, 2014 (36) S.T.R. 1084 (Tri.- Del)]

Unjust enrichment – Burden cannot be deemed as passed on when consideration is inclusive of taxes: The department sought to deny refund of service tax paid stating that the work order between the assessee and service recipient (Punjab State Electricity Board) contained a covenant that the consideration was inclusive of taxes and hence the burden of tax must have been passed on. On facts, the assessee had paid service tax when the particular service was exempted under relevant notification. The Tribunal held that refund could not be denied merely on premise of unjust enrichment. [*Commissioner* v. *J.R. Transformers*, 2014 (36) S.T.R. 1167 (Tri.- Del)]

Exigibility to tax to be determined before issue of SCN: Quashing the show cause notice issued by the department, the Calcutta High Court opined that the department should first ascertain whether the service involved was liable to service tax and whether it was classifiable under the particular category and only after such exercise, show cause notice could be issued. At issue was whether service tax was liable as "support services" as defined under Section 65B(49) of Finance Act, 1944 on the service provided by the state government to protect the tea gardens in certain disturbed areas. The asssessee contended that it was discharge of a sovereign function and not exigible to service tax. The department argued that since the service was personalised and limited as the personnel had no police powers and paid for by the assessee, it could not be called sovereign function. The court was of the view that prima facie, a strong case existed to classify the service under sovereign function and not support service. [*Mc Leod Russell Limited* v. *Union of India*, Writ Petition No. 48/2014, Judgment dated 20-11-2014, Calcutta High Court]

Date of receipt of service relevant for determination of credit eligibility: Emphasising that the date of receipt of service is relevant to determine eligibility for Cenvat credit, the Tribunal held that when service was received prior to 10-9-2004 but invoice was raised later, no credit would be available. The assessee argued without success, that rendering of services was completed only when bill was raised and paid. The Tribunal held that the date of realisation of payment would be relevant only for payment of service tax. [*Elecon Engineering* v. *Commissioner*, Order No. 11858/2014 dated 30-10-2014, CESTAT, Ahmedabad]

Cenvat credit of service tax on maintenance of pipelines for carrying water to factory for manufacture, admissible: The department sought to deny credit on services used for maintenance of pipelines installed for carrying

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water from the canal to the factory. However, noting that credit had been allowed in respect of laying and maintenance of the pipelines earlier, the Tribunal held that credit could not be denied on maintenance of the pipelines. [*Torrent Pharmaceuticals* v. *Commissioner*, Order No. A/12018/2014 dated 14-11-2014, CESTAT, Ahmedabad]

Abatement can be availed if credit taken is subsequently reversed: Refusing to accept the department's argument that though the assessee had reversed the amount taken as Cenvat credit, abatement could not be availed as regards service of erection, commissioning and installation (ECI), the Tribunal held that the service tax could not be demanded on the gross amount and the assessee was entitled to benefit of Notification No. 1/2006-S.T. It opined that merely because benefit under a notification could not be availed earlier, it could not be denied for a later period. Also, it observed it would be a travesty of justice if service tax was demanded because a small amount of credit was availed and reversed later. On facts, the assessee had paid service tax under ECI and also tax applicable under works contract for supply of materials. [*UB Engineering* v. *Commissioner*, Order No. A/1717/14/CSTB/C-I dated 18-11-2014, CESTAT, Mumbai]

Rebate on export of service – Limitation under Section 11B not applicable: Refund of service tax paid on export of service under the provisions of Rule 4 read with Rule 5 of the Export of Service Rules, 2005 and Notification No. 11/2005-ST dated 19-4-2005 was rejected on the ground that it was time barred under Section 11B of the Central Excise Act and hit by unjust enrichment as from perusal of the balance-sheet and profit and loss account, it appeared that the service tax paid by the appellant was not shown as 'receivable from the government'. It was observed by the Tribunal that Rule 4 of the said rules provided for export of service without payment of tax and Rule 5 provided for rebate in case the tax has been paid mistakenly or by way of abundant caution and in the case before it, the amount of tax deposited by the assessee was not tax but in the nature of deposit for which time limit for refund was not applicable. [*Commissioner* v. *Hincon Technoconsult Ltd.*, 2014-TIOL-2373-CESTAT-MUM]

Marketing in India for foreign supplier & receipt in INR – Coverage under export of service: The issue before the Tribunal was whether the appellant who were rendering the service of marketing the product of their foreign counterpart and for which they were receiving certain commission in India in Indian rupees will qualify as export of service in terms of the Export of Service Rules, 2005. Rejecting the contention of the department that the said service was consumed in India, the Tribunal relying upon precedent decision held that in the present case the service was of marketing of product of a person who was located outside India and who had consumed the service outside India and therefore, the said service qualified as export of service in terms of Rule 3 (3) (i) of the Export of Service Rules, 2005. Further, relying on the case of *National Engineering Industries Ltd.* [2011-TIOL-1060-CESTAT-DEL], it was held that as the appellant had received the payment

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of commission in Indian Rupees on behalf of their counterpart from the client of their foreign counterpart, the same fulfilled the condition contained in the above rules and hence, refund claim was admissible. [*Pam Pharmaceuticals* v. *Commissioner*, 2014-TIOL-2342-CESTAT-MUM]

Event management services for promotional activity within temple premises – Credit admissible: Observing that it was irrational on part of the lower authorities to presume that any function inside temple premises partakes a religious character, the Tribunal held that event management services used to organise a sales promotion meet could qualify as input service. [*Shree Cement Ltd* v. *Commissioner,* 2014 (36) S.T.R. 1107 (Tri.- Del)]

Cenvat credit on cargo handling for export goods, admissible: Upholding the order of the lower authorities, the Gujarat High Court held that the assessee could take credit of service tax paid on cargo handling services since it qualified as an input service. The department argued that place of removal cannot be the port of shipment and as such cargo handling services availed after clearance of goods from the factory cannot be an input service. However, the Tribunal emphasised the wide nature of definition of the term 'input service' and held that in case of exports the place of removal will necessarily be the port and services utilised till the goods leave India will be covered. [*Central Excise* v. *Inductotherm India*, 2014 (36) S.T.R. 994 (Guj.)]

VALUE ADDED TAX (VAT)

Notifications & Circulars

Stock transfer – Market value under Chhattisgarh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976: Market value of goods which are not generally sold in the market or where the correct sale price in respect of such goods is not ascertainable, is the sum total of the value of the goods and other expenses (transport expenses and other direct or indirect expenses) incurred in respect of such goods, when such goods are stock transferred into a local area in Chhattisgarh. Notification No. F-10/76/2014/CT/V (82), dated 18-11-2014 issued in this regard by the Commercial Tax Department of Chhattisgarh, substitutes Sl. No. 5 of Notification No. F-10/65/2014/CT/V (67) dated 1-7-2014, retrospectively with effect from 1-7-2014.

Tamil Nadu VAT - Refund of ITC on export of exempted goods: If a dealer manufactures fabric out of yarn purchased in Tamil Nadu and exports such fabric to other country, such export can be treated as zero rated sale as falling under Section 18(1)(i) of the Tamil Nadu Value Added Tax Act, 2006, though the fabric is an exempted item. Zero rate sale as defined under Section 2(44) of the TN-VAT Act *means a sale of any goods on which no tax is payable but credit for the input tax related to that sale is admissible.* Circular No. 59/2014, dated 27-11-2014 issued by Principal Secretary and Commissioner of Commercial Taxes states that exporters of exempted goods which are manufactured out of taxable inputs are eligible to avail the benefit of refund of ITC

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on related purchases as provided under Section 18(2) of the TN-VAT Act.

UP VAT – No TDS deduction by educational institution: A university or an educational institution or a training centre is not required to deduct TDS under Section 34(1) of the Uttar Pradesh Value Added Tax Act, 2008 from the payments made to the seller for sale of goods, with effect from 8-11-2014. Notification No. KA.NI.-2-1459/XI-9(10)/08-U.P.Act-5-2008-Order-(120)-2014, dated 7-11-2014, issued in this regard removes the stipulation requiring such purchaser to make a deduction from the payment made to a selling dealer towards satisfaction of tax liability of such selling dealer in a sale, as provided under earlier Notification No. KA.NI.-2-1315/XI-9(10)/08-U.P.Act-5-2008-Order-(101)-2013, dated 7-10-2013.

Ratio decidendi

Supply of food in restaurants and service of providing accommodation – Sales tax and Service tax liability: Kerala High Court has held that sales tax is leviable on whole consideration received, in respect of supply of food in restaurants, since by virtue of Article 366(29-A)(f) of the Constitution even the service part involved in the supply of food and other articles of human consumption, is deemed as a sale to enable the State to impose tax on the same. The court in this regard held that since the whole consideration received by a restaurant owner for supply of food, including the service part of the transaction, is exigible to tax by the State, it is not open to the Union to characterise the same transaction as a service for imposition and levy of service tax under sub-clause (zzzzv) of Clause 105 of Section 65 of the Finance Act, 1994. Judgment of the Constitution Bench of the Supreme Court in the case of *K. Damodarasamy Naidu* [2000 (117) STC 1] was relied on by the court while affirming the decision of the single judge bench. It was also held that there is no service involved in the supply of food and other articles of human consumption in a restaurant and hence the same is a matter enumerated in Entry 54 of List II of Seventh Schedule and the States alone have the legislative competence to enact any law imposing tax on the said matter.

Further, in respect of sub-clause (zzzzw) related to accommodation services provided by hotels, inn, guest house, club house or camp site etc., the division bench relied on *Godfrey Philips India Ltd.* [(2005) 2 SCC 515] and held that matter was covered by Entry 62 of List II of the Seventh Schedule i.e. luxuries, and the States alone have the legislative competence to enact any law imposing tax on the said matter. It may be noted that court here did not agree with the decision of the Bombay High Court in case of *Indian Hotels and Restaurant Association* [2014-VIL-94-BOM-ST] and held that no service tax was applicable in the instant case as only State legislature is competent to levy taxes under Entries 54 and 62 of List II of Seventh Schedule to the Constitution. [*Union of India* v. *Kerala Bar Hotels Association* - 2014-VIL-340-KER-ST]

Sub-contracting – Liability on amount retained before making payment to sub-contractor: In a case involving sub-contracting of works contract, the Kerala High Court has held the petitioner, a works contractor, sub-contracting the entire

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work, is not liable to pay tax on the amount received from the awarder of the contract which was retained by the petitioner over and above the amount paid to the sub-contractor. The court placed reliance on the decision of the Supreme Court in the case of *Larsen & Toubro Ltd.* [(2008)17 VST 1], wherein it was held that where there is an agreement between the contractor and the sub-contractor and the entire work under the contract is sub-contracted to a sub-contractor by the main contractor, the execution of the work then involves a transfer of material, directly from the sub-contractor to the awarder of the contract. It was noted that the tax in respect of the work sub-contracted was not due from the petitioner (as the main contractor) and the amount retained by the petitioner from out of payment made by the awarder, represented only the profit element that accrued to the petitioner in his capacity as the main contractor. Further, there was no sale of material in the course of execution of works contract that emanated from the petitioner to the awarder of the contract. [*Surya Constructions* v. *Commercial Tax Officer* - 2014-VIL-358-KER]

Input Tax Credit – Effect of bifurcation of States: In this case, the assessee-petitioner had excess Input Tax Credit in United Andhra Pradesh and stated the same in the monthly returns of May 2014 in United AP. The state was bifurcated into State of Telangana and residuary State of Andhra Pradesh on 2nd June, 2014. There was an ambiguity with respect to the excess ITC carried forward from United AP to State of Telangana. The Commercial Tax Department of Telangana posted a communication on the Commercial Tax website requesting the dealers to file the VAT returns for the month of June, 2014 and mention "zero" against the excess ITC carried forward from United AP in the return. The monthly tax returns filed by the petitioner for the month of May, 2014 showed an excess ITC however, the respondents made the excess ITC as "zero" in the petitioner's monthly return of July, 2014 without an assessment order being passed, and without even giving the petitioner an opportunity of being heard.

The court stated that in the absence of such excess ITC being adjusted against the tax payable by the petitioner such excess could not have been treated as "zero" by the department without even an assessment order being passed, and without determining the actual excess ITC available to the petitioner. Respondent was therefore, directed to include the excess ITC as claimed by the petitioner in the monthly returns for the month of May, 2014, in subsequent monthly returns. The court however made it clear that the order shall not preclude the department from assessing the petitioner to tax under the Act after giving them an opportunity of being heard and thereafter, determine the actual excess ITC entitlement of the petitioner. [*Sushee Infra Pvt. Ltd.* v. *Commercial Tax Officer* - W.P. No. 30076 of 2014, dated 14-10-2014, High Court at Hyderabad for States of Telangana and Andhra Pradesh]

Tamil Nadu VAT - Transfer of one line of business: In this case, the petitioner sold a division of its business (windmill division) and claimed exclusion from the turnover under *Explanation III* to Section 2(44) of the Tamil Nadu Value

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Added Tax Act, 2006, which provides that *any amount realized by a dealer by way of sale of his business as a whole, shall not be included in the turnover* as provided under Section 2(41) of the Act. The department contended that the petitioner has sold only a division of its business and not sold its business as a whole. The Madras High Court relied upon the judgments in the case of *Eicher Motors Ltd.* [2013-VIL-111-MAD] and *K. Behannan Thomas* [(1997) 39 STC 325 (Mad)], where the court held that transfer of even one line of business amounted to transfer of business as a whole and held that sale of the windmill division by the petitioner amounted to sale of business as a whole and was not liable to be taxed under the Act. [*VTX Industries Limited* v. *Assistant Commissioner (CT)* - 2014-VIL-338-MAD]

Surcharge under Madhya Pradesh Commercial Tax provisions: Madhya Pradesh High Court has held that surcharge is in the nature of tax and once the assessee has paid tax by way of composition, then all taxes, which includes surcharge under Section 10A of the Madhya Pradesh Commercial Tax Act, 1994 is deemed to have been paid and no further surcharge is required to be paid. In the instant case, the petitioner, a dealer engaged in the execution of works contract, opted to pay tax by way of composition under Section 19 of the MPCTA at the rate of 4%. Reliance in this regard was also placed by the court on the decision of the Supreme Court in the case of *Sarojini Tea Co. Pvt. Ltd.* [AIR 1992 SC 1264], holding that surcharge in a taxing provision means an additional imposition which results in enhancement of the tax and therefore, an addition or imposition by way of surcharge is same as tax on which it is imposed. It was also held that Section 19 is a provision for composition of tax and it is a payment in a lumpsum manner *in lieu* of all taxes payable under the MPCTA. [*Narmada Transmission Pvt. Ltd.* v. *State of Madhya Pradesh* - 2014-VIL-341-MP]

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