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Lakshmikumaran & Sridharan wishes you a very happy and prosperous New Year 2015

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Place of Entertainment – Uncertainty prevails

By **Tushar Aggarwal**

With the passage of time, different technologies and standards evolve. Similarly, law cannot stand still; it must change with the changing social concepts and values[1]. Tax laws though necessarily enacted in its own time, are nevertheless to be construed as taking note of the advances in technology.

Entertainment tax in India is being levied for more than a century now. Levying taxes on different forms of entertainment was originally a British practice under which taxes were imposed on disorderly houses using any building or room for public entertainment on Sundays under a series of Sunday Observance Acts.[2] In India during pre-independence era several laws were passed to impose huge taxes on events of entertainment and amusement. Bengal at that time was the first state to levy a tax of such kind under Bengal Amusement Act of 1922 following which the Bombay Entertainment Duty Act was passed in 1923 and soon after many other similar legislations were introduced in different States. Earlier entertainment tax was levied on movie tickets, large commercial shows and large private festival celebrations. In the late 1990s, States started levying entertainment tax on cable service.

The dispute regarding determination of place of provision of entertainment to find out the jurisdiction of State which has the power to levy tax never cropped up as the provider as well the receiver or customer were in the same State. With the advent and growth of Direct to Home or DTH services in India, a new way of reaching the homes of consumers has emerged. DTH has eliminated the role of cable operators who earlier acted as middlemen and took satellite television to different households.

Most of the States are levying entertainment tax on entertainment through DTH services. Time and again concerns have been raised pertaining to the constitutional validity of entertainment tax on DTH services stating that it is beyond the State's competence to levy tax on such operations. However, it is a settled principle now that none of the entries in the Lists in the Seventh Schedule of the Indian Constitution is to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be included in it. The courts have time and again upheld the constitutional validity of entertainment tax on DTH services[3]

However, DTH services providers being located in one State and their customers being spread across the country have raised a red flag on the issue of determination of the place of

1 National Textile Worker's *Union* vs. *P. R. Ramakrishnan* (AIR 1983 S.C. 75)

2 Halsbury's Laws of England, 4th ed., Vol. 45

3 *Bharti Telemedia Limited and Ors.* vs. *The State of Jharkhand & Ors*

entertainment to decide the jurisdiction of the State which can levy and administer the tax. There is no clarity as to how to determine the place of entertainment in such cases i.e., will it be the place where infrastructure is located or the place where the customer is located or the place where books of accounts are kept.

The Uttar Pradesh Entertainments and Betting Tax Act, 1979 as amended in year 2009 defines 'place of entertainment' as including a place where the books of account, pertaining to the entertainment (DTH service), are kept. Does it mean that the UP Government has the power to impose entertainment tax provided by DTH operators irrespective of the fact that the subscribers are located outside the State?

Entry 62 of List II of Seventh Schedule of the Constitution has been used in the sense of an activity or service namely, the providing of luxury/entertainment and what could be taxed by the State under that entry would be entertainment through such service[4]. Therefore, entertainment can only be provided by way of a service. *Hence, the criteria and the principles for determining the place of entertainment and the place of supply of services should be same.*

For taxation of services, the basic choice between the destination and origin principles traded between jurisdictions is well known. Having location of infrastructure or where the books of accounts are maintained as place of entertainment (origin principle) suffers from two deficiencies. First, it will not efficiently allocate tax across various jurisdictions and provide revenue to the States. Second, it will offer tax planning opportunities to DTH service providers to shift the location of infrastructure or books of accounts to states having no entertainment tax or lower rate of entertainment tax. However, this principle achieves consumption efficiency since consumers pay the same price for any commodity whichever jurisdiction they reside in.

With the increasing "disconnect" between performance and consumption of services in a territorial sense, the traditional rule for determining the place of taxation of services by reference to the service provider's establishment becomes problematic. Adoption of consumption based principles for determining the place of entertainment would restore a balanced sharing of tax revenue among States though this would impose burdensome compliance costs on DTH service providers.

In implementing the principle that consumption of services which are not capable of direct delivery from a remote location should be taxed where consumption occurs, which is now characterized as the "destination principle," the OECD consultation paper adopts as its basic proxy the rule that "the place of consumption should be deemed to be the jurisdiction where the customer is located ('Main Rule')."With the increasing "disconnect" between performance and consumption of services in a territorial sense,

Even in EU, from January 2015, all suppliers of goods and services will be required to account

[4] *Godfrey Phillips India Ltd.* v. *State of Uttar Pradesh,* (2005) 139 STC 537 (SC).

for VAT based on the rates applicable where their non-business customers are based. In India also, the general rule for determining the place of provision of services is the location of service recipient.

Therefore, determining the place of entertainment in case of DTH services on the basis of location of customer could be a better alternative which would ensure consistency in the principles adopted by the State for finding place of entertainment and the Centre for finding place of provision of service. It is imperative that all the States must address this issue and must adopt the same principle for determining their jurisdiction and power. However, a more effective solution may lie in multilateral coordination by all the States, not in unilateral efforts by a single State.

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CUSTOMS

Notifications, Circulars & Notices

Bank Guarantee exemption to penalized authorization holders: Importers who have been penalized in the previous three financial years under the Customs Act, Central Excise Act, FEMA or the FTDR Act are now eligible for exemption from providing bank guarantee in case of imports under various export promotion schemes. CBEC Circular No. 15/2014-Cus., dated 18-12-2014 issued for the purpose has added para 3.2(d) to basic Circular No. 58/2004-Cus. to provide for such exemption subject to satisfaction of jurisdictional Commissioner of Customs about absence of risk to revenue.

Packing list not mandatory now: Customs will henceforth not insist on filing of packing list by the importers or exporters. As per CBEC Circular No. 1/2015-Cus., dated 12-1-2015 issued for the purpose, in case an importer or exporter submits a commercial invoice cum packing list containing information on description of goods, mark and numbers, quantity, gross weight, net weight, number and types of packages, in addition to the details in a commercial invoice, a separate packing list is not to be insisted upon. The importer or exporter will however have the option to file such commercial invoice cum packing list or to continue filing of packing list and commercial invoice.

ACP status withdrawn or not extended – Restoration of: The Accredited Clients Programme (ACP) status of importers which has been withdrawn or not extended on account of issuance of a show cause notice to the importer in terms of para 7(iii) of the Circular No. 42/2005-Cus. may now be restored i) after 3 months if the entity pays the duty demanded with interest and 25% penalty within 30 days of the show cause notice or if the entity's application is allowed to be proceeded with by the Settlement Commission or (ii) after 6 months if the entity pays the duty demanded with interest, subject to conditions. CBEC Circular No.18/2014-Cus., dated 22-12-2014 in this regard additionally clarifies that ACP status would not ordinarily be denied if, Customs/Central Excise duty or Service Tax involved is up to Rs. 50 lakh and Rs. 25 lakh, respectively.

EOUs - Deemed export benefits: In order to facilitate availing of deemed export benefits by EOU / EHTP / STP / BTP units following self-bonding / warehousing procedures, CBEC Circular No. 16/2014-Cus., dated 18-12-2014 now provides that on receipt of the ARE-3, the Superintendent-in-charge of the unit shall make two legible photocopies of the countersigned ARE-3 and attest them as true copies along with signature and date. As per the circular, one such copy shall be forwarded to the Range office for records and the other would be handed over to the unit for use while applying for deemed export benefits. Para 2(b) of Circular No. 19/2007-Cus., has been modified in this regard.

Further, Paragraph 2(a) of Circular No. 15/2008-Cus., has also been amended whereby relevant documents shall be endorsed by Superintendent of Central Excise within 21 days. Circular No. 17/2014-Cus., dated 18-12-2014 issued for this purpose also reiterates that EOU / EHTP / STP / BTP units operating under self-bonding / warehousing procedure specified under Circular No. 19/2007-Cus., shall be provided with an attested photocopy of the original ARE-3 by the Superintendent of Central Excise for availing deemed export benefits.

Customs duty reduced for specified goods imported from Korea, Japan, Malaysia, ASEAN countries and Singapore: Basic Customs duty (BCD) has been reduced on specified goods imported from Korea and Japan under respective Comprehensive Economic Partnership Agreements, from ASEAN countries under Preferential Trade Agreement, and from Singapore and Malaysia under respective Comprehensive Economic Cooperation Agreements. Notification Nos. 35 to 38/2014-Cus., all dated 29-12-2014 and No. 1/2015-Cus., dated 5-1-2015 have been issued in this regard.

DGFT as Appellate Authority: DGFT aided by one Additional DGFT has been authorized to function as appellate authority against the orders passed either by Additional DGFT, Development Commissioner of SEZ, or Designated Officer, Department of Electronics & Information Technology. Hitherto, a bench of two Additional DGFTs as constituted by Director General was the appellate authority for such cases. DGFT Notification No. 101 (RE-2013)/2009-2014, dated 5-12-2014 has been issued in this regard.

DRI & DGCEI officers empowered to adjudicate: Specified officers of DRI and DGCEI have been allowed to adjudicate cases where show cause notices for short levy / non-levy of customs duty have been issued under Section 28 of the Customs Act 1962. CBEC Circular No. 14/2014-Cus., dated 11-12-2014 issued for the purpose, modifies Circular No. 44/2011-Cus., which stated that officers of DRI and DGCEI were not authorized under Section 28(8) of the Customs Act, 1962 to adjudicate show cause notices issued under Section 28 of the Act.

Jammu & Kashmir – Exemption to imports intended for donation: Goods imported into India intended for donation towards rehabilitation of people affected by the floods in Jammu & Kashmir have been exempted from basic and additional (including SAD) customs duties subject to specified conditions.

Notification No. 33/2014-Cus., dated 11-12-2014 issued in this regard will be effective upto 31-3-2015.

Cotton and cotton yarn – Export policy relaxed: Restrictive requirement of "prior registration of contracts with DGFT" for export of cotton and cotton yarn classifiable under HS codes 5201, 5203, 5205, 5206, 5207 has been dispensed with. DGFT Notification Nos. 102 and 103(RE-2013)/2009-14, both dated 8-12-2014 have been issued in this regard.

Organic product export – Implementation of Public Notice No. 73 deferred: DGFT Public Notice No. 73, dated 19-11-2014, stipulates that a product will be exported as an organic product only when it is accompanied by a Transaction Certificate. Further, organic products will be certified only if they are produced, processed and packed as per standards laid down in the 'National Programme for Organic Production'. However, DGFT by Public Notice No. 77(RE-2013)/2009-2014, dated 1-12-2014 had deferred the date of its implementation to 18-12-2014, which has now been further postponed by DGFT Public Notice No. 78 (RE-2013)/2009-2014, dated 18-12-2014 till further orders.

Ratio decidendi

DTA clearances from SEZ – Exemption notifications issued under Excise Section 5A applicable: Gujarat High Court has held that if Central Excise duty is exempt on a product manufactured in India by virtue of an exemption notification issued under Section 5A of the Central Excise Act, 1944, then such exemption shall also extend to domestic clearances made by SEZ units in computing CVD. The High Court in this regard relied upon Section 30 of the SEZ Act and regarded proviso to Section 5A(i), disallowing such exemptions to goods produced in SEZ, as a legislative oversight. [*Roxul Rockwood Insulation India Private Limited* v. *Union of India* - 2014-TIOL-2123-HC-AHMD]

Valuation – Royalty or license fee when includible/not includible: Royalty paid for indigenous value addition of the imported goods in India with the supplied technical know-how is not to be included in the assessable value of the imported raw material, under Rules 9(1)(c) and 9(1)(e) of Customs Valuation Rules, 1988. The Tribunal in this regard relied on an earlier order in the case of *Foseco India Ltd.*, wherein the Tribunal had held that if the royalty is computed excluding the cost of imported material and is based on the indigenous value addition clearly showing that payments made had nothing to do with the imports undertaken, the same could not be included. [*Lord India Chemical Products Pvt. Ltd.* v. *Commissioner* - 2014-TIOL-2517-CESTAT-MUM]

Royalty payments made in respect of technical know-how and fees paid for basic engineering services and supervisory services agreement were found to be includible, by the Tribunal in another case, in the assessable value of the equipment imported, as the payments were found to be integrally connected with the supply of the equipment and formed part of package deal. The Tribunal here distinguished the facts of the case with that involved in Supreme

Court Orders in the cases of *J.K. Corporation* and *Toyota Kirloskar Motor Pvt. Ltd.* [*Welspun Maxsteel Ltd.* v. *Commissioner* - 2014-TIOL-2599-CESTAT-MUM]

Interest when duty payment delayed, payable even if demand for interest absent: Relying on Supreme Court decision in the case of *Commissioner of Trade Tax* v. *Kanhai Ram Thekedar* [2005 (185) ELT 3 (SC)], the Mumbai Bench of CESTAT has held that interest liability accrues automatically and is payable even if there is no specific demand under Section 28 of the Customs Act, 1962 with respect to interest. [*Vijay Cine Services Pvt. Ltd.* v. *Commissioner* - 2014-TIOL-2414-CESTAT-MUM]

Redemption fine not payable when goods re-exported: CESTAT Mumbai has held that in a case where the goods are ordered to be re-exported, the question of sale of goods and making a profit would not arise and hence redemption fine of Rs. 7.5 lakhs imposed in the case involving goods of value Rs. 93.3 lakh, was on the higher side. It was noted that normally fine is imposed to take way the profit margin. [*Gujarat Ambuja Exports Ltd.* v. *Commissioner* – Order No. A/1420/14/SMB/C-IV, dated 7-11-2014, CESTAT Mumbai]

Valuation – Effect of value of spare parts on value of capital goods: Use of new spare parts as replacement to old and worn out machinery parts would not increase the value of machinery according to Mumbai Bench of CESTAT. The case involved value of capital goods at the time of debonding of EOU. The EOU had before debonding imported spare parts without payment of duty and had capitalized them. The Tribunal held that value of capital goods cannot be enhanced by the value of spare parts even if the same have been capitalized. [*Century Denim* v. *Commissioner* – 2014 (310) ELT 939 (Tri.-Del.)]

Tribunal can remand matter to competent authority different from authority who passed impugned order: Madras High Court has held that the Tribunal, if finds an error in the order passed by an authority, is justified in remanding the case back to the competent authority, even if such an authority is not a Customs Authority. It was also held that Section 129B of the Customs Act does not restrict the power of the Tribunal to remand the matter back to the same authority which had given the ruling. Tribunal in the case impugned before the High court had remanded the matter to Commissioner of Central Excise, after setting aside adjudication order passed by Commissioner of Customs. The Tribunal had in this regard observed that the unit was not an EOU when the SCN was issued. [*C.P. Aqua Culture (India) Pvt. Ltd.* v. *CESTAT* - 2014-TIOL-2170-HC-MAD-CUS]

Demand – Limitation for demand of duty in respect of redeemed goods: Relying on Supreme Court's orders in the cases of *Northern Plastics Ltd.* and *Uniworth Textiles Ltd.*, the CESTAT Mumbai has held that if the importer makes a declaration correctly, furnishes requisite particulars and claims a particular classification, it cannot amount to misdeclaration. The Tribunal in this regard also rejected the argument that since one of the vessels were seized and confiscated and allowed to be redeemed, there is no time limit

for demand of duty. It was held that once assessment has been completed by the Customs, demand for differential duty on account of short levy or non-levy should be raised under Section 28 only and not under any other provision. [*Devraj M. Salian* v. *Commissioner* - 2014-TIOL-2514-CESTAT-MUM]

Limitation Act not applicable for condoning delay in filing ROM application: Mumbai Bench of CESTAT has, relying on Karnataka High Court Order in the case of *Shree Chamnundeswari Sugars Ltd.*, held that Section 5 of the Limitation Act shall not apply to condonation of delay in filing a ROM application. It was observed that Section 129B (2) of the Customs Act, which permitted such application, specifically grants only six months from the time the order is passed by the Tribunal. [*Global Exim* v. *Commissioner* - 2014-TIOL-2539-CESTAT-MUM]

Pre-deposit mandatory for entertaining appeal even if order impugned passed prior to amendment in Section 129E: CESTAT Mumbai has held that from a plain reading of the amended Section 129E of the Customs Act, it is clear that the Tribunal or Commissioner (Appeals) cannot entertain any appeal under Section 128, unless the appellant has made a pre-deposit. It was held that the same provision is applicable in cases where the orders appealed were passed prior to the amendment of Section 129E. [*Bhatia Global Trading* v. *Commissioner* - 2014-TIOL-2637-CESTAT-MUM]

CENTRAL EXCISE

Circular

Mandatory pre-deposit to be made in drawback cases as well: CBEC has clarified that mandatory pre-deposit would be payable in cases of appeals filed against demand of drawback granted erroneously on the ground that drawback is refund of duty suffered on export goods. Circular No. 993/17/2014-CX, dated 5-1-2015 also states that the provisions for mandatory pre-deposit are applicable to appeals filed on 6-8-2014 also and would not be applicable to cases which involve filing of Revision Application before the Government of India.

Ratio decidendi

Dross and Skimmings are not excisable – Tribunal LB Order quashed: Dross and Skimmings are not excisable even after introduction of Explanation to Section 2(d) in Central Excise Act, 1944 in 2008. Bombay High Court while holding so quashed CESTAT's Larger Bench Order observing to the contrary. Two CBEC Circulars, dated 28-10-2009 and 14-2-2011, on excisability of similar wastes were also set aside by the court. The High Court felt that the decision of the larger bench could not be agreed with considering the authoritative pronouncements of Supreme Court. It was of the view that binding effect of such judgments of the Supreme Court, including that of in *Grasim Industries*, would not be lost merely because the Tribunal had another occasion to consider the issue or another shade of the same controversy. [*Hindalco Industries Ltd.* v. *Union*

of India - WP No. 9263 of 2014, decided on 8-12-2014, Bombay High Court]

Cenvat credit when final product subsequently exempted: Introduction of Rule 11(3) of the Cenvat Credit Rules, 2004 by Notification No. 10/2007-C.E. (N.T.), dated 1-3-2007 is not retrospective. Madras High Court while holding so noted that the amendment was clarified as coming into force immediately by circular bearing D.O. F. No. 334/1/2007-TRU, dated 28-2-2007. Impugned order of the Tribunal which had relied upon an earlier decision in the case of *Albert David Ltd.*, and had distinguished assessee's own case, was hence set aside by the court. [*Tractor and Farm Equipment Ltd.* v. *Commissioner* - C.M.A. No. 940 of 2007, decided on 28-11-2014, Madras High Court]

Export of exempted goods under bond – Notification No. 24/2010-C.E. (N.T.) restricting benefit is not retrospective: CESTAT Mumbai has held that amendment to Notification No. 42/2001-C.E. (N.T.) by Notification No. 24/2010-C.E. (N.T.) thereby denying benefit of export under bond/LUT to exempted goods, is not retrospective. The Tribunal in this regard held that since this amendment adversely affects the manufacturers, the same cannot be given retrospective effect. Further, in this case it was also held that Rule 11(3) of the Cenvat Credit Rules, 2004 would be applicable only if all the final products manufactured by the assessee become exempt. [*Also see Order in the case of Shree Baba Exports, reported in December 2014 issue of Tax Amicus*] [*Commissioner* v. *Sharp Menthol India Ltd.* – Final Order No. 54515-54516/2014-Ex(DB), dated 27-11-2014, CESTAT Delhi]

Export proceeds not realised - Cenvat refund and benefit of Excise Rule 19, not deniable: Refund of unutilized Cenvat credit under Rule 5 of the Cenvat Credit Rules, 2004 in case of exports, cannot be denied on ground of non-receipt of sale proceeds of export goods. The Tribunal in this regard noted that there is no such condition either in Rule 5 or in Notification No. 5/2006-C.E. (N.T.) issued under the said rule. [*P&P Overseas* v. *Commissioner* - Final Order No. 54440-54441/2014, dated 29-10-2014, CESTAT Delhi]

Similarly in another case pertaining to denial of benefit of export under bond under Rule 19 of the Central Excise Rules, 2002, it has been held that such benefit cannot be denied in case of non-receipt of export proceeds. In this case also, it was observed that Notification No. 42/2001-C.E. (N.T.) issued under Excise Rule 19 and said rule itself do not prescribe any such condition. It was held that the condition on receipt of export proceeds cannot be imposed to demand duty foregone in respect of the goods cleared for export under bond/LUT. [*Commissioner* v. *Shyam Telecom Ltd.* - Final Order No. 54434/2014, dated 28-10-2014, CESTAT Delhi]

Area based exemption - Non-filing of declaration is not suppression: Non-filing of declaration for the purpose of claiming area based exemption is not suppression of fact. CESTAT Delhi in this regard noted that registration of assessee under Finance Act, 1994 and carrying out activity as job worker proved its bonafide belief of non-

manufacture. It noted absence of intention to evade payment of duty and held that the assessee was not debarred from file the declaration before the authority. The Tribunal while remanding the matter for filing necessary declaration observed that holding otherwise would defeat the purpose of area based exemption. Earlier, the Tribunal found the activity of repacking and banding of soap cakes to be a manufacturing activity. [*Vasantham Enterprise* v. *Commissioner* – Final Order No. 54420, dated 12-11-2014, CESTAT Delhi]

Valuation - Biscuits sold to Municipal Corporation to be assessed under Section 4 and not 4A: Biscuits sold to Municipal Corporation of Delhi under National Programme of Nutritional Support of Primary Education under contract are assessable under Section 4 of Central Excise Act, 1944. While arriving at such conclusion CESTAT Delhi took note of the fact that wheat was supplied by MCD free of cost and uniform price was printed on packets irrespective of weight and hence was not as per the Standards of Weights & Measures (Packaged Commodities) Rules, 1977. It was also observed that the weight of the package was not according to the Packaged Commodities Rules and that sale to MCD qualified as sale to institutional buyer. [*Bajaj Food Products (P) Ltd.* v. *Commissioner* – Final Order No. 54503-54505/2014, dated 26-11-2014, CESTAT Delhi]

Stay orders to continue till disposal of appeals: CESTAT Ahmedabad has held that any stay order passed by the Tribunal which is in force after 7-8-2014, would continue till the appeals are disposed. It was held that there is no need to file any application for extension of such stay orders. The Tribunal in this regard noted that after the omission of provisos to Section 35C(2A) of Central Excise Act, 1944, by Finance (No. 2) Act, 2014, there is no provision for making any application for extension of stay nor Tribunal has powers for hearing and disposing applications for extension of stay from 7-8-2014. Gujarat High Court decision in the case of Krishna Processors was also relied upon by the Tribunal in this regard. [*Venketeshwara Filaments P. Ltd.* v. *Commissioner* – 2014 (310) ELT 749 (Tri.-Ahmd.)]

Refund – Pre-audit when not required: CESTAT Delhi has held that in the absence of any dispute about admissibility of refund, procedural aspect prescribed by the CBEC Circular No. 809/6/2005-CX, which is also not a requirement of law, cannot affect prejudicially assessee's case. The Tribunal in this regard noting that the department had no case on infirmity in sanction of refund, held that refund cannot be rejected on the ground that same was not pre-audited. [*Shyam Detergents* v. *Commissioner* – 2014 (310) ELT 799 (Tri.-Del.)]

Cenvat credit on inputs used in production of electricity transmitted to sister concern: CESTAT Delhi has allowed Cenvat credit on inputs used in generation of power transmitted to and used by the sister concern of the assessee. Observing absence of any finding to show that the power transmitted to the sister concern was used for the purpose other than manufacture, the Tribunal held Cenvat credit cannot be denied here. [*Hindustan Zinc Ltd.* v. *Commissioner* – Final Order No. 54457/2014, dated 7-11-2014]

SERVICE TAX

Ratio decidendi

Invoice in the name of head office - Credit admissibility to other unit when ISD registration absent: Cenvat credit of service tax was sought to be denied on clearing charges on the ground that the services were received by a unit which did not have registration as ISD and invoices issued by the CHA were in the name of the head office. On facts, there was no allegation that service had not been received by the unit. Reasoning that invoices issued by the CHA would naturally be in the name of the head office since clearance of goods through customs was centralised, the Tribunal held that credit was admissible. [*Inox Air Products* v. *Commissioner* – 2015-TIOL-08-CESTAT-MUM]

ISD registration not necessary to take credit for units within same compound: Units within the same compound, not registered separately do not need ISD registration to avail credit. At issue was the recovery of refund of Cenvat credit granted earlier on the ground that assessee should have taken registration as Input Service Distributor in order to avail credit in respect of units located in the same compound. Granting relief to the assessee, the Tribunal held that being within the same factory, ISD registration was not required for the units. [*Apotex Research* v. *Commissioner* – 2014-TIOL-2583-CESTAT-BANG]

Storing of goods by manufacturer post sale not necessarily storage service: Rent received towards storage tanks for gas supplied by appellant-sssessee is not taxable under storage and warehousing services. Agreeing with the assessee's contention that the essential test is provision of security, tracking, loading and unloading of goods in storage area, the Tribunal held that since goods have passed to the buyer, the assessee has no control over the goods i.e. gas sold by them. Also, being responsible for maintenance of tanks or insuring the tank did not put assessee in control of the goods. [*Inox Air Products* v. *Commissioner* – 2014-TIOL-2556-CESTAT-MUM]

Laying of pipelines in port area for transport of oil is not covered under port service: Laying of pipelines within the land and seabed under the control of port trust is not covered under port service. The department contended that the assessee was exigible to service tax for consideration received as 'wharfage' which was paid by the client who laid pipelines for transport of petroleum. Holding that the term merely referred to measure of compensation and not nature of service the Tribunal agreed with the assessee that pipelines below the seabed cannot be a structure to hold the same as a wharf and there was no loading or unloading of goods taking place. Thus, the impugned activity was not covered under port service. [*Commissioner* v. *Traffic Manager, Mumbai Port Trust* – 2014-TIOL-2548-CESTAT-MUM]

Pre-construction anti-termite treatment is not construction service: The assessee provided anti-termite treatment in the pre-construction stage and this was sought to be taxed under

commercial or industrial construction service or construction of complex service, since the main contractor carried out construction of buildings. The Tribunal held that the said activity was not part of construction service and the service rendered by the main contractor will not determine the nature of service rendered by the sub-contractor. The Tribunal also found force in the argument that the activity related to treatment of soil before foundation was made or floor was laid. [*Premier Pest Control P. Ltd* v. *Commissioner*, Final Order No. 54734 , dated 27-11-2014, CESTAT Delhi]

Fee collected at government notified rates not automatically statutory levy: Deciding on an application to modify the stay order, the Tribunal did not accept the contention that the impugned amount "adda fees" was statutory levy and hence not liable to tax. The Tribunal opined that merely because a certain fee was collected by the assessee who had contracted with a government agency to set up bus terminals, at a rate notified by the government it would not become a statutory levy. To be exempt as a compulsory exaction the fee must be remitted in entirety to government treasury. In the instant case, the fee was in nature of consideration for support services provided by the assessee. [*Rohan and Rajdeep Infrastructure* v. *Commissioner*, Misc Order No.54316 /2014, dated 28-11-2014, CESTAT Delhi]

Renting of immovable property to install towers – Cenvat credit admissible: The Tribunal held that renting of immovable property which had been provided to install towers was an input service for the assessee and hence credit was admissible. The department argued without success, that there was no nexus between renting of immovable property and installation of towers for boosting signals to provide output telecom service. [*Bharti Hexacom* v. *Commissioner*, Final Order No. 54443/2014, dated 7-11-2014, CESTAT Delhi]

Small service provider exemption when other's brand name used: Exemption under Notification No. 6/2005-S.T., meant for small service provider would be admissible when the recipient of the service is the brand name owner and services are not provided to any other person. In this case, the assessee was engaged in marketing of loan products of recipient (housing finance company) and was receiving commission. The brand name belonged to the housing finance company and exemption was sought to be denied on the ground that appellant was providing service using other's brand name which was not accepted by the Tribunal. [*Commissioner* v. *Loan Zone*, Final Order No. 54800/2014, dated 19-12-2014, CESTAT Delhi]

VALUE ADDED TAX (VAT)

Notifications & Circulars

Computer parts - Uttar Pradesh VAT amended: "Computer parts" have been added in Entry 22 of Schedule II-B of Uttar Pradesh VAT Act, 2008. Notification No. KA.NI.-2-1795/XI-9(86)/14-U.P.Act-5-2008-Order-(123)-2014 (with effect from 20th December, 2014) has been issued under the UP VAT provisions in this regard. It may be noted that goods covered under

Schedule II-B attract VAT at the rate of 5% (4% + 1% additional tax).

Entry tax on goods purchased through e-commerce in Assam: Notification has been issued under Section 9A of the Assam Entry Tax Act, 2008, providing for procedure for collection of entry tax on entry of specified goods into the local area of Assam from outside the State purchased online or through e-commerce. Notification No. CTS-62/2014/53 dated 23-12-2014 issued for the purpose provides that:

- Every transporter, courier, agent or any other person has to make online declaration of such consignment of goods before transporting for delivery to the buyers in the local area.
- Such transporter shall obtain registration and online login credentials to make such online declaration.
- Further, such transporter is also required to pay the entry tax on behalf of purchaser.
- Road permit for such transportation of goods purchased online meant for personal consumption or use will not be required on fulfilment of the other conditions of the said notification.

Ratio decidendi

Valuation – Deduction of discount from taxable turnover: Gujarat High Court has held that it is the final computed price alone, which the seller of petroleum products receives from the oil marketing companies, can form part of the taxable turnover. In this case ONGC, authorized to sell petroleum products to oil marketing companies at the price fixed by the Central Government, had undertaken sale of certain petroleum products to Indian Oil Corporation. Subsequently, as directed by the Government of India, it issued a credit note to IOC in respect of the said sale and claimed that discount given will not form part of the taxable turnover under the Gujarat Sales Tax Act, 1969. The question before the court was whether the amount of discount given was deductible from its taxable turnover.

The court placed reliance on the decision in the case of *GAIL India Ltd.* v. *State of M.P.,* (2014) 72 VST 161 (MP) and noted that in the case there was no prefixed price which as per the trade practice was reduced by a discount given by the seller to the purchaser. It was held that merely because precise computation of the price was deferred post sale (since it required taking into consideration complex economic and other factors), it would not mean that this was a case of waiver of the sale price by ONGC. It was also observed that price indicated at the time of supply was merely provisional, temporary, and *adhoc* and always subject to finalisation once the Government of India issued final directives on the rate of petroleum products. [*ONGC Ltd.* v. *State of Gujarat* - 2014-VIL-401-GUJ]

Phone charger is accessory and not part of cell phone: Supreme Court of India has held that cell phone charger is an accessory to the cell phone and is not an integral part of the cell phone. Answering the question as to whether the cell phone battery charger, sold alongwith the cell phone as a composite package, can be sold at the concessional rate applicable to cell phones and its parts under the Punjab

Value Added Tax Act, 2005, the Apex Court held that merely making a composite package of cell phone and charger would not make it composite good for the purpose of interpretation of the provisions. Further holding cell phone chargers as accessories to cell phone, it held that accessories of cell phones are not covered separately under any of the Schedules of the PVAT Act, and hence covered under the residuary Schedule F and chargeable at the rate of 12.5%. [*State of Punjab* v. *Nokia India Pvt. Ltd.* - 2014-VIL-23-SC]

Sale of used motor vehicles – Exemption under Delhi VAT: Sale consideration received on resale of used motor vehicle to third parties by dealers of different commodities is not includible in the taxable turnover for attracting liability under Delhi VAT provisions if conditions of Section 6(3) of DVAT Act are satisfied. The Delhi High Court while holding so looked into the definitions of the terms 'business', 'capital goods', non-creditable goods' and 'sale price' while discussing at length Section 6 and Section 9 of the DVAT Act. Drawing its attention to Section 6(3) relating to exemption from VAT, the court enlisted conditions required to claim benefit thereof. It was observed that for such exemption, there should be sale of capital goods, the said capital goods should have been used by the dealer from the time of purchase till sale, the capital goods should have been used for making sale of taxable goods or taxable and non-taxable goods, and the dealer should not have taken tax credit in respect of such capital goods under Section 9.

The court in this regard also held that the language used in the definition of capital goods under Section 2(f) as well as Section 9(1) is wide enough to cover the goods in question. Further, department's plea that to be eligible for exemption under Section 6(3), the assessee should have voluntarily not taken credit though eligible for it, was also rejected by the court. [*Anand Decors* v. *Commissioner* - 2015-01-VIL-DEL]