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

June 2013 / Issue–24

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June
2013

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Facilitation of cross-border services: Imprecision in the Place of Provision of Services Rules

By **Narendra Singhvi & Chetan Agrawal**

International transactions involving provision of services now revolve around the concept of place of provision of service. Service tax is imposed under Section 66B of the Finance Act, 1994 where the provision of service is from one person to another and the place of provision is in the taxable territory. The place of provision of a service is determinable in terms of the Place of Provision of Services Rules, 2012 ('POP Rules').

Cross-border provision of services generally entails the presence of an agent of the party located outside India. Such an agent is usually a subsidiary of the foreign principal which undertakes facilitation as well as provision of various services on behalf of the principal. Each such case involves provision of two independent supplies, i.e., one from the principal to the ultimate customer and another from the agent to the principal/ ultimate customer. This article focuses on the determination of the place of provision of the service provided by the agent to the principal in cross-border services.

The services provided by these agents are referred to as the intermediary services under the POP Rules. Any broker, agent or any other person, arranging or facilitating a provision of service ('the main service') between two or more persons, is called as intermediary provided such person does not provide the main service on his own account. In other words, the first supply is from the principal to the customer, called as the main supply and the second supply is from the intermediary to the principal. Thus, in order to fall under the ambit of Rule 9(c) of the POP Rules as an intermediary, a person should not provide the main service on his own account.

Further, the necessary implication of the definition of intermediary is that a person, who facilitates or arranges the supply of goods between two or more persons, does not qualify as an 'intermediary' and consequently, is not covered within the scope of Rule 9(c). However, these provisions are far from being simple as they seem. This situation is further complicated by the interpretation given by the department as set out in the Education Guide. Let us identify some of the issues emerging from the new provisions.

The use of words 'facilitates' and 'arranges' has, in one way, expanded the scope of application of Rule 9(c). What has been *excluded* from the definition is the person who provides the *main service on his own account.* In other words, where the intermediary provides the main service in the capacity of an agent of the principal, his service would *still be considered to be intermediary service*. Thus, 'facilitation' can even go upto providing whole of the main service by the intermediary himself, but in the capacity of an agent.

However, another view is also possible for construing the definition of intermediary. It is a cardinal principle of interpretation (*Noscitur-a-sociis*) that when the meaning of a provision is not clear, it shall take colour from the context in which it is used. In the definition of intermediary, the activity to be carried out by the person should

be in the nature of facilitation or arrangement. 'Facilitation' has to take colour from 'arrangement' and vice-versa. Thus, the meaning of 'facilitation' cannot be extended to cover those cases where the intermediary undertakes the main service itself, though in the capacity of an agent.

In another situation, the services provided by an agent by way of identifying customers and promoting the services of a foreign party were earlier taxable as business support services, falling under Category-3 of the erstwhile Export of Services Rules wherein such services were treated as export of services and not charged to service tax. However, under the new provisions, the service of facilitating the provision of services by the foreign principal to customers in India shall be treated as provided in the taxable territory, as the agent is located in the taxable territory.

The same services will now become chargeable to service tax and cannot be treated as export of services under Rule 6A of the Service Tax Rules, 1994 (this rule has been introduced to lay down the conditions for qualifying as export of service).

The new provisions have also caused confusion with respect to the international in-bound roaming services provided to subscribers of a foreign telecom service provider by the Indian telecom company. It is a settled position that these services are in the nature of telecom services. While the provision of these services was covered under Category-3 of the erstwhile Export of Services Rules wherein such services were treated as export of service and not charged to service tax, the place of provision of these services under the new provisions shall be India as these consist of facilitation of the main service from the foreign telecom company to its subscriber, making the Indian company an 'intermediary' within the meaning of Rule 9(c).

The explanation provided in the Education Guide for the services of estate agents also seems to be in contradiction to the statutory provisions contained in Rule 14. Rule 5 of the POP Rules governs the place of provision of services in relation to immovable properties and specifically includes services of estate agents. The Education Guide provides that since Rule 5 provides a specific description of 'estate agent', the same shall prevail. However, where the estate agents are engaged in arranging a service, say renting of immovable property, they will qualify to be 'intermediary' and fall under the scope of Rule 9(c). In such a case, the above clarification in the Education Guide appears to be in contradiction to the provisions of Rule 14 which provides that in case provision of service is *prima facie* determinable in terms of more than one rule, the later amongst them shall prevail, whereby Rule 9(c), as occurring later, should prevail.

The agents engaged in money transfer business receive money from the foreign service providers located outside India and in turn give them to the intended recipient in India. In such a case, the question arises as to the nature of their services. In other words, whether they are merely facilitating the provision of service from the foreign service provider or providing the main service on their own account.

Many multinational companies (MNCs) venturing in India have arrangements with Indian companies for setting up their plants etc., in the nature of works contracts. These arrangements are facilitated by the subsidiary companies of such MNCs. The rules are not clear in respect of their application to these situations as the Indian subsidiary, in such cases, would be involved in facilitating works contracts,

i.e. provision of services as well as supply of goods. In other words, the definition restricts itself only to those persons who facilitate the provision of services. It leads to an ambiguity regarding the place of provision of services provided by such person, i.e., whether he can be considered to be an intermediary or not.

The above issues clearly imply that the cross-border services entailing presence of an intermediary may suffer service tax unnecessarily. Considering the same, the provisions need more clarity in terms of their application to persons facilitating cross-border services in one respect or other. Moreover, the clarification is also desirable in view of the unnecessary litigation likely to arise due to such vague provisions and the Education Guide.

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CUSTOMS

Notifications & Circulars

Tablet Computers – Classification of: Tablet computers are classifiable under sub-heading 8471 30 as automatic data processing machine and not under Heading 8517 of the Customs Tariff as telephone. CBEC Circular No. 20/2013-Cus., dated 14-5-2013 notes that machines commercially referred to as "Tablet Computers" are capable of processing data and executing programs, and can connect to the internet for exchanging e-mails and downloading files and can be programmed in different ways. The circular, therefore, holds that the functioning of tablets as data processing machine is the 'main function' whereas the mobile phone calling feature is only a supplementary one and further such use as phone requires a headset. Rules 1 and 6 of Interpretative Rules read with Note 3 to Section XVI and Note 5 (A) to Chapter 84 have been relied upon in arriving at the said conclusion.

Oil exploration – Clarification on exemption to imports: Central Board of Excise and Customs has clarified certain issues relating to availability of exemption on certain products for the oil exploration sector. Circular No. 21/2013-Cus., dated 14-5-2013 clarifies that:

1. Imported goods can be diverted from one eligible project to another without payment of duty on the basis of Essentiality Certificate (EC) issued by DG, Hydrocarbons;
2. Execution of a 're-export bond' shall not be insisted upon at the time of clearance of goods under Notification No. 12/2012-Cus.;
3. Individual member companies constituting a consortium are eligible to import goods under the aforesaid exemption even though the contract has been signed by the consortium subject to the condition that the EC includes their names;
4. Sub-contractors can also make duty free imports based on EC even if their names do not appear in the agreement between the contractor and Government of India.

Export of goods imported against freely convertible currency: Export of goods earlier imported against payment in freely convertible

currency has now been allowed against payment in Indian Rupees also. DGFT Notification No. 16 (RE 2013)/2009-2014, dated 6-6-2013 issued in this regard amends Para 2.33(b) of the Foreign Trade Policy. This facility would however be available on export to countries notified by DGFT in this behalf and would be subject to value addition of at least 15%.

Deemed export benefits for supplies to projects enjoying zero customs duty - Clarifications: DGFT has clarified on deemed export benefits available to supplies made under Para 8.2(f) of the FTP. Policy Circular No. 1(RE 2013)/2009-2014, dated 29-5-2013 issued in this regard states that:

1. Deemed export benefit is not available for supplies to non-mega power projects;
2. Para 8.2(f)(i) and Para 8.2(f)(ii) of FTP are in continuation and hence to be read in conjunction. Para 8.2(f) (ii) of FTP lays down conditions in respect of supplies covered under para 8.2(f)(i) of FTP;
3. Except for supplies made to mega power projects, deemed export benefits under para 8.2(f) are available only if supplies are under ICB;

Supplies under ICB are exempted from payment of TED. In other cases such supplies are eligible for refund of TED under Para 8.3(c) of the FTP.

Disposable Sterlized Dialyzer & Microbarrier for filtering blood – Classification of: CBEC has clarified that Disposable Sterlized Dialyzer & Microbarrier shall be classifiable under Heading 8421 and not under Heading 9018 of the Customs Tariff Act, 1975. Circular No. 19/2013-Cus., dated 9-5-2013 issued in this regard observes that Chapter Note 2(b) to Chapter 90 stating that parts of goods classifiable under 9018 shall be classified with the same product, is applicable only if the products are not otherwise covered under Chapter 84, 85, 90 and 91 of CTA [as per Chapter Note 2(a) to Chapter 90]. As Disposable Sterlized Dialyzer & Microbarrier act as filters, it is clarified that the same shall be classifiable under Heading 8421 which covers 'filtering or purifying machinery and apparatus for liquids'.

Customs valuation databases not to be used for reference prices :

The World Customs Organisation (WCO) has recommended that its members use customs valuation databases as a risk management and analysis tool and not use them to set minimum values for the purposes of customs valuation. As per communication received from the Chairman of the Technical Committee on Customs Valuation, International Chamber of Commerce (ICC) has expressed concern about misuse of customs valuation databases by the members when they use them to set minimum values or reference prices. This communication dated 15-5-2013 also notes that customs valuation databases are not an essential component of customs valuation control programme for those administrations that have developed programmes which principally use post-clearance audits based on the profiling of importers. The matter will be brought to the attention of the Technical Committee on Customs Valuation at its October, 2013 session.

Ratio decidendi

Import of second-hand multi-function printing and copying machine - No conflict between Para 2.17 of FTP and Para 2.33 of HBP: Madras High Court has held that except

for those specifically mentioned restricted category of second hand capital goods, which are not freely importable, all other second hand capital goods including other enumerated restricted category of second hand capital goods as per Para 2.17 of the FTP are permitted free import. The court hence rejected the contentions of the department that there is conflict between Para 2.17 of FTP and Para 2.33 of the HBP as Para 2.17 of the Foreign Trade Policy states that 'second-hand multi-function printer' along with some other goods are under 'restricted' category whereas Para 2.33 of the HBP provides the procedure on import of second hand capital goods, not specifically covering multi-function printing and copying machine. [*Commissioner* v. *City Office Equipment* - 2013-TIOL-359-HC-MAD-CUS]

Cross-examination in adjudication proceedings: Delhi High Court has held that opportunity of cross-examining the persons who made statements ought to be given to the assessee, except in situations specified under Section 138B of the Customs Act, 1962. Earlier, the Commissioner of Customs had rejected the request of cross-examination on the understanding that noticees have no right to cross examine witnesses and officers of customs in adjudication proceedings. [*Basudev Garg* v. *Commissioner* - 2013-TIOL-464-HC-DEL-CUS]

'Stock transfer' from SEZ to DTA – SAD exemption available: Advance Ruling Authority has held that exemption under Notification No. 45/2005-Cus., is available to the goods cleared from the SEZ to the DTA unit on stock transfer basis. Applicant in this case would import and store parts of 'Wind Operated Electricity Generator' in its FTWZ Unit and thereafter clear the same to its DTA unit on payment of applicable customs duties under Section 30 of the SEZ Act, 2005. The applicant wanted to know whether in such situation, it can avail benefit of Notification No. 45/2005-Cus. which exempts payment of Special Additional Duty (SAD) on clearance of goods from SEZ to DTA if VAT/Sales Tax is not exempt on such goods. It was held that 'stock transfer' is distinct from 'sale' as two persons are not involved because such stock transfer is between two units of the same legal entity. It was held that in such factual scenario, the applicant would be entitled to exemption from payment of SAD. [*GE India Industrial Pvt. Ltd.* - 2013-TIOL-01-ARA-CUS]

EPCG Scheme benefit not available if tariff heading of imported goods does not match with that mentioned in authorization: In this case, EPCG licence issued to the importer specified tariff heading 8437. However, goods imported by the importer were classifiable under tariff heading 7309. Customs sought to deny the exemption on this ground. It was contended by the appellant that the imported goods satisfy the description mentioned in the EPCG licence. However the Tribunal held that mentioning of ITC HS code in licences issued by DGFT is not a formality but a legal necessity as ITC HS code aligns the import policy with the HSN code which is the basis for customs classification and the intention behind specifying the codes in such licences is to have clarity and certainty with regard to both levy of customs duty and the importability and/or exportability of the goods. Denial of EPCG benefit was upheld by the Tribunal on the above ground. [*KGN Enterprises Ltd* v. *Commissioner* - 2013-TIOL-712-CESTAT-MUM]

CENTRAL EXCISE

Notifications

Duty free shops - Exemption on removal of goods thereto: Notification No. 19/2013-C.E., dated 23-5-2013 has been issued by CBEC exempting goods cleared to duty free shops located in arrival terminals of international airports. Notification No. 145/89-C.E., granting such exemption to only specified goods of Chapter 85, has been rescinded. Procedure to be followed by a manufacturer has been specified under Circular No. 970/4/2013-CX, dated 23-5-2013. Further, through Notification No. 7/2013-C.E. (N.T.), dated 23-5-2013, facility under Rule 20 of the Central Excise Rules, 2002, relating to removal of goods without payment of duty to export warehouses, has been extended to duty free shops located in departure or arrival terminals of international airports.

Ratio decidendi

Refund of interest – Unjust enrichment not applicable: CESTAT, Mumbai has held that unjust enrichment is not applicable to refund of interest paid in excess as the provisions of Section 12(b) of the Central Excise Act, 1944 make it clear that bar of unjust enrichment is applicable to duty only and not to interest. The Tribunal also observed that the Department had failed to prove recovery of excess interest paid on supplementary invoice, from the customers. [*AMJ Corporation* v. *Commissioner* – 2013 (291) ELT 563 (Tri. – Mumbai)]

Cenvat credit utilization by units availing area based exemption: An assessee claiming benefit of area based exemption (Notification No. 56/2002-C.E.) cannot utilize Cenvat credit of basic excise duty for payment of education cesses. CESTAT, New Delhi has held that even though such a restriction has not been added in the Cenvat Credit Rules, 2004, if such adjustment is allowed, the same would defeat the purpose of the notification, as it would lead to less Cenvat credit being utilized for payment of basic excise duty, and eventually higher refund of basic excise duty. [*Commissioner* v. *Tai Chemical Industries* - 2013 (290) ELT 734 (Tri-Del)]

Cenvat credit – Suo motu re-credit when admissible: CESTAT, Ahmedabad has allowed *suo-motu* re-credit of the amount mistakenly reversed on inputs used in manufacture of final products exported under bond. The Tribunal in this case observed that the decision of *BDH Industries Ltd.* [2008 (229) ELT 364 (Tri.-LB)] is contrary to the decision of the decision of Karnataka High Court in the case of *Motorola India Pvt. Ltd.* [2006 (206) ELT 90 (Kar.)] and therefore has no binding effect. The Karnataka High Court in the said case had held that an assessee would be eligible to avail *suo-motu* credit of the duty mistakenly paid. [*Sopariwala Exports Pvt. Ltd.* v. *Commissioner* - 2013 (291) ELT 70 (Tri-Ahmd.)]

Registration of manufacturer having 8 to 10 workers: Registration cannot be denied to a manufacturer of cigarettes even in the absence of industrial license under Industrial (Development and Regulation) Act, 1951. CESTAT, Delhi in this case observed that none of the notification issued under Rule 9 of the Central Excise Rules, 2002 prescribe any condition of possession of license under IRDA by Ministry of Commerce. It was also noted that letter from Ministry of Commerce and Industry that units having less than 50/100 workers with/without power do not come under the purview of definition of factory and hence are beyond application of IRDA. [*Commissioner* v. *Sidhdida Tobacco Co.* – 2013 (291) ELT 367 (Tri. – Del.)]

Cenvat credit on capital goods – Balance 50% credit when final product exempted: CESTAT. New Delhi has held that remaining 50% Cenvat credit on the capital goods received at the time when the final product was dutiable cannot be denied when the goods became exempted in the subsequent year. The Tribunal relied upon Larger Bench decision in the case of *Spenta International Ltd.* while also observed that there is no condition provided in Rule 4(2)(b) of the Cenvat Credit Rules, 2004 that the remaining credit is available only when the capital goods are used in manufacture of dutiable goods. [*Commissioner* v. *Backwell Agro Ltd.* – 2013 (291) ELT 365 (Tri. – Del.)]

Rate of interest as on date of default, applicable: Andhra Pradesh High Court has held that rate of interest prevailing as on date of default will be taken for calculation of interest on delayed payment, and new rate introduced vide amendment will be applicable only on defaults made after such amendment. The High Court in this case concurred with the views of Commissioner (Appeals) and the Tribunal. [*Commissioner* v. *Priyadarshni Cements Ltd.* - 2013 (292) ELT 30 (A.P.)]

SERVICE TAX

Notifications & Circulars

Service Tax Voluntary Compliance Encouragement Rules, 2013 notified: The amnesty scheme 'Voluntary Compliance Encouragement Scheme' or VCES announced in the Budget 2013 has been implemented by issuing Notification No. 10/2013-ST, dated 13-5-2013. The Service Tax Voluntary Compliance Encouragement Rules, 2013 and instructions provide:

- Any person, who wishes to make a declaration under VCES shall take registration under service tax provisions, if not already registered.
- The declaration in respect of tax dues shall be made in Form VCES -1.
- The tax dues may be computed separately for each service if the tax dues relate to more than one service during the period of declaration.
- The tax dues payable under VCES along with interest, if any, shall be paid in the manner prescribed for the payment of service tax under the Service Tax Rules, 1994. Cenvat credit shall not be utilized for payment of tax dues under the scheme.

Further, the CBEC vide Circular No. 169/4/2013-ST, dated 13-5-2013 has clarified the scope and applicability of the scheme which has come into effect on enactment of the Finance Act, 2013 on 10-5-2013. The circular provides:

- Under VCES, besides interest and penalty, the declarant shall get immunity from any other proceedings under the Act such as late fee/ penalty for non filing or delayed filing of return or delay in taking registration.
- Assessee to whom show cause notice (SCN) or adjudication order has been issued can also file declaration in respect of those tax dues which are neither covered by such SCN or such order issued or made before 1-3-2013 nor by the SCN or order issued or made subsequently which pertains to the same issue.
- Section 106(2)(a)(iii) of the Finance Act, 2013 providing for rejection of declaration if the same is made by a person against whom an inquiry or investigation has been initiated shall be attracted only in such cases where accounts, documents or other evidences are requisitioned

by the authorized officer from the declarant and not for any other communication from the department.

Ratio decidendi

Direct expenditure not to be added to professional fee: Service tax was sought to be collected on amounts towards reimbursement of expenses as well as certain expenditure incurred by the assessee. The High Court of Delhi, granting waiver of pre-deposit held that direct expenditure incurred by the assessee can never be added to the professional fees charged and paid by clients, on which service tax had been collected and paid. Further, even if reimbursed expenditure was to be taxed, only actual receipts by the assesee can be subject matter of levy of service tax. [*Sercon India* v. *Commissioner,* 2013 (30) S.T.R. 454 (Del.)]

No distribution of Cenvat credit without registration as ISD: Emphasising that the registration as Input Service Distributor (ISD) is essential to distribute credit, the Tribunal upheld the department's stand that an assessee cannot take credit on the basis of invoice issued to its corporate office when such corporate office does not have an ISD registration. In the instant case, the manufacturing unit of the assessee sought to utlilise credit on banking and financial services used by the corporate office. It argued, without success that since services were actually used and had nexus with manufacturing activity, non-registration as ISD was only a procedural deficiency and credit should not be denied. The Tribunal also noted that special provisions like those related to ISD must prevail over general provisions. [*Mangalore Refinery & Petrochemicals* v. *Commissioner,* 2013 (30) S.T.R. 475 (Tri. - Bang)].

Credit in bank statement cannot be held to be consideration: In a dispute as regards value of services, the Tribunal held that the entire money found in the bank's statement cannot be held to be consideration for services. The appellant had paid service tax on rent-a-cab services provided but the department sought to collect tax on the total amount of credit in the bank account of the assessee. However no evidence of service rendered was adduced by the department in respect of certain amount which the assessee claimed to be personal transactions. [*Batra Motors & Travels* v. *Commissioner,* 2013 (30) S.T.R. 478 (Tri. - Del.)].

Renting of immovable property for display of final product – Credit admissible: Reiterating that every limb of the definition of input service can confer an independent benefit, the Tribunal held that renting of property to facilitate display of tiles manufactured, would qualify as an input service. On facts, the appellant also proved that the said charges had been included as selling and distribution overhead and thus entered the final value of products manufactured. [*Oracle Granito Ltd* v. *Commissioner,* 2013 (30) S.T.R. 357 (Tri. - Ahmd.)]

Departmental clarification cannot restrict statutory exemption: CESTAT Delhi upheld the appellant's contention that sale of course material to students would qualify for exclusion from value of coaching and commercial training services rendered by it. The department contended that as per the CBEC Circular No. 59/8/2003-ST dated 20-6-2003 exclusion would apply only to standard priced textbooks. However, the Tribunal held that the generality and plenitude of statutory exemption cannot be restricted by the Board. [*Aadishwar Motors (P) ltd* v. *CST,* 2013-TIOL-798-CESTAT-AHM]

Supply of bullock carts alone not taxable under STGU: Right of possession and effective control does not rest with the service provider when bullock carts are rented without bullocks or any person to drive the cart. The Tribunal therefore held that mere renting of bullock carts will not come under the purview of 'Supply of tangible goods for use' services. [*Bhima SSK Ltd* v. *Commissioner,* 2013–TIOL–775–CESTAT–MUM]

Commercial Training or Coaching Service - Degree should be 'approved by law' not necessarily conferred by statute: The Court was dealing with a question as to whether Flight Training Institutes providing training for obtaining CPL or other licenses from DGCA can be considered to be engaged in Commercial Training and Coaching services. The scope of these services excluded 'training centres or establishments issuing any certificate or diploma or degree or any educational qualification recognized by law'. The Court held that 'recognized by law' is different from 'conferred by law or statute'. This expression has a wide scope whereby the same would include any certificate/degree/diploma/qualification which has approval of some kind in 'law', though not necessarily a product of a statute. The recognition of the said training in the Aircraft Rules, 1937 and the Civil Aviation Requirements (CAR) issued by the DGCA is sufficient to establish that the same is recognized by law and thus is not a taxable service. [*Indian Institute of Aircraft Engineering* v. *Union of India*, 2013-TIOL-430-HC-DEL-ST]

Franchise service – Manufacture without transfer of representational rights not covered: The Tribunal held that in agreement between the appellant owner of various brands of IMFL and the contract bottling unit (CBU), no right is transferred to the CBU to use the intellectual property right over the brands. The commercial interest of the CBU is to earn profits from the activity of bottling or manufacturing alcoholic beverages. In such a case, it cannot be said that there was provision of any franchise services. [*Diageo India Private Limited* v. *Commissioner of Central Excise*, 2013-TIOL-790-CESTAT-MUM]

Tax liability - Even part of government liable on providing taxable services: The Tribunal held that though Indian Railways is a part of the Union Government, it is liable to pay service tax on activities undertaken as the same fall within the definition of taxable services. The contention that prior to the amendment by Finance Act, 2012 defining person under Section 65 B (37) so as to include the government, there was no definition and hence Railways is not liable was not accepted by the Tribunal. [*Central Railway* v. *Commissioner of Central Excise,* 2013-TIOL-575-CESTAT-MUM]

VALUE ADDED TAX (VAT)

Notifications

VAT on Horticulture Contracts - Ruling under Section 85 of DVAT Act, 2004: The VATO (Special Zone), Department of Trade and Taxes, had filed an application under Section 85 of the DVAT Act, 2004, seeking clarification/ruling on "Whether VAT is applicable on horticulture composite contracts wherein goods involved/used for execution of such works contract are covered under Schedule I of the DVAT Act, 2004 and are exempted from levy of VAT?" While explaining the

nature of transaction, the applicant in his application had stated that many departments/organizations/companies award horticulture contracts which may include development of lawns/parks/roadsides and their maintenance.

It was decided that if the contract given is composite in nature, then the said transactions are covered under the definition of works contract. Notification dated 29-4-2013 by Commissioner of VAT states that the rate of tax in respect of the goods involved in the execution of all types of works contracts, irrespective of the fact under which schedule such goods are covered, are taxable @ 12.5% under Section 4(1)(d) of the DVAT Act, 2004 but, the declared goods used in the same form are taxable @ 5% with effect from 1st October, 2011. Further, the ruling has been given effect from 1-4-2005.

Inadmissibility of set-off in respect of purchase of motor vehicle in Maharashtra: Input tax credit under Maharashtra VAT available on purchases of motor vehicles (being passenger vehicles) if the claimant dealer is engaged in the business of transferring the right to use the said vehicle is not available with effect from 1st May, 2013. By Notification No. VAT 1513/ CR 61/ Taxation-1, dated 21st May, 2013, Rule 54 of the Maharashtra Value Added Tax Rules, 2005, which provides for non-admissibility of set-off in certain cases, has been amended with effect from 1st May, 2013. The amendment deletes the words and brackets *"unless the claimant dealer is engaged in the business of transferring the right to use (whether or not for a specified period) for any purpose, in respect of the said vehicles"* from Rule 54(a).

Entry Tax on Iron and Steel in UP reduced: Rate of Entry Tax on 'iron and steel as defined under Section 14 of the Central Sales Tax, 1956 excluding certain goods' has been reduced to 1%. By Notification No. KA.NI.-2-643/XI-9(66)/2012-U.P.Act-30-07-Order-(94)-2013 Lucknow, dated 16th May, 2013, issued under Section 4 of the Uttar Pradesh Tax on Entry of Goods into Local Areas Act, 2007, an earlier notification dated 29th September, 2008 has been amended with effect from 17th May, 2013.

Entry tax rebate in respect of iron and steel – Notification rescinded in UP: By Notification No. KA.NI.-2-604/X1-9(66)/2012-U.P.Act-30-07-Order-(93)-2013 Lucknow, dated 16th May 2013, an earlier notification dated 31st March, 2011 providing for rebate of entry tax payable under the Uttar Pradesh Tax on Entry of Goods into Local Areas Act, 2007, to the extent of VAT paid under UP VAT Act, 2008 on sale or purchase of iron and steel as defined under Section 14 of the Central Sales Tax Act, 1956, has been rescinded. The same is effective 17th May, 2013.

Ratio decidendi

Pre-deposit under DVAT for period prior to introduction of provisions: For period prior to 1-10-2011, the Commissioner cannot insist upon a deposit as a condition for entertaining objection under Section 74 of Delhi VAT Act, 2004. It is only after such date that the Commissioner could, direct the dealer to deposit such an amount. The Special Commissioner in this case had invoked the provisions of the 3rd proviso to section 74(1) of the DVAT Act, 2004 to direct pre-deposit while the said 3rd proviso was introduced with effect from 1-10-2011 and the relevant period in the case was financial years 2010-11 and 2008-09. The petitioner had contended that the 3rd proviso to section 74(1) did not exist on the statute book during the relevant

period and that their right to file objections was a substantive right which was more or less like the right to file an appeal. However, the department had contended that since the default assessment orders had been made after the amendment and, consequently, the objections had also been filed after the amendment had been introduced, the 3rd proviso to section 74(1) would be clearly applicable. The Delhi High Court held that a plain reading of section 35 would indicate that as a normal rule, the Commissioner is not to enforce the payment of any amount in dispute under an assessment until the objections, if preferred, are resolved by him. It was noted that Section 74 provides for making objections and the 3rd proviso to section 74(1) was introduced with effect from 1-10-2011, hence, prior to 1-10-2011, the Commissioner could not have insisted upon a deposit. It was also observed that the said provisions were not expressly made retrospective. It was also noted that since returns had been filed much prior to the introduction of the 3rd proviso, the Commissioner could not have invoked that proviso. [*Bajaj Overseas Impex* v. *Special Commissioner* - 2013-VIL-38-DEL]

UP Entry tax not imposable on local sales: Allahabad High Court has held that entry tax under the Uttar Pradesh Tax on Entry of Goods into Local Areas Act, 2007 is leviable only on entry of goods into a local area from outside such area, hence, in case a person or dealer who is situated within the local area of Mawana purchases sugar from the manufacturing unit of the petitioner company at Mawana then such a sale will not attract entry tax. The petitioner in this case sold non-levy sugar to dealers of the same local area but did not collect and deposit entry tax under Section 12 of said provisions requiring the manufacturer to collect tax from purchaser of the goods. As regards such obligation of the manufacturer irrespective of the fact that the sale in question has been made within the same local area and hence is not chargeable to entry tax under the Act, the High Court held that Section 12 does not have a universal application, it neither applies to all sale transactions, without exception, nor extends the liability of entry tax to a manufacturer and will not apply to sales made within the same local area. It was noted that liability continues to be of the person/dealer who intends to bring goods into a local area for consumption, use or sale therein and that Section 12 is only machinery provided to facilitate collection of entry tax. [*Mawana Sugars Ltd.* v. *Deputy Commissioner, Commercial Taxes* - 2013-VIL-40-ALH]

INCOME TAX

Notification

TDS on payment received for transfer of certain immovable property: CBDT by Notification No. 39 dated 31-5-2013 has amended Rules 30, 31 and 31A and new Form 16B and Form 26QB have been inserted to facilitate the procedure relating to deposit of TDS and furnishing of information relating to TDS on payment made for transfer of certain immovable property. Form 26Q has also been revised to incorporate columns relating to surcharge.

Ratio decidendi

'*Due date*' in Section 36(1)(va) for crediting PF amount should be read to mean '*due date*' for filing ROI: The assessee collected employees' Provident Fund (PF) contribution for payment to the PF authorities. However, the amount was not paid to the PF authorities within the '*due date*' specified in the PF Act though it was paid before the due date of filing the Return of Income (ROI). The AO did not allow a deduction under Section 36(1)(va) on the ground that the amounts were not paid within the prescribed '*due date*'. On these facts, the High Court held that, the '*due date*' referred to in Section 36(1)(va) must be read in conjunction with Section 43B(b) to mean the '*due date*' of filing the ROI. [*CIT* v. *Kichha Sugar Company Ltd.* ITA No. 50/2009 (Uttarakhand), Order dated 20-05-2013]

No penalty under Section 271(1)(c) for not offering capital gains on stamp duty value: The assessee sold property for a consideration of Rs. 2.50 crores. However, for the purpose of stamp duty, the property was valued at Rs. 5.19 crores. The assessee offered capital gains on the basis that the sale consideration was Rs. 2.50 crores but the Assessing Officer proposed additions based on the valuation for stamp duty. The High Court, granting relief to the assessee, held that deemed consideration cannot be a basis for computation and there is no concealment of income when the entire amount received has been offered to tax. [*CIT* v. *Madan Theatres,* ITA No. 62 of 2013 (Calcutta), Order dated 14-5-2013]

Taxation of foreign firms & concept of '*force of attraction*' explained: The assessee, a U.K. partnership firm of solicitors, provided legal consultancy services in connection with different projects in India and claimed taxability of income under Article 15 of the India-UK DTAA (presence in India through partner and employees exceeding 90 days). The AO rejected the claim on applicability of Article 15 and held that as the assessee had a PE in India as per Article 5 and as the services had been rendered in India, the entire income was chargeable to tax in India under Article 7. The Special Bench held that, the services provided by the foreign entity outside India is not taxable under Income-tax Act, 1961 (the Act) in spite of retrospective amendment to Section 9 of the Act, and on applicability of 'force of attraction' principles, it was held that the provisions under the UN Model Conventions are different from the provisions of Article 7(1) read with Article 7(3) of the India-UK tax treaty. Article 7(3) of the India-UK tax treaty clearly explains the scope and ambit of the profits indirectly attributable to the PE, therefore, force of attraction principle would not be applicable to India-UK tax treaty. [*ADIT* v. *Clifford Chance,* 33 taxmann.com 200 (Mum – Trib.) (SB), Order dated 13-5-2013]

Transaction not determined by AE is not an 'international transaction': The assessee, a wholly owned subsidiary of a US based company, manufactured and supplied equipment directly to Indian customers under warranty. Assessee booked orders for its parent company (AE) for which commission was received. It also rendered services under its AE's warranty and both these transactions were 'international transactions' with the AE and subject to transfer pricing regulations. The assessee also undertook installation of the said equipment and provided annual maintenance, which being

an independent transaction was not treated as an international transaction by the assessee. The said treatment was rejected by the TPO. On these facts, the High Court held that the installation/ commissioning and maintenance agreements were independent agreements unconnected with the transactions of warranty support services and commission income and that there was no finding that the terms of transaction of installation and maintenance had been determined in substance between the customers and assessee by the AE. Therefore, the said transaction was held as not an international transaction. [*CIT* v. *Stratex Net Works (India) (P.) Ltd.* 33 taxmann.com 168 (Delhi)]

Deduction cannot be claimed when amount neither paid nor credited: The assessee incurred expenditure on which TDS was required to be deducted but did not deduct the same. The expenditure was disallowed under Section 40(a)(ia). On these facts the High Court held, reversing the Special Bench decision, that the key words in Section 40(a)(ia) are *"on which tax is deductible at source under Chapter XVII–B"* and the same made it clear that it applied to all expenses. According to the court, if an amount has neither been paid nor credited, deduction cannot be claimed. [*CIT* v. *Crescent Export Syndicate,* ITAT No. 20 of 2013(Calcutta), Order dated 3-4-2013]