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Contents

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Article

Budget 2015 & supplies to ICB projects – Certain issues

By **Deepak Suneja**

Supplies against International Competitive Bidding (ICB) have been on the rise with several specified projects being awarded in the recent times. In Union Budget, 2015 itself, five ultra Mega Power Projects have been announced. Considering the importance of these projects and their contribution towards economic growth, the Government has given several concessions for supplies to such projects, including benefits of deemed exports under Foreign Trade Policy, customs exemption on import of goods for the projects and also excise exemption on procurement of goods for the projects from the domestic market.

However, availment of excise duty exemption by the domestic manufacturers has remained a matter of dispute and various cases are pending before different Appellate Fora. One such issue is whether the exemption will be available to the sub-contractor, where the sub-contractor has not participated in the ICB process. The Government is trying to simplify the matter so that some clarity exists in the mind of the domestic manufacturers acting as sub-Contractors and supplying goods to contractors for projects awarded through ICB. An effort in this regard was made by the Government by issuing a clarification in Budget, 2014-15 stating that exemption under S. No. 336 of Notification No. 12/2012-CE is also available to sub-contractors for manufacture and supply of goods for or on behalf of the main contractor who has won the bid for the project through ICB.

The latest amendment by Notification No. 12/2015-C.E., dated 1-3-2015, in the condition to Notification No. 12/2012-CE dated 17.3.2012 ("Notification No. 12/2012-CE") is another step in this direction. However, a closer scrutiny is required to analyze whether the amendment will result in reduction of the disputes or will further complicate the law for the domestic manufacturers.

A brief background

Notification No. 12/2012-CE provides exemption from payment of central excise duty to all goods supplied against ICB and classifiable under 'Any Chapter' of the Excise Tariff, subject to the condition that the goods when imported into India are exempted from Basic Customs Duty (BCD) and Countervailing Duty (CVD). However, a proviso to the condition has been inserted as follows: *"Provided that if the goods when imported into India are so exempt from the said duties of customs subject to certain conditions prescribed under a notification issued under the Customs Act, 1962, then such conditions shall, mutatis mutandis, apply for the purposes of this exemption"*. To illustrate, let us see some of the conditions as specified in the Customs Notification. With respect to S. No. 507 of Notification No. 12/2012-Cus, a certificate from the Power Ministry is required to certify that power purchasing States shall carry out distribution reforms and regulatory commission constituted to fix tariff. Similarly, a

certificate from Directorate General of Hydro Carbons in the Ministry of Petroleum and Natural Gas to the effect that the imported goods are required for petroleum operations is required under S. No. 41 of Notification No. 12/2012-Cus. Sub-contractors often faced difficulties in getting the certificate from the ministries.

In the past, the Department raised disputes as to whether the manufacturer is required to satisfy all the conditions specified in the Customs Exemption Notifications. The confusion persisted for long before the matter reached the Tribunal in the case of *Kent Introl Pvt. Ltd.,* 2014-TIOL-211-CESTAT-Mum. In this case, the Tribunal held that for the purpose of exemption under excise notification, as long as the name of the assessee figures as a sub-contractor in Project Authority Certificate (PAC) and supplies are made in respect of contract awarded under ICB, the goods would be considered as supplied against ICB. The corresponding condition under Customs Notification, which required essentiality certificate from the Directorate General of Hydro Carbons (DGHC), was held as inapplicable to domestic suppliers. Accordingly, benefit of excise exemption was allowed to the Appellant. The above view was reiterated by the Tribunal in *Unique Industrial Handlers Pvt. Ltd.* 2014-TIOL-408-CESTAT-Mum.

Effect of the amendment

Government has brought an amendment that the conditions of the customs notification will be *mutatis mutandis* applicable to domestic supplies also. The intention of the Government behind the amendment seems to bring domestic suppliers at par with the importers. However, the supplies under projects awarded under ICB usually have long gestation periods and clearances are made over several months. Thus, the amendment will have adverse impact on the manufacturers who have accepted orders and started manufacturing goods or made part dispatches without obtaining certificates required under Customs Notification in light of the Tribunal decisions. Such manufacturers will now have to pay excise duty on their clearance.

It is hoped that no one interprets the amended condition to state that where the Customs Notification exempts goods falling under Chapter Heading 9801, the goods being supplied by the domestic manufacturers will now have to be classified under Chapter Heading 9801 and the domestic manufacturers would have to be registered with Project Import Regulations, 1986. Such a view is unwarranted as there is no Chapter Heading 9801 under the Excise Tariff. In case the abovementioned interpretation is adopted by the Department, the disputes on domestic supplies will be endless and no domestic supplier will be able to claim exemption under excise law. The domestic manufactures may place reliance on the words *"mutatis mutandis"* in the proviso to the condition to state that only the conditions which can be fulfilled by the domestic manufacturers will be borrowed.

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Budget 2015 Changes - Articles authored by us

- *Non-excisable goods - Rule 6 of CCR, 2004 amended - cogent or superfluous?* – By K.Prathiba & Shivam Mehta ,Lakshmikumaran & Sridharan, Delhi
- *Amendment in Rule 14 of CCR, 2004 - A new dilemma for the taxpayers* – By Kabir Rishi & Shivam Mehta, Lakshmikumaran & Sridharan, Delhi
- *An Aggregator & Cenvat credit-ill-equipped rules* – By Nupoor Agrawal, Lakshmikumaran & Sridharan, Mumbai
- *Refund on deemed exports - MoF and MoC point finger at each other* – By Kalirajan, Lakshmikumaran & Sridharan, Bangalore
- *Rule 6 of CCR, 2004 - New explanation to create new complications* – By Jagannadh Grandhi, Lakshmikumaran & Sridharan, Hyderabad
- *Rationalization of abatements for transportation- Impact on logistics sector* – By Geetika Srivastav, Lakshmikumaran & Sridharan, Delhi
- *Chargeability of Service Tax on reimbursable expenditure* – By Sonal Singh, Lakshmikumaran & Sridharan, Hyderabad
- *ST - Section 73(1B) - Beware before you declare!* – By Zubin J F Poovathinkal, Lakshmikumaran & Sridharan, Hyderabad
- *Service tax no longer entertains or amuses assessees* – By Sushma Prasad, Lakshmikumaran & Sridharan, Hyderabad
- *Time limit for availing Cenvat credit on input* – By Anjali Hirawat, Lakshmikumaran & Sridharan, Mumbai
- *Withdrawal of Cenvat Credit of EC & SHE Cess - Many unanswered questions* – By Rohini Mukherjee & Shivam Mehta, Lakshmikumaran & Sridharan, Delhi
- *Recovery mechanism in Rule 4 of CCR, 2004* – By Harish R, Lakshmikumaran & Sridharan, Bangalore
- *Budget cares for healthcare* – By Vivek Sharma, Lakshmikumaran & Sridharan, Delhi
- *Swachh Bharat Cess - Not so Swachh!* – By Vishwanath K, Lakshmikumaran & Sridharan, Bangalore
- *Swachh Bharat Cess - Trick or Treat?* – By Nupur Maheshwari, Lakshmikumaran & Sridharan, Delhi
- *Towards Swachh Bharat - Exemption to Effluent treatment Services* – By Sushma Prasad, Lakshmikumaran & Sridharan, Hyderabad

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CUSTOMS

Budget 2015 – Customs

Penalty provisions proposed to be relaxed:

Finance Bill, 2015 (Clause 80) proposes to amend Section 28 of the Customs Act, 1962 to provide for non-imposition of penalty in case the person to whom a show cause notice has been served in relation to duty or interest, pays said duty and interest within 30 days of receipt of the notice. The new provisions, relevant in case of

SCNs issued not invoking the extended period (i.e. within the normal limitation period), make it clear that proceedings against such person shall be deemed to be concluded after payment of such duty and interest. Further, in respect of notices issued invoking extended period in cases of collusion, willful mis-statement or suppression of facts, penalty payable, after the enactment of the Finance Bill, would be 15% only if the duty along with interest is paid within 30 days of issuance of notice. Presently penalty equal to 25% of the duty specified in the notice or accepted by that person, is payable.

Further, Section 112 of the Customs Act, 1962 pertaining to penalty for improper importation of goods is also proposed to be amended by Clause 81 of the Finance Bill, 2015 to allow for payment of penalty not exceeding 10% of the duty sought to be evaded. This relaxation however would be limited only in cases of dutiable goods, other than prohibited goods, not involving valuation issues, and would be subject to provisions of Section 114A of the Customs Act. The new provisions also propose that if the duty and interest determined by the officer is paid within 30 days of the order determining such duty, penalty payable would be only 25% of the penalty so determined. Presently, penalty not exceeding the duty sought to be evaded on such goods, is payable. Similar provisions have also been proposed in Section 114 relating to penalty for attempt to export goods improperly.

Certificate under Central Excise Rules not required if same obtained under Customs Rules: Ministry of Finance has clarified that there is no need to separately comply with Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 for the purpose of availing exemption from additional customs duty, if the procedure as laid down under Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996 is already followed by the importer for availing exemption or concession from basic customs duty on the said goods. Clarification issued by the Ministry along with Budget 2015 papers was given in the context of bulk drugs imported for use in manufacture of specified drugs.

Exemption available if description of goods mentioned without classification: Benefit of exemption from basic customs duty is available to parts and components of cash dispensers and automatic bank note dispensers under Notification No. 12/2012-Cus. even when the said notification did not mention classification of such goods. This clarification issued by the Ministry of Finance as part of Budget 2015 also notes that now Sl. No. 408 of Notification No. 12/2012-Cus. has been amended by Notification No. 10/2015-Cus. to include classification (sub-heading 8473 40) and that such amendment is prospective.

Notification, Circular and Public Notice

Cancellation of multiple IECs issued against single PAN: Para 2.9(b) of the HBP provides that only one IEC would be issued against a single PAN. An addition to the said para has been made by DGFT Public Notice No. 87(RE-2013)/2009-2014, dated 17-2-2015 stating that multiple IECs issued against a single PAN will be deactivated suo-motu after 31-3-2015. The Public Notice

also requires importers with multiple IEC against a single PAN to retain one IEC and surrender all other IECs before 31-3-2015.

Urea from Oman - Exemption: Import of urea, classifiable under tariff item 3102 10 00 of the Customs Tariff, from Oman under the Urea Off-Take Agreement (UOTA) has been exempted from BCD and CVD, as is in excess of amount calculated on the declared value of urea agreed under the UOTA. According to Notification No. 4/2015-Cus., dated 16-2-2015 issued for the purpose, exemption shall be subject to production of a certificate before the Assistant / Deputy Commissioner of Customs, obtained from an officer not below the rank of Under Secretary, Department of Fertilizer to the effect that the declared value is in terms of the price agreed under UOTA.

Courier imports and exports - Documents for KYC verification: CBEC has instructed that in relation to 'Know Your Client (KYC)' verification of individuals by courier companies, it is sufficient if an individual submits any one document listed in the Circular No.9/2010-Cus., dated 8-4-2010 that contains both 'proof of identity' and 'proof of addresses'. CBEC Circular No. 7/2015-Cus., dated 12-2-2015 issued for this purpose also allows 'Addhar Card' as one of the valid documents that can be submitted by individuals for such verification. Further, as part of trade facilitation, the circular states that permission under the Courier Imports and Exports (Clearance) Regulations, 1998 and Courier Imports and Exports (Electronic declaration and Processing) Regulations, 2010 would be granted within 7 days and that request of re-export in the particular situation mentioned in Circular No. 4/2015-Cus., dated 20-1-2015 should ordinarily be taken within 2 days.

Ratio decidendi

Mandatory pre-deposit of 7.5%/10% - Effective right of appeal not deprived: Kerala High Court has held that the requirement of pre-deposit makes the statutory right of appeal conditional one and that such conditions are not so onerous that it deprives a party of effective right of appeal. Mandatory pre-deposit of 7.5% of the duty or penalty, under Section 129E of Customs Act was challenged by writ petition. [*Sea Breeze Courier* v. *Commissioner* - 2015-TIOL-499-HC-KERALA-CUS]

Royalty for reproduction of plant varieties in India not includible: CESTAT Bench at Mumbai has held that royalty paid to foreign supplier for reproduction of plant varieties in India is not includible in the value of the clumps imported, as per Interpretative Notes to Rule 10(1)(c) of Customs Valuation Rules, 2007. Reliance was placed in this regard by the Tribunal on the order in the case of *Syngenta India Ltd.* [A/696/13/CSTC/C-I dated 12-3-2013] and clarification provided by World Customs Organization (WCO). [*KF Bioplants Pvt. Ltd.* v. *Commissioner* - 2015-TIOL-248-CESTAT-MUM]

SAD refund - Second refund claim in a month when permissible: Circular No. 6/2008-Cus., dated 28-4-2008 provides that only a single claim of refund of SAD can be made in a month under Notification No. 102/2007-Cus., irrespective of any number of bills of entry. Mumbai Bench of the CESTAT has however held that a second refund claim may be allowed in

the same month in situations where the statutory limit of one year to file the refund claim is about to end. The Tribunal in this regard noted that it is not the intention of the CBEC Circular that even though the period of one year is getting expired, the assessee is not allowed to file more than one refund claim in a month. [*Devki Nandan J Gupta* v. *Commissioner* - 2015-TIOL-330-CESTAT-MUMBAI]

Refund - Limitation not applicable to duty paid by mistake: Calcutta High Court has held that period of limitation of one year prescribed under Section 27 of the Customs Act, 1962 is not applicable to cases where duty has been paid inadvertently on goods that are not liable to any duty. It was held that in such cases, the government becomes a trustee to such amount and is under an obligation to return the same. It was noted that in such cases the money received by the government, could more appropriately be called money paid by mistake by one person to another which the other person was under obligation to repay under Section 72 of the Contract Act, 1962. [*Parimal Ray* v. *Commissioner* - 2015-TIOL-441-HC-KOLKATA-CUSTOMS]

No discretion with Tribunal to reject appeal filed against Commissioner's order passed under Section 129A(1): CESTAT Bench at Mumbai has held that the discretionary power of the Tribunal under proviso to Section 129A(1) of the Customs Act, 1962 to admit an appeal or otherwise in certain specified situations such as when the amount of fine and penalty is less than Rs. 50,000/- is not applicable in respect of appeals filed against order passed by the Commissioner of Customs as an adjudicating authority. The Tribunal hence admitted the appeal in this case. [*Rajiv Praful Kamdar* v. *Commissioner* - 2015-TIOL-280-CESTAT-MUMBAI]

Advance authorisation - Transferee-importer not responsible for non-compliance by transferor-exporter: Relying upon the Larger Bench decision of the Tribunal in *Hico Enterprises* [2005 (189) ELT 135], the Mumbai Bench of the CESTAT has held that the condition of non-availment of MODVAT credit under Notification No. 203/92-Cus., was an obligation imposed upon the transferor-exporter. It was hence held that the *bona fide* transferee-importer of an Advance Authorization shall not be responsible for non-compliance of such condition by the transferor-exporter. [*Industrial Chemicals Manufacturing Co. Limited* v. *Commissioner* - 2015-TIOL-237-CESTAT-MUMBAI]

Vessel undertaking seismic survey classifiable as scientific research vehicle: CESTAT Mumbai Bench has held that a vessel performing seismic surveys would be classified as a scientific research vehicle under Heading 8906 of the Customs Tariff Act, 1975 and not under Heading 8905. The Tribunal in this regard noted that Seismic survey vehicles gather reliable seismic data, the analysis of which leads to scientifically valid conclusions and that collection of such data and its analysis form an integral part of empirical scientific research. It was also held that the vessel undertakes the survey while being continuously on the move at constant speed and depth and that the vessels of Heading 8905 do not have this capability and perform their main function in a static/stationary position. [*JM Baxi & Co.* v. *Commissioner* - 2015-TIOL-320-CESTAT-MUMBAI]

CENTRAL EXCISE

Budget 2015 – Major changes

Excise duty rate of 12% enhanced to 12.5%: Rate of Central Excise duty has been revised upwards to 12.5%. According to provisions of Provisional Collection of Taxes Act, 1931 Clause 104 readwith Fifth Schedule to the Finance Bill, 2015 which amends First Schedule to the Central Excise Tariff Act, 1985, this change in rate is applicable from 1-3-2015. There is however a small concession inasmuch as exemption has been provided from the Education Cesses (both Education Cess and Secondary & Higher Secondary Education Cess) with effect from such date. Notification Nos. 14&15/2015-C.E., both dated 1-3-2015 provide for such exemption from cess.

Penalty provisions relaxed: Clause 92 of the Finance Bill, 2015 proposes to substitute Section 11AC of the Central Excise Act, 1944 to allow for payment of reduced penalty in certain circumstances. In cases involving fraud or willful misstatement or collusion, i.e. where extended period is being invoked, penalty payable would be 15% if the same is paid along with duty and interest within 30 days of communication of SCN. This penalty would be 25% of the duty if the same is paid along with interest within 30 days of communication of the adjudication order.

Further, the new Section 11AC for the first time also proposes to provide for imposition of penalty not exceeding 10% of the duty demanded in cases involving normal period of demand. However this penalty is not payable if the duty demanded is paid along with interest, either before or within 30 days of issuance of SCN. The quantum of penalty would be 25% of the penalty imposed if the said amount is paid along with duty and interest within 30 days of the communication of adjudication order.

Registration procedure simplified: Registration process under Central Excise has been simplified (with effect from 1-3-2015) to provide for grant of registration within two working days. According to amendments made by Notification No. 7/2015-C.E. (N.T.), dated 1-3-2015, in Notification No. 35/2001-C.E. (N.T.) registration application has to be approved by the Deputy/ Assistant Commissioner within two days, pending post facto verification of premises and documents. CBEC Circular No. 997/4/2015-CX, dated 28-2-2015 issued in this regard also states that Registration Certificate downloaded online from the ACES system would be accepted as proof of registration. This circular also requests the existing registrants, who have not submitted their e-mail address and mobile number, to file the same within 3 months.

Procedures simplified – Central Excise and Cenvat Credit Rules amended: Time limit for taking Cenvat credit of Central Excise duty paid on inputs and Service Tax paid on input services has been enhanced from six months to one year. Time limit for return of capital goods from the job worker has also been enhanced from the present six months to two years. Further, Rule 4(1) and Rule 4(2) have been amended to allow Cenvat

credit on inputs and capital goods received by job-worker without being first received by the manufacturer or output service provider. Rule 6 of the Cenvat Credit Rules has been amended to insert an *Explanation* to include non-excisable goods 'cleared for a consideration from factory', in the category of 'exempted goods' or 'final products' as defined in Rule 2 of the Credit Rules. Notification No. 6/2015-C.E. (N.T.), dated 1-3-2015 issued to amend Cenvat Credit Rules, 2004 also amends Rule 14 to provide for non-payment of interest in case where Cenvat credit is taken but is not utilized.

As per the amendments in Central Excise Rules, 2002, assessees have been allowed to maintain electronic records with digital signature. Amendments for this purpose have been made in Rules 10 and 11 by Notification No. 8/2015-C.E. (N.T.), dated 1-3-2015. New sub-rule (8) to Rule 11 also states that an invoice issued under this rule by a manufacturer may be authenticated by means of digital signature.

Ratio decidendi

NCCD not exempt under Notification No. 50/2003-C.E. (area based exemption): Uttarakhand High Court has held that exemption granted by a notification must be read limited to the duty of excise mentioned in the notification and by simple interpretation it cannot be extended to cover any other kind of excise duty. The court further held that Notification No. 50/2003-C.E. is to be read in plain and simple manner and thus, rejected the assessee's contention regarding exemption from paying NCCD under the said notification by applying the principle of liberal interpretation. [*Bajaj Auto Ltd.* v. *UOI* - 2015 (317) ELT 12 (Uttarakhand)]

Cenvat Credit can be transferred on conversion of DTA unit into 100% EOU: CESTAT Mumbai has held that there is no bar on transfer of credit available in the books of account on the date of conversion of a unit in DTA into 100% EOU under Rule 10 of the Cenvat Credit Rules, 2004. Thus, the assessee was allowed to transfer credit available in the books of accounts on its conversion from DTA to 100% EOU. [*Matrix Laboratories Ltd.* v. *Commissioner* - 2015 (316) ELT 168 (Tri-Mumbai)]

Interest on Cenvat credit wrongly availed but reversed before SCN: In this case, the assessee availed certain ineligible credit which was reversed when pointed out by the department (before issuance of show cause notice). However, the assessee appealed against the interest demanded by the department on the ineligible credit taken on the grounds that it has been reversed before issuance of show cause notice. The Ahmedabad Bench of the CESTAT in this case however held that as the appellant on being pointed out reversed the amount and was not contesting the issue on merits, interest was liable to be paid. [*Sun Pharmaceuticals Industries* v. *Commissioner* - 2015 (317) ELT 144 (Tri-Ahmd.)]

However, another single Member Bench of CESTAT at Ahmedabad in a different case has held that credit taken but not utilized till reversal, could not compel the assessee to pay interest. [*Hindalco Industries Ltd.* v. *Commissioner* - Order No. A/10196/2015, dated 4-2-2015]

No requirement to send raw material to 'job-worker' to whom moulds/dies sent: Madras High Court has held that it is not necessary for the manufacturer to send raw-materials to the job-worker to whom moulds and dies were sent without reversal of credit under Rule 57S(8) of the Central Excise Rules, 1944 (predecessor of Rule 4(5)(b) of the Cenvat Credit Rules, 2004). The High Court held that the definition of job-worker as defined under Notification No. 214/86-C.E. cannot be borrowed for the purpose of this rule. Further, observing that the department had accepted the decision of the Tribunal in the case of *Monica Electronics* [2000 (123) ELT 1047] on similar issue, the court held that once the view was accepted by the department, it cannot in another case decide to litigate the matter. [*Commissioner* v. *Whirlpool of India Ltd.* - 2015 (316) ELT 209 (Mad.)]

Change in name does not disentitle Cenvat credit on documents with old name: In this case, the assessee had changed the name. The document of input service was issued by the service provider in the former name, but invoice was received after change in name. The department disputed the eligibility of Cenvat credit to the appellant. The Tribunal held that Cenvat credit shall be admissible to the appellant, particularly when change in name was known to the department and existing credit balance on the date of transfer was allowed to be transferred under Rule 10 of the Cenvat Credit Rules, 2004. [*AMA India Enterprises P. Ltd.* v. *Commissioner* - 2015 (316) ELT 268 (Tri-Del.)]

Area based exemption - Commencement of commercial production of goods for which unit is set up required: The appellant had set up a unit for manufacture of cement in Uttarakhand claiming area based exemption. The unit had commenced commercial production of clinker on 31-3-2010 (i.e. before the sunset date). The question for consideration was whether the commencement of commercial production of clinker will make the unit eligible for benefit of area based exemption or not. The Tribunal held that the unit was set up for production of cement. Thus, commencement of commercial production of any other product will not make the unit eligible for claiming benefit of Notification No. 50/2003-C.E. [*Jaypee Himachal Cement Plant* v. *Commissioner* - 2015 (316) ELT 281 (Tri-Del.)]

SERVICE TAX

Budget 2015 – Major changes

Service Tax rate to be increased to 14%: Rate of Service Tax will stand increased to 14% from the date to be notified after enactment of Finance Bill, 2015. Education Cess and Sec. & Higher Education Cess will be subsumed (absorbed within this rate) taking the effective service tax rate of 12.36% to 14%. The provisions relating to such cesses are proposed to be omitted as per the Budget proposals. CBEC has clarified that till the time the new rate of 14% is notified, cesses will continue to be levied.

Swachh Bharat Cess to be leived: Clause 117 of the Finance Bill, 2015 proposes to levy Swachh Bharat Cess at the rate of 2% on the

value of service from the date to be notified for this purpose. The government seeks to empower itself to impose such cess on all or any of the services. Statutory provisions relating to service tax will be applicable to SB cess as well.

Negative list to be amended: Certain amendments have been proposed to the negative list as contained in Section 66D of Finance Act, 1994. The changes include omission of 'admission to entertainment event or access to amusement facility'. However, exemption has been provided to certain specified entertainment events as per amendments to Notification No. 25/2012-S.T. Another negative list related amendment is on the 'process amounting to manufacture or production of goods' so as to exclude service of processes for production or manufacture of alcoholic liquor for human consumption. According to CBEC's clarification, service tax will become leviable on contact manufacturing / job work for production of potable liquor for a consideration. Services provided by Government or a local authority are, in general, excluded from service tax levy presently and this is being amended to levy tax on all services provided by the government or local authority to a business entity except those which are expressly exempted.

Valuation provision to be amended to include reimbursements: Section 67 of the Finance Act, 1994 is being amended to re-define and amplify 'consideration' so as to include any reimbursable expenditure or cost incurred by the service provider and charged in the course of providing service except in certain cases. CBEC has clarified that the courts have taken contrary view on this issue by holding such reimbursements as not includible in taxable value while the legislative intention has always been to tax them.

Service Tax demand & penalty – Amendments proposed: Section 73 relating to demand of service tax is proposed to be amended whereby no show cause notice will be required if service tax self-assessed and declared in the return is not paid and such unpaid amount will be recovered under Section 87. Penalty provision contained in Section 76 is being amended whereby in cases not involving fraud, suppression, etc., penalty upto 10% of the tax amount will be imposable. If tax is paid with interest within 30 days of SCN, penalty will not be imposed. Provisions are also being made for imposing reduced penalty depending upon the period of compliance with orders passed. Cases involving suppression or fraud will also have the benefit of reduced penalties like 15% of tax amount if tax, interest and reduced penalty are paid within 30 days of service of SCN. A major amendment relating to penalty is proposed omission of Section 80 which currently provides for waiver of penalty on existence of reasonable cause for failure to pay.

Exemptions notifications amended: Exemption under Notification No. 25/2012-S.T. (S. No. 12), is being amended, from 1-4-2015, so as to tax services like construction, maintenance or repair provided to government or local authority provided for civil structure meant predominantly for non-industrial or non-commercial use. Also such services to structures

mainly used for cultural, educational or clinical purposes will attract service tax. Exemption to construction and other such services (original works) provided to ports and airports is being withdrawn. Transportation of food stuff is being restricted to foodgrains including rice and pulses, flour, milk and salt. Exemption to transportation of agricultural produce remains unchanged. Services provided by mutual fund agent or distributor to MF or AMC and marketing agent of lottery ticket to distributor will not be exempt.

New exemptions and abatement changes: Services by operator of common effluent treatment plant for effluent treatment is being exempted. Exemption to transportation of patient is being expanded to include any ambulance service which is currently restricted to clinical establishments. Movie exhibition service provided by theatre owner to distributor is being exempted. Certain services provided to processing of fruits and vegetables will also enjoy exemption from 1-4-2015. Uniform percentage of abatement (70%) is being extended to all transportation services whether by road, rail or vessels.

Service Tax Rules, CCR & RCM - Amendments: From 1-3-2015, Service Tax Rules stand amended to cast liability on aggregators if service is provided under the brand name of the aggregator. Digital signed invoices and maintenance of electronic records have also been allowed. In respect of liability under reverse charge mechanism (RCM), manpower supply service is being brought under full reverse charge from 1-4-2015 which is currently under partial RCM. Services provided by mutual fund agents / distributors and lottery agents will also be under RCM whereby the AMC or distributor will be liable. Cenvat Credit Rules will also stand amended from the said date to provide for service tax credit under partial RCM for the service recipient without being conditional on payment to service provider.

Ratio decidendi

Refund not deniable when tax paid by mistake: The appellant, an SEZ unit received services from a service provider outside the SEZ unit. In terms of Notification No. 15/2009-S.T., since the services were wholly consumed within the SEZ, the department sought to recover the refund sanctioned by the adjudicating authority. It was held by the Tribunal that Section 26(i)(e) of the SEZ Act provides that all services imported into the SEZ to carry on authorized operations in SEZ shall be exempted. Further Section 51 of this Act gives overriding effect over other Acts. Thus the condition of Notification No. 15/2009-S.T., that refund is only admissible to services which are not wholly consumed within the SEZ cannot nullify the overriding provisions of Section 51 of the SEZ Act. The Tribunal also held that refund cannot be denied under the Act for procedural infraction of having paid the Service Tax which ought not to have been paid by the service provider. [*Eon Kharadi Infrastructure* v. *Commissioner* - 2015-TIOL-327-Cestat-Mum]

Differential tax treatment to theatre and films is not discriminatory: At issue was the Notification No.25/2012-S.T., dated 20-6-2012 (Entry 16) providing for exemption in respect of services provided by performing artist or folk or classical

art forms of music, dance or theatre. This was assailed on the ground that it was discriminatory and violative of Articles 14 and 19(1)(g) of the Constitution of India as the same benefit was not extended to other performing artistes namely film actors. It was held by the High Court that the two categories are clearly different and distinguishable and cannot be treated at parity. According to the court, the fact that there is an element of drama or acting both in the case of theatre and in the case of films does not mean that the two activities are identical, taking into consideration the circumstances in which films are made and theatre is performed. The court, while dismissing the writ petition observed that under Article 229 of the Constitution of India a salutary endeavour has been made to give support to native art and culture and encourage them as they suffer from financial constraints. [*Siddharth Suryanarayan* v. *Union of India* - 2015-TIOL-561-HC-MAD-ST]

Recovery of dues from third party holding money on account of assessee: The petitioner challenged the legality of the issue of notice to recover service tax dues from the bank where he had an account. The Andhra Pradesh High Court held that the department was empowered to recover the same. It observed that the recovery provisions were wide and sweeping and the Central Excise Officer could direct any person holding the money on account of the assessee (debtor) to pay the same. The bank has also not objected to the notice and the petitioner's argument that the bank did not owe money to the authorities was not acceptable. [*Tirumala Cabs* v. *Commissioner* - 2015 (37) S.T.R 930 (A.P)]

Time limit not applicable to refund claim when tax not due was mistakenly paid: Service tax paid by mistake or by way of abundant caution (in this case on export of services) is not tax but a deposit. The Tribunal held that the assessee was entitled to refund if other conditions as to export and receipt of foreign exchange were satisfied and time limit of one year to claim refund would not apply. [*Commissioner* v. *Hincon Technoconsult Lt.* - 2015 (37) S.T.R. 956 (Tri.-Mumbai)]

Marketing of foreign product in India & receipt in INR whether covered under export of service: Granting relief to the assessee, the Tribunal held that service rendered by the assessee to foreign counterpart to market the product in India and receipt of commission in Indian currency from client of the foreign counterpart can satisfy the provisions relating to export of services. The department argued, without success that the product having been sold in India, services were consumed in India, and since remuneration also had not been received in foreign exchange, the transaction was not export of services. [*Pam Pharma & Allied Machinery Co P Ltd* v. *Commissioner* - 2015 (37) S.T.R. 958 (Tri.-Mumbai)]

Sourcing services provided in India to overseas parent is use outside India: The dispute was whether services like vendor verification, inspecting of export consignment, etc., which were carried out in India to source goods to the overseas parent would qualify as export of services. Emphasising that service tax is a destination based consumption tax, the

Tribunal held that the service, in relation to procurement of goods, provided in India is used by the overseas parent and will qualify as export of service. Also, the parent did not have a branch, project or business establishment in India and payment had been received in foreign exchange. [*GAP International Sourcing (India) P. Ltd.* v. *Commissioner* - 2015 (37) S.T.R. 757 (Tri.-Del.)]

Provision of digitalised images of AV coverage of events – Liability under Programme Producer's Service: Examining taxability under Programme Producer's Service in respect of provision of digitalised images of audio visual coverage of sporting events by certain non-resident service providers, the Tribunal held that the programme had been produced on behalf of organiser of the event who was also the producer as per terms of the contract and the services were exigible to tax under Programme Producer's Service. The assessee argued that the term 'programme' included audio or visual matter and not both, that the programme had not been produced on behalf of the organiser since no third party was involved and supply of software programmes for recording could not be covered under said service. The Tribunal opined that programme would include audio or visual matter or both and there was no requirement that such programme must be produced on behalf of the other for a third party. In any case, the broadcasters who disseminated the programme would be third parties. As regards software programmes supplied, they would fall under 'services in relation to' Programme Producer's Services and would be taxable. [*Board of Control for Cricket in India* v. *Commissioner* - 2015 (37) S.T.R. 785 (Tri.-Mumbai)]

Process of welding where no new goods emerge is not BAS: Joining of two pieces of rails at the site by thermite welding is not a process not amounting to manufacture so as to be exigible to service tax. Holding against the department's stand that service tax was payable under Business Auxiliary Service, the Tribunal reasoned that in the process of merely welding rails no goods have emerged and it was part of the process of laying of tracks. Thus, merely because pieces of rails longer in length result from the process, it is not exigible to tax. [*Harshad Thermic Industries P. Ltd.* v. *Commissioner* - 2015 (37) S.T.R. 808 (Tri.-Del.)]

VALUE ADDED TAX (VAT)

Notifications

Cellular phones, parts, accessories and tablet computers – Tax rate under Rajasthan Value Added Tax Act, 2003 revised: By Notification No. F.12(23)FD/Tax/2015-198, dated 9-3-2015, Serial number 3 of Schedule IV Part A appended to Rajasthan Value Added Tax Act 2003 has been amended to substitute the expression *"Computer system and peripherals"* by the expression *"Computer system and peripherals excluding tablet computers known by whatever name like i-pad, e-book reader, Phablet, slate etc."*. Simultaneously by Notification No. F.12(23)FD/Tax/2015-200, dated 9-3-2015, a new serial number 19 has been inserted in

Schedule VI, which reads as *"Tablet computers known by whatever name like i-pad, e-book reader, Phablet, slate etc."*, taxable at the rate of 8%.

Further, by Notification No. F.12(23)FD/Tax/2015-198, dated 9-3-2015, the expression "cellular telephones" in Serial number 12 of Schedule IV Part A has been deleted and simultaneously by Notification No. F.12(23)FD/Tax/2015-200 of the same date, new Serial number 18, which reads as *"Cellular phones, parts and accessories thereof"* has been inserted into Schedule VI appended to R-VAT Act, taxable at the rate of 8%. By virtue of the above mentioned notifications cellular phones, parts, accessories and tablet computers are now taxable at the rate of 8% under R-VAT Act with effect from 9-3-2015.

Rajasthan Value Added Tax Act, 2003 - Residuary rate of tax increased: Residuary rate of tax provided under Schedule V appended to Rajasthan VAT Act has been increased from 14% to 14.5% with effect from 9-3-2015. Notification No. F.12(23)FD/Tax/2015-199, dated 9-3-2015 has been issued in this regard.

Works contract TDS under Rajasthan Value Added Tax Act, 2003 - Rates revised: By Notification No. F.12(23)FD/Tax/2015-208, dated 9-3-2015, the awarder of works contract or any person authorised by him is required to deduct in lieu of tax, at the time of making payment to the contractor carrying out any work, 6% of such sum, if payment is made to a dealer registered under the Rajasthan VAT Act and 7% of such sum, if payment is made to any person other than such dealer. The said change is effective from 1-4-2015. Currently, according to Notification No. F.12(101)FD/Tax/2011-191, dated 24-2-2015, the awarder of a works contract is required to deduct an amount equal to 3%, in lieu of tax, from the payment made to the contractor registered under R-VAT Act and 4% in case of others.

Ratio decidendi

Hydraulic Excavator classifiable as motor vehicle: Allahabad High Court has held that "Hydraulic Excavator" is covered under Entry 13 of the Schedule attached to the Uttar Pradesh Tax on Entry of Goods into Local Areas Act, 2007 meant for *'motor vehicles of all kinds including chassis thereof but excluding tractors'* and not under Entry 2 of the said Schedule covering 'machine'. The court in this regard observed that the term "machinery" is a genus and "motor vehicle" is a species and hence motor vehicles in wider sense may specify the term "machine" and "machinery" but when a special entry is provided in the same statute then the items which would be covered by the definition of "motor vehicle" will be governed by that specific entry and not by "machine" and "machinery" which is the general entry. It was held that the mere fact that general goods are not being transported by 'Excavator' would make no difference as the legislature has used the term "motor vehicles" in a very wide manner by providing that all kinds of motor vehicles would be governed by said Entry. It was also noted that just because the excavator in question works with hydraulic system, the same would not change its very nature of being a excavator and hence a motor vehicle. [*Commissioner* v. *Anand Tyres* - 2015-VIL-56-ALH]

Supply of medicines, implants, etc. during treatment is not sale: Punjab & Haryana High Court has held that supply of medicines, drugs, stents and other implants etc., during the course of treatment or a medical procedure such as open heart surgery, hip replacement etc. is not a "sale". The Court in this regard noted that the dominant purpose of medical treatment is medical services and integral to such a service is a medical procedure that involves administering medicines and drugs and may involve, implants, stents, etc., as integral to a successful medical treatment/procedure. It was observed that statutory definition of "sale" in both Punjab and Haryana enactments after setting out that a sale is a transfer of ownership in goods for consideration proceeds to replicate Article 366(29A) of the Constitution of India and that a medical procedure is a pure service with no part having attributes or elements set out in Article 366(29A) of the Constitution of India or the definition of sale under the Punjab and Haryana statutes and therefore cannot be held to involve a "sale". It was hence held that the State is not empowered under any provision of the Constitution much less the definition of goods, sale or dealer, to severe the contract and construe the supply of drugs, medicines, stents, implants etc. as a severable part of the contract and therefore, exigible to VAT, as a sale. [*Fortis Healthcare Limited* v. *State of Punjab* - 2015-VIL-73-P&H]