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

May 2013 / Issue–23

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May
2013

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Refund of Cenvat credit on services under reverse charge mechanism

By **Jagannadh Grandhi & Satya Sai**

It is been almost a year since the negative list of services based regime for levy of Service Tax under the Finance Act, 1994 (in short 'the Act') was introduced. The industry is, in fact, slowly getting acquainted with the new system. However, there are certain provisions the impact of which is required to be fully understood particularly those relating to 'reverse charge mechanism'. In this article, we shall discuss the provisions relating to refund of Cenvat credit to service providers providing services to which the reverse charge mechanism is applicable.

Rule 5B of the Cenvat Credit Rules, 2004 (in short, 'Credit Rules') provides for refund of Cenvat credit availed by the service providers whose services are notified under Section 68(2) of the Finance Act, 1994. Section 68(2) of the Act provides that *in respect of taxable services as may be notified by the Central Government, the service tax thereon shall be paid by such person and in such manner as may be prescribed.* In addition, the proviso to this Section provides that the Central Government may notify the service and the extent of service tax which shall be payable by such persons. In accordance with Section 68(2) of the Act, Notification No. 30/2012-S.T., dated 20-6-2012 has been issued notifying certain services and the extent of service tax to be paid by the persons other than the service providers.

Coming to Rule 5B of the Cenvat Credit Rules that grants refund of Cenvat credit to service providers who are providing services covered under reverse charge mechanism, it has to be noted that no notification has been issued by the Central Government till date in this regard. Even the latest budget is also silent on this aspect. However, we will examine who will be eligible for refund and upto what extent. Rule 5B provides for the refund of Cenvat credit availed by a service provider providing services which are covered under reverse charge mechanism. There are two kinds of reverse charge namely full reverse charge and partial reverse charge. We will now analyse whether all the service providers covered under reverse charge, are eligible for this refund or not.

Goods or services which are used for providing the *output service* qualify as input and input service respectively under Rule 2(k) and Rule 2(l) of the Cenvat Credit Rules. Output service is defined under Rule 2(p) of the Cenvat Credit Rules which inter alia *excludes a service where whole of service tax is liable to be paid by the recipient of service.* Thus, in cases where there is full reverse charge on a particular service, then such service does not qualify as 'output service'. Therefore, service providers providing such services are not entitled for Cenvat credit on the inputs and input services used for providing such services as they do not qualify as 'output service'. Consequently, they cannot claim any refund of duties/taxes paid on the goods / services used for providing such services where the full tax liability is on the service recipient.

This can be illustrated by way of an example: sponsorship service provided or agreed to be

provided is covered under full reverse charge. Therefore, the sponsorship service does not qualify as 'output service' for the purpose of the Cenvat Credit Rules. Accordingly, the person providing sponsorship service is not entitled to avail Cenvat credit of the duty/tax paid on inputs / input services received for providing sponsorship service. Consequently, they cannot claim any refund of such duty/tax.

On the other hand, services which are covered under partial reverse charge are still covered under the definition of 'output service' under the Cenvat Credit Rules. Accordingly, such service providers whose services are covered under partial reverse charge can claim refund of unutilized credit availed on inputs and input services used for providing the output service.

For example, works contract service provided by a partnership firm to a company is covered under partial reverse charge and both the service provider and service recipient are liable to pay 50% of the service tax on such service. Works contract service provided by a partnership firm satisfies the definition of 'output service' and therefore, Cenvat credit of the duty/ tax paid on the inputs / input services can be availed and the service provider can claim refund of the unutilized Cenvat credit.

It can, therefore, be understood that Rule 5B of the Cenvat Credit Rules is applicable only to service providers who provide services which are covered under partial reverse charge mechanism. Such service providers are entitled to avail full Cenvat credit even though service tax liability on them is only partial. Accordingly, the service providers who are under partial reverse charge are in an advantageous position in terms of Cenvat credit and refund when compared to service providers providing services covered under full reverse charge mechanism.

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FOREIGN TRADE POLICY / CUSTOMS

Ministry of Commerce & Industry, on 18-4-2013, announced Annual Supplement to the Foreign Trade Policy 2009-14. Some of the important provisions are discussed in the following paragraphs.

Export Promotion Capital Goods (EPCG) Scheme: EPCG Scheme provided in Chapter 5 of the Foreign Trade Policy (FTP) and Handbook of Procedures has been revamped. Under the new regime, EPCG scheme has been divided into two categories, viz., Pre-export EPCG scheme and Post-export EPCG scheme. DGFT Notification Nos. 1 & 7 (RE-2013)/2009-2014 and Public Notices Nos. 1 & 4, all dated 18-4-2013 make the following changes in the pre-export EPCG scheme. To operationalise the changes, notifications on customs and excise sides viz., Notification Nos. 22 & 23/2013-Cus., and 14/2013-CE., all dated 18-4-2013 have been issued by the Ministry of Finance.

- Benefit of zero duty EPCG scheme has been extended to all sectors by merging existing 3% scheme with the new zero duty EPCG scheme. Export obligation (EO) under this new EPCG scheme shall be six times the duty saved on capital goods imported under the scheme to be

fulfilled in six years reckoned from the date of issue of authorization.

- Computation of average EO for new Authorisations - Exports during the last three years against specific EO of existing EPCG Authorisation's EO period, not to be reckoned. Hitherto, exports made against unredeemed authorizations only were not to be included.
- Exporter who has availed the benefits under the Technology Upgradation Fund Scheme, administered by the Ministry of Textiles, will be eligible for benefits of the zero duty EPCG Scheme. Further, if the benefit of SHIS is refunded or surrendered by a unit before applying for an EPCG authorisation, such unit may avail the benefit of the new scheme.
- Validity of EPCG Authorisation has been increased from nine months to eighteen months.
- Facility of counting export of alternate products and that of group companies for fulfillment of EO has been withdrawn.
- Import of motor cars, sports utility vehicles or all purpose vehicles by hotels, travel agents, tour operators, etc. is not permitted under the new scheme.
- On domestic sourcing of capital goods under EPCG Scheme, the specific EO shall be 10% less of the normal EO.
- Second hand capital goods are not permitted to be imported under the new EPCG Scheme.
- Export/supply/use of energy (power) - Authorization under EPCG Scheme shall not be issued for import of any capital goods (including captive plants and power generator sets of any kind) for export or supply under deemed exports of electrical energy; use of power in their own unit; or for supply/export of electricity transmission services.

Served From India Scheme (SFIS): DGFT Notification No. 3 (RE 2013)/2009-14, dated 18-4-2013 read with Notification No. 24/2013-Cus., dated 18-4-2013 makes following changes in the said scheme:

- SFIS scrips shall be allowed on the basis of net foreign exchange earned.
- Service provider also engaged in manufacturing activity can use SFIS scrips for importing/ domestic sourcing of capital goods including spares. However such manufacture sector business of service provider needs to be endorsed on the SFIS scrip by the RA concerned and transferability of such goods is restricted. Importer of such goods will be required to produce an undertaking before the Deputy/ Assistant Commissioner of Customs.
- SFIS scrips can be utilised for payment of duty on import/domestic sourcing of motor cars, SUVs or other vehicles required as professional equipment by hotels, travel agents, tour operators or tour transport operators and companies owning/operating golf resorts. Such vehicles need to be registered for tourist purpose only. Proof of registration needs to be submitted to RA concerned within 6 months of import/ domestic procurement.

Incremental Exports Incentivisation Scheme (IEIS): Incremental Exports Incentivisation Scheme (IEIS): This scheme which was introduced in January,

2013 for three months only has been continued on annual basis by inserting Para 3.14.5 in the FTP by Notification No. 3 (RE-2013)/2009-14, dated 18-4-2013. Under this scheme transferable duty credit scrip @ 2% on the incremental growth achieved during the year as compared to previous year on the FOB value of exports is available to each IEC holder. Scheme covers export to USA, Europe and Asia including other 53 countries of Latin America and Africa as notified under Public Notice No. 3(RE 2013)/2009-14 dated 18-4-2013. Benefit of such scrip is not available to an exporter who had made no export during the fiscal years 2011-12 and 2012-13 and for specified exports listed in Para 3.14.5 (d), however, such benefit shall be over and above other benefits under Chapter 3.

Agri. Infrastructure Incentive Scrip: Transferability has been allowed to supporting manufacturer of the status holder who is neither a status holder nor has a unit in a park recognized by Ministry of Food Processing Industries. As per DGFT Notification No. 3, dated 18-4-2013 read with Notification Nos. 15/2003-CE and 24/2013-Cus,, all dated 18-4-2013 such transferability needs to be endorsed on the scrip by the RA concerned.

Status Holder Incentive Scrip (SHIS): These scrips can now be transferred to a manufacturer group company of the scrip holder even if such group company is not a status holder. As per DGFT Notification No. 3, dated 18-4-2013 read with Notification Nos. 15/2003-CE and 24/2013-Cus., all dated 18-4-2013 such transferability need to be endorsed on the scrip by the RA concerned.

FPS, FMS and VKGUY: Scrips issued under FPS, FMS and VKGUY can now be used for payment of service tax and the scrip holder would be entitled for drawback or Cenvat credit of service tax debited in the said scrips. Service tax Notification Nos. 6, 7 and 8/2013-ST, all dated 18-4-2013 have also been issued in this regard.

Utilisation of all Chapter 3 scrips: All duty credit scrips can now be used for payment of composition fee or application fee under FTP and for payment of value shortfall in EO under Para 4.28(b) of HBP v1.

Duty Free Import Authorisation (DFIA): Exemption from anti-dumping duty and safeguard duty would now be available only to 'actual user' before endorsement of transferability of DFIA. Therefore, exemption from said duties would not be available to the transferee of DFIA after endorsement of transferability. In case the imported material is transferred with the permission of RA, the importer shall be liable to pay an amount equal to the safeguard duty and anti-dumping duty leviable along with interest @ 15%. Notification No. 2 (RE-2013)/2009-14 and Notification No. 24/2013-Cus., both dated 18-4-2013 have been issued in this regard.

Advance Authorization: Advance Authorisations will not be available for import/supply of 'energy'. DGFT Notification No. 2 (RE-2013)/2009-14, dated 18-4-2013, in this regard, deletes word 'energy' from Para 4.1.3.1 of the FTP which provided for issuance of advance authorization for import of inputs, fuel, oil, energy and catalysts. Further, Para 4.20.5 of HBP has been amended to allow clubbing of Advance Authorisation issued between 1-4-2002 and 31-5-2012, wherein the application for clubbing has been received by the Regional Authorities on or before 4-6-2012. This benevolent amendment

by DGFT Public Notice No. 2(RE 2013)/2009-2014, dated 18-4-2013 has been made to facilitate disposal of pending applications for clubbing.

EOU/EHTP/STP/BTP - Employees permitted to work from a place outside: Keeping pace with technological developments, a new Para 6.7.5 has been inserted in Chapter 6 of the HBP according to which authorized employees of an EOU/EHTP/STP/BTP unit shall be allowed to work from a place outside the EOU/EHTP/STP/BTP unit. The unit must specify the duration of such authorization and be responsible for the work and supervision carried out at the place outside the unit and is liable for any misuse. As per DGFT Public Notice No. 5 (RE-2013)/2009-2014, dated 18-4-2013, export of resultant products/services however shall take place only from the unit premises.

Deemed Exports: Para 8.3(c) of FTP has also been amended in furtherance of earlier clarification on availability of refund of 'Terminal Excise Duty' (TED), that such refund is available only when exemption from Central Excise duty is not available. Supplies eligible for upfront exemption from excise duty have also been listed to avoid any confusion. Further, benefits to the deemed exports supplies made under Para 8.2(a) (Advance Authorisation holder) have been modified to distinguish between invalidation route and Advance Release Order (ARO)/ Back to back Letter of Credit (LC) route. As per the amendment by Notification No. 4 (RE-2013)/2009-14, dated 18-4-2013, following benefit would be available on supplies under Para 8.2(a):

Supplies made under Para 8.2(a)	Deemed Export Benefits under Para 8.3		
	Advance Authorisation	Deemed Export Drawback	Exemption/ Refund of TED
Invalidation Letter	Yes (for intermediate supplies)	No	Exemption from TED
ARO/LC	No	Yes	Refund of TED

Utilization of re-credit of 4% Special Additional Duty (SAD): Exporters have been allowed to utilize 4% re-credited SAD till 30-9-2013. Duty credit scrips, including Duty Entitlement Passbook (DEPB) scrips have been deemed to be re-validated till such date. No further endorsement from the Regional Authority (RA) shall be required. DGFT Public Notice No. 6 (RE-2013) / 2009-2014 and CBEC Circular No. 18/2013-Cus., dated 29-4-2013 state that no further extension would be considered.

Other changes: As part of its post-budget changes, the Finance Ministry has increased the effective rate of duty on specified goods on 8-5-2013. Basic Customs duty has been increased on titanium dioxide (Heading 2823), polymers (Headings 3901, 3902, 3903 and 3904) including ethylene vinyl acetate (EVA), iron or steel scrap including stainless steel scrap (Heading 7204) and aluminum scrap (Heading 7602). Exemption from SAD on brass scrap has also been withdrawn. Further, 2 specified PSUs have been exempted from payment of BCD

on imports of Liquefied Natural Gas (LNG) and Natural Gas (NG) for supply to generating company. Notification Nos. 25 and 26/2013-Cus., both dated 8-5-2013 have been issued in this regard.

Ratio decidendi

Interest on delayed payment of sale proceeds of auctioned goods: All statutory powers have to be exercised within a reasonable period even when no specific period is prescribed by law. Bombay High Court while observing so, has granted interest on delayed payment of the sale proceeds of auctioned goods (under Section 150 of the Customs Act) as directed by the Settlement Commission. The court while exercising its jurisdiction under Article 226 of the Constitution of India rejected the department's defence that Customs Act provides for payment of interest only in respect of a refund of duty and interest. [*Vishnu M. Harlalka* v. *Union of India* – Bombay High Court Judgement dated 3-4-2013 in Writ Petition No. 1136 of 2011]

Unjust enrichment not applicable in case of penalty and redemption fine: Mumbai Bench of CESTAT has held that principle of unjust enrichment cannot be made applicable in cases involving refund of penalty and fine since Section 28D of the Customs Act, 1962 covers only case involving refund of duty. Reliance in this regard was placed on the judgment of *United Spirits Ltd.*, 2009-TIOL-316-HC-MUM-CUS. [*Veekay Products* v. *Commissioner* - 2013-TIOL-622-CESTAT-MUM]

Pre-deposit of redemption fine not required: CESTAT, Mumbai has held that redemption fine does not come within the purview of Section 129E of Customs Act, 1962, i.e. the provision under which stay application is made and therefore pre-deposit of redemption fine is not warranted while hearing any stay application. [*Aristo Export* v. *Commissioner* - 2013-TIOL-584-CESTAT-MUM]

Confiscation of goods before their identification not permissible: For taking action under Section 111(d) or Section 111(m) of the Customs Act, 1962, the competent authority should identify the imported goods and show that they are prohibited items. Without ascertaining the correct identity of the goods, one cannot hold the goods to be prohibited or to have been misdeclared. CESTAT, Bangalore held that the goods could not be confiscated in view of the said facts. [*Pasura Life Sciences Pvt Limited* v. *Commissioner* - 2013 TIOL 576 CESTAT-Bang]

Retraction of statements made under Customs Section 108: Statements of co-accused recorded under Section 108 by the customs officers are admissible as evidence. Mere retraction of the statements so recorded is not enough to make the statements inadmissible as evidence. Delhi High Court while observing so held that for determination of inadmissibility of such statements as evidence, it is relevant to consider when and why the statement was retracted. It was also held that inadmissibility of a witness cannot also be claimed on technical ground of the witness not being a cited witness as list of additional witnesses can be filed subsequently. [*Prem Prakash Chaudhary* v. *DRI* - 2013 TIOL 276 HC-Del.]

Valuation of DVDs - Royalty/licencee fee paid for sale in India, includible: CESTAT, Mumbai has held that royalty/licence fee relating

to sale of imported goods in India is includible in assessable value of imported goods as it becomes a 'condition of sale' under Rule 9(1)(c) of the Customs Valuation Rules. It was further held that since a replicated CD contains artistic/intellectual inputs, cost of the same has to be considered while charging customs duty. The Tribunal in this regard relied upon Supreme Court order in the case of *Living Media India Ltd.*, 2011-TIOL-81-SC-CUS. [*Commissioner* v. *Excel Productions Audio Visuals Pvt Ltd.* - 2013-TIOL-647-CESTAT-MUM]

SAD refund – Non-mention of SAD in invoice is sufficient: CESTAT Delhi has allowed refund of Special Additional Duty (Special CVD) under Notification No. 102/2007-Cus. even when the invoice did not contain the stamp that no credit of additional duty of customs shall be admissible. The Tribunal observed that the assessee had not mentioned SAD on the invoice and hence the purchaser was not in a position to avail credit of the same, thus fulfilling the condition of the notification. [*R.K.G. International Pvt. Ltd.* v. *Commissioner* – 2013 (290) ELT 253 (Tri. – Del.)]

CENTRAL EXCISE

Notification

Post-Budget changes – Exemption to specified products: As part of the post-budget changes, a few products have been exempted from Central Excise duty while effective rate of duty has been reduced on certain other products. Particle/ Fibre Board manufactured from agricultural crop residues, clay bricks (Tariff Item 6901 00 10) and roofing tiles (Tariff Item 6905 10 00) have been exempted unconditionally, while steel supplied to Indian shipyards manufacturing ships and vessels has been exempted subject to certain conditions. Effective rate of duty has been reduced on jaggery powder and flattened bamboo boards and bamboo flooring tiles, from 12% to 2% without Cenvat credit and to 6% with Cenvat credit. Notification No. 16/2013-C.E., dated 8-5-2013 has been issued in this regard.

Ratio decidendi

Education cesses payable only once on DTA clearance by EOU: Larger Bench of CESTAT has held that education cess and secondary & higher education cess would be chargeable only once under Section 93 of Finance Act, 2004 and Section 138 of the Finance Act, 2007 on the sum of basic customs duty and additional customs duty in respect of goods cleared in DTA by EOU. It held that such cesses are not payable for the third time as the intention of the legislature was never to charge education cess on education cess. The Tribunal also held that education cesses have to be treated as different and distinct levies from the excise and customs duties on which the same are charged. The Larger Bench hence upheld the view of the Tribunal in the case of *Sarla Performance Fibers Ltd.*, 2010 (253) ELT 203 (Tri.-Ahmd.). [*Kumar Arch Tech Pvt. Ltd.* v. *Commissioner* – 2013 (290) ELT 372 (Tri. – LB)]

Bulk pack and retail pack, clarified: The term 'bulk pack' used in various Chapter Notes of Central Excise Tariff deeming the activity of packing/ repacking from 'bulk packs' to 'retail packs' as manufacture is to be interpreted on case

to case basis, and it is not necessary that a 'bulk pack' must contain unmeasured or undetermined quantity. Thus, in a case where a standard pack of soda ash (of 50/ 75 kgs) was opened and the contents were transferred into retail packs (½ kg and 1 kg), then the standard pack would qualify to be a bulk pack. CESTAT, Kolkata, relying on Supreme Court order in case of *Air Liquide North India Pvt. Ltd.*, 2011 (271) ELT 321 held that where the transfer from bulk packs to retail packs enhances the marketability, the activity shall be deemed as manufacture under Chapter Note 10 to Chapter 28 of the Central Excise Tariff Act. [*Abdos Trading Co. Pvt. Ltd.* v. *Commissioner* – 2013 (290) ELT 467 (Tri. – Kolkata)]

EOU eligible for rebate on exports: Rebate on exports is available to an Export Oriented Unit (EOU). The assessee had submitted that the exemption granted to an EOU under Notification No. 24/2003-C.E. is not absolute as it grants exemption to a particular manufacturer and the proviso states that the exemption is not available when the goods are removed in DTA. It was also contended that since the department is allowing taking of Cenvat credit on input services treating the goods as not exempted, it cannot consider them to be exempted for the purpose of payment of duty. The Department on the other hand contended that said notification is unconditional and EOU does not have an option to export the goods on payment of duty and claim rebate. The court further held that rebate would be available in cash when the unit is not having any local sales. [*Orchid Health Care* v. *Union of India* – 2013 (290) ELT 504 (Mad.)]

EOU eligible for area based exemption for CVD payment in case of DTA clearance: Himachal Pradesh High Court has held that Export Oriented Units operating in specified areas of Himachal Pradesh would be eligible for exemption under Notification No. 50/2003-CE for computation of CVD on the goods cleared in DTA. The court noted that there was no bar under the said exemption notification for calculation of CVD by a 100% EOU. It was also noted that provisions of Section 5A(1A) of the Central Excise Act, 1944 do not allow manufacturer complying with the conditions of area based exemption notification to opt out and hence there existed only one rate i.e. Nil rate of duty. [*Satya Metals* v. *Union of India* – 2013 (290) ELT 514 (H.P.)]

Penalty under Rule 25 imposable only on specified persons: Delhi High Court in its recent order has upheld CESTAT's view that penalty under Rule 25 of the Central Excise Rules, 2002 is imposable only on producers, manufacturers, registered person of a warehouse or on a registered dealer. In a case pertaining to storage and sale of alleged clandestinely removed goods, the court held that no penalty under Rule 25 can be imposed on such person for such act as he did not fall under any of the categories mentioned in Rule 25. The court also rejected the department's contention that the case would be covered under Rule 25(1)(c). [*Commissioner* v. *Balaji Trading Co.* – 2013 (290) ELT 200 (Del.)]

Transfer of Cenvat credit without transfer of capital goods: CESTAT, Mumbai has allowed transfer of unutilized Cenvat credit to another unit of the same manufacturer in a case where only inputs, both as such and in process, were transferred but there was no transfer of capital goods. The Tribunal noted that Rule 10(3) of the Central Excise Rules used the expression "inputs or capital goods"

and not "inputs and capital goods". It was also observed that if the assessee has to transfer inputs corresponding to transfer of entire Cenvat credit, then he can very well clear the inputs on payment of duty and avail credit of same at a different location, rendering provisions of Rule 10 redundant. [*Ispat Industries* v. *Commissioner* – 2013 TIOL 565 CESTAT-Mum.]

Settlement application maintainable even after adjudication when order not dispatched: Mumbai High Court has held that application before the Settlement Commission is maintainable even after passing of the adjudication order in case the said order is not dispatched to the assessee. The court noted that adjudication cannot be regarded as complete merely upon signing of the adjudication order and that the said order has to be placed by the authority out of his control by dispatching it to the assessee. The court held that expression 'before adjudication' under Section 32E of the Central Excise Act must be given a purposive interpretation. [*Vishnu Steel* v. *Union of India* – 2013 TIOL 339 HC-Mum-CX]

MOT fees when not payable: Merchant Overtime fees is not payable in case of supervision of stuffing of export containers during normal working hours by the Central Excise Officer in the factory of the manufacturer-exporter which is within the territorial jurisdiction of the Range Officer. [*Commissioner* v. *Sigma Corporation* – Delhi High Court Judgement dated 22-4-2013 in CEAC No. 11/2004]

SERVICE TAX

Notification

Construction service – Abatement amended: Notification No. 26/2012-S.T., has been amended in respect of construction service. Abatement of 75% available to construction of complex, building, etc., has been restricted to residential units satisfying both the conditions (i) having carpet area less than 2000 sq. ft. and (ii) the amount charged for the same is less than Rs. 1 crore. For other construction not satisfying such conditions, the abatement will be 70% as per the amending Notification No. 9/2013-S.T., dated 8-5-2013. The conditions like non-availment of Cenvat credit on inputs and inclusion of value of land in the taxable value remain unchanged.

Ratio decidendi

Agent can discharge tax liability of principal: Service tax cannot be demanded from the principal if the liability has been discharged by agent. In the instant case the assessee, a cricketer had entered into contracts with the agent to negotiate, receive consideration for promotion activities and discharge service tax liability. Agreeing with the contentions of the assessee, the Tribunal held that 'person liable' to pay service tax includes agent and such payment by agent discharges liability of the principal. [*Zaheer Khan* v. *Commissioner,* 2013-TIOL -643-CESTAT -MUM]

Service to Indian customers of overseas recipient qualifies as export of service: Service rendered to a third party in India at behest of foreign customer can be export of services. Ruling in favour of the assessee, the Tribunal held that in the instant case the service provided to foreign telecom operator enabling him to provide roaming services

to his customer in India was export of service. The department had contended that since service was used in India, it was rendered to a person in India, and no export of services was involved. [*Vodafone Essar Cellular Ltd.* v. *Commissioner,* 2013-TIOL-566-CESTAT-MUM]

Service rendered by overseas subsidiary as independent contractor is not export of service: Examining the assessee's claim for refund of service tax paid on onsite and offsite services provided to recipient overseas, the Tribunal held that since the subsidiary had functioned as an independent contractor, serving overseas customers, no export of services from India took place. Thus, onsite services provided overseas (prior to 27-2-2010) cannot be said to be 'provided from India' and did not satisfy the condition for export of service. [*Tech Mahindra Ltd.* v. *Commissioner,* 2013-TIOL-543- CESTAT-MUM]

Process of painting/denting essential to complete manufacture not exigible to service tax: At issue, was the department's contention that painting and denting activities carried out by the appellant were processing and production undertaken on behalf of the client and taxable as Business Auxiliary Service. It also sought to tax the activity of loading and unloading of bus body and metal scrap within the factory. The Tribunal held that the said processes carried out before the bus body was cleared out of the factory were essential for completion of manufacture. Further the processes by themselves were essential for transforming semi-finished bus body onto a complete finished article. On shifting, the Tribunal held that such activity is not process or production and cannot be taxed as Business Auxiliary Service or Cargo Handling Services. [*Sharwan Kumar* v. *Commissioner,* 2013 (30) S.T.R. 176 (Tri. – Del.)]

Storage and warehousing charges incurred at depot – Cenvat credit admissible: The department denied Cenvat credit on storage and warehousing charges paid at depot on the ground that it was post manufacturing activity. Upholding eligibility of Cenvat credit on storage and warehousing charges, the Tribunal held that since depot was the place of removal for the appellant, credit would be available on eligible input services received upto place of removal. [*Danmet* v. *Commissioner,* 2013 (30) S.T.R. 306 (Tri. – Mumbai.)]

Chit fund business - Services of foreman not liable to Service Tax: The Delhi High Court has quashed Notification No. 26/2012-S.T., dated 20-6-2012 in so far as it relates to chit funds and has held that services of foreman of chit fund business is not a taxable service for the purposes of Section 65B(44) of the Finance Act, 1994 inserted from 1st July, 2012. It held that no service is involved in case of any transaction in money. When no service is involved in such transactions, the same will be covered under the exclusionary part of the definition of service. It held that if the only activity, for which a separate consideration is charged, and which cannot be considered as a transaction in money is the activity mentioned in the explanation to Section 65B(44), service tax would be charged on the consideration received in respect of such an activity and all other cases of transaction in money shall stand excluded from the charge of service tax, including the consideration charged for the services of a foreman in a chit business [*Delhi Chit Fund Assn.* v. *UOI,* 2013-TIOL-331-HC-DEL-ST]

Cleaning service undertaken in factory is eligible input service: Examining the admissibility of Cenvat credit on cleaning service undertaken in the factory, the Tribunal held that cleaning is a prerequisite for and is integrally connected with manufacturing activity. It observed that manufacturing activities require hygienic atmosphere besides inputs and capital goods. The appellant had argued that cleaning services were required since it undertook packing of various products. [*Paper Products Ltd* v. *Commissioner*, 2013 (30) S.T.R. 310 (Tri. – Mumbai)]

VALUE ADDED TAX (VAT)

Notifications

Tax credit of goods used for sale by way of TRUG available in phased manner in Delhi: With effect from 1st April, 2013, input tax credit in respect of goods which are used for sale by way of transfer of right to use goods, is available in a phased manner in four years and not upfront. 1/4th of the input tax on such goods arising in the tax period, is available in the same tax period, while balance 3/4th of such input tax, in equal proportions, is available in corresponding tax periods, in three immediately successive financial years. Delhi Value Added Tax (Amendment) Act, 2013 read with Notification No. F.3 (18)/ Fin. (Rev.1)/ 2012-13/ dsVI/263, dated 30th March, 2013, in this regard, inserts sub-section 9(11) in the Delhi VAT Act, with effect from 1st April, 2013.

WCT-TDS rate increased in Punjab: Rate of WCT-TDS under the Punjab Value Added Tax Act, 2005 has been increased from 5% to 6% vide the Punjab Value Added Tax (Amendment) Act, 2013.

Residuary rate of tax and tax rate for works contract increased in Kerala: Residuary rate of tax has been increased from 13.5% to 14.5% in Kerala. Further, with respect to transfer of goods involved in execution of works contract, where the transfer is not in the form of goods, but in some other form, the rate of tax has also been increased from 13.5% to 14.5%. Section 6 of the Kerala Value Added Tax Act, 2003 has been amended, in this regard, by Kerala Finance Bill, 2013 read with Circular No. 4/2013, dated 2-4-2013.

Ratio decidendi

Quantification of gross turnover in case of lease rentals: The right to use vehicle is dependent upon the monthly payment of rentals and therefore, the monthly rentals received or receivable by the dealer is a turnover and consequently the sale price. The question examined in the present case before the Punjab and Haryana High Court was whether the gross turnover is to be quantified in respect of the lease rentals received or receivable during the year or the entire lease rentals to be received during the entire period of lease would form part of gross turnover of the year, in a case pertaining to agreement for lease of the vehicles. The High Court held that since transfer of the right of use in the vehicle is 'sale' falling within the definition in Section 2(zf), only the rentals received or receivable during the tax period is the sale price received by the dealer, exigible to tax in a financial year. It was observed that the tax period in terms of Rule 2(zf) means a period of time usually a month, a quarter or a year for which tax payable by a dealer is quantified and the turnover is aggregate of the goods sold or purchased by a dealer during a tax period in terms of

Rule 2(zg). The court held that lease rental received or receivable during the tax period only, as a right to use goods, is the turnover forming part of sale price. [*GE Capital Transportation Financial Services Limited* v. *State of Haryana* - 2013-VIL-34-P&H].

Interest for delayed payment of tax when no return filed: Delhi High Court has held that no interest is payable if return has not been filed by the assessee. The court noted that if no return is filed then there could be no tax due within the meaning of Section 27(1) of Delhi Sales Tax Act read with Section 21(3) as the tax which is ultimately assessed is the tax which becomes due on assessment. It was hence held that if the tax so assessed is not paid even after the demand is raised then the dealer would be deemed to be in default and would be liable to pay interest under Section 27(2), but till such tax is assessed no interest can be levied on such a dealer, who has not filed a return under Section 27(1). In the present case, no return was filed and the petitioner had also not deposited any tax during the currency of that year. [*Pure Drinks (New Delhi) Limited* v. *Member, Sales Tax Tribunal* - 2013-VIL-28-DEL].

INCOME TAX

Notifications

E-filing of audit report and return mandatory when income is Rs. 5 lakh or above: CBDT by Notification No. 34 dated 1-5-2013 *interalia* has mandated e-filing of (i) audit report under Section 44AB, 92E or 115JB and (ii) return of income where the income is Rs. 5 lakhs or more.

Limits for variation from ALP notified: By way of Notification No. 30/2013 (F. No. 500/185/2011-FTD-I, dated 15-4-2013 the Central Government has notified the tolerance band for variations between the arm's length price determined under Section 92C of the Income-tax Act and the price at which the international transaction or specified domestic transaction has actually been undertaken. The price at which the international transaction (or specified domestic transaction) has been undertaken will be ALP where the variation does not exceed 1% in case of wholesalers. The limit has been notified as 3% in all other cases.

Ratio decidendi

Virtual presence through website does not create permanent establishment in India: The assessee, a florist, paid certain sum to Google Ireland Ltd and Yahoo USA for online advertising, however, no tax was deducted at source. The Assessing Officer disallowed the advertisement expenditure under Section 40(a)(i) of the Income-tax Act, 1961 ('the Act') on the premise of non-deduction of tax on advertisement payments. The ITAT Kolkata observed that a website does not constitute a 'permanent establishment' unless the servers on which websites are hosted are located in the taxable territory and as the servers of Google and Yahoo are not located in India, there is no PE in India. Further, it was also observed that the services to qualify as 'fees for technical services' should involve a human element i.e. if there is no human intervention in a service, it cannot be treated as a technical service under Section 9(1)(vii) of the Act. The service rendered by Google and Yahoo is a wholly automated process and in the services rendered by such search engines, which provide these advertising opportunities, *there is no human touch at all*. Accordingly, it was held that the whole process of actual advertising service provided by Google and Yahoo, even if it be a technical service, is not covered by the limited scope of Section

9(1)(vii). [*ITO* v. *Right Florists Pvt. Ltd.* ITA No. 1336/Kol./2011, Order dated 12-4-2013 (ITAT Kolkata)]

Depreciation is not available on non-compete fee: The assessee acquired the business of manufacture of glass and also entered into a non-compete agreement whereby it agreed to pay a certain sum to the seller as consideration to refrain from carrying on a competing business for a period of 18 years. The payment was claimed as a revenue deduction and in the alternate as a depreciable asset by the assessee. The ITAT Mumbai observed that the expression, '*any other business or commercial rights of similar nature*' in the definition of '*intangible asset*' in Section 32 (1)(ii) shows that the initial part, i.e. know how, patents, copyrights, trademarks, license, franchises, has been separated by the disjunction 'or'. The legislature has used 'or' in the provision for explaining the distinction of application of like nature with that of the unlike nature, which is an accepted principle i.e. doctrine of ejusdem generis. The Tribunal held that use of the word 'or', is essential to carve out a meaningful genus. Accordingly, it was held that non-compete fee did not fall within the ambit of any other commercial or business rights and therefore no depreciation would be available. Further, it was also held that since the payment was a capital expenditure, it was not allowable as an expense. [*Gujarat Gas Private Limited* v. *ACIT,* ITA No 4842/Mum/2004, Order dated 5-4-2013 (ITAT Mumbai)]

Share application is not 'loan or advance' for the purpose of Section 2 (22) (e): The assessee was a beneficial shareholder of two companies viz., Kingston Properties Pvt. Ltd. (KPPL) and New Dimensions Consultants Pvt. Ltd (NDCPL). Money was advanced by NDCPL to KPPL towards 'share application money', of which a part was returned by KPPL while rest was adjusted towards allotment of shares. The assessing officer observed that the transaction triggered the provisions of Section 2 (22) (e) and accordingly assessed the share application money as deemed dividend in the hands of the assessee (beneficial shareholder). ITAT Mumbai observed that share application money is distinct from loan or advance. Although share application money is a kind of advance given with the intention to obtain the allotment of shares/equity/preference shares etc, such advances are different from the normal loan or advances specified both in Section 269SS or 2(22)(e) of the Act. It was further observed that share application money when partly returned without any allotment of shares, should not be classified as 'loan or advance' merely because share application advance is returned without allotment of share. The Tribunal noted that in the instant case, the refund of the amount was made for commercial reasons and also in the best interest of the prospective share applicant. Reference was also made to the books entries which suggested the share application nature of the advance. Accordingly, it was held that the share application money may be an advance but they are not advances which are referred to in Section 2(22)(e) of the Act merely because the same is repaid or returned or refunded in the same year or later years after keeping the money for some time with the company. [*DCIT* v. *Vikas Oberoi,* ITA No. 4362/M/2011, Order dated 20-3-2013 (ITAT Mumbai)]

No liability to deduct surcharge and education cess where DTAA is silent: In the instant case, the assessee made a remittance of management fee and interest to an entity tax resident of France. The

assessing officer held that the assessee should have applied tax rate including surcharge and cess while deducting tax at source under Section 195. The assessee contended that India-France DTAA was silent about inclusion of surcharge and education cess and it was under no obligation to add these elements to the tax rates specified in the DTAA. In these facts, it was held by ITAT Cochin that as per Section 90(2) if the provisions of the DTAA are more beneficial to the taxpayer, the DTAA prevails over the Income-tax Act. Since the DTAA is silent about the surcharge and education cess for the purpose of deduction of tax at source, the taxpayer may take advantage of that provision in the DTAA for deduction of tax. [*ITO* v. *Far Hotels Ltd.*, ITA No. 430 to 435/Coch/2011, Order dated 5-4-2013 (ITAT Cochin)]

Dispute Resolution Panel (DRP) empowered to enhance variations proposed by TPO:

The assessee contended that the Dispute Resolution Panel (DRP) could not modify the TPO's order to the assessee's prejudice, when the objections have been taken against the draft order in terms of Section 144C(2) of the Act. Further it objected to the questioning of whether tangible and direct benefit had been derived on payment in respect of management fee and R&D services, to the associated enterprise (AE). The Tribunal held that as per Section 144C (8), the DRP has powers to enhance any variations proposed in the draft order. The power of enhancement is also embedded in Section 144C (5) whereby it is obligatory on the DRP to issue directions as it 'thinks fit'. The Tribunal also observed that Finance Act 2012 extends the power even to matters arising out of assessment proceedings. [*Hamon Shriram Cottrell Pvt.Ltd.* v. *Income Tax Officer* , Order dated 19-4-2013 (ITAT Mumbai)]