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Articles

Centrica's law on secondment of employees – Hurting hard UK companies

By **Sumeet Khurana & Ashish Karundia**

In this era of rapid globalization, the multinational companies (MNCs) are increasingly outsourcing 'non-integral' and 'non-revenue generating' (business support) functions to their subsidiaries or to third party vendors, located in low cost jurisdiction such as India. At times, MNCs send their employees, having expertise in the respective field to help the subsidiaries set up and carry out outsourced activities efficiently. Such secondment arrangements, unless carefully structured, can result in serious tax implications, both for the Indian subsidiary and the foreign company.

In a recent decision in *Centrica India Offshore Pvt. Ltd.* [WP (C) No. 6807/2012 dated 25-4-2014], the Delhi High Court has held that business support services provided by foreign company through seconded employees to Indian subsidiary constitutes 'fees for technical services' (FTS). Surprisingly, the High Court further held that such services also create foreign company's Service PE in India. The present article analyses the law laid down by the court and its implications, with respect to secondment.

Key facts of the case

Centrica Plc., United Kingdom (Centrica UK) had subsidiaries in Canada and UK (hereinafter referred to as 'overseas entities') besides Centrica India. The overseas entities had outsourced some of their business support functions viz., debt collections, consumers' billings, monthly jobs etc., to Indian vendors. Centrica India acted as interface between overseas entities and Indian vendors. A service agreement was entered into between Centrica India and overseas entities in this regard providing for a cost plus remuneration. Centrica India requested overseas entities to *provide staff with knowledge and experience of various processes and practices employed by Centrica UK*. Managerial employees of the overseas entities were deputed to Centrica India, under secondment agreements, for assignments ranging from three to nineteen months. Centrica India, thereafter, entered into individual agreements ('employment agreement') with seconded employees (Secondees) reiterating the terms of the secondment agreement and providing as under:

- Secondees have to function and act exclusively under the direction, control and supervision of Centrica India;
- Overseas Entities are not responsible for the work of Secondees and have no responsibility for the errors/omissions or for the work performed by them.
- Centrica India should bear all risks in respect of work performed by the Secondees and reap the benefit from their output.
- Rules, regulations, policies and other practices established by Centrica India for its employees apply to Secondees.
- Secondees continue to participate in retirement, social security plans and other benefits in accordance with overseas entities applicable policies.

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Centrica India had a right under the secondment agreement, to terminate Secondees from India assignments without any effect on the employment of Secondees with overseas entities. Salary to Secondees was paid directly by the overseas entities and claimed as 'reimbursement' from Centrica India on a monthly basis. The reimbursement increased the cost base of Centrica India which was to be recovered as per service agreement after adding mark-up. The taxpayer was unsuccessful before Authority for Advance Ruling (AAR) and filed a writ before Delhi High Court. Analysis of these rulings is as under.

Services without profit motive

Centrica India contended to be the economic employer of the Secondees, however the fact that control and supervision of the employees was fully with Centrica India could not influence the court. The court instead laid emphasis on the fact that employees have a right to recover their salaries only from overseas entities and their employment with overseas entities remains intact and unaffected by termination of secondment by Centrica India. The court relied on a passage from the authoritative book of Prof. Klaus Vogel written in the context of dual employment which suggested that merely because an employee works for an entity and receives instructions, tools, etc., from it are irrelevant *except* where the employees exclusively work for it during a period in which they are *released* by their legal employer. The court apparently equated the expression 'released' with severance of legal / formal employment. It was therefore concluded that overseas entities *are rendering service* to Centrica India as against mere hiring of labour. Having so held, the court added that the fact that there was no mark-up on the salary reimbursed does not alter the character of transaction.

Fees for technical services

The AAR had held that payment is not in the nature of 'fees for technical services' (FTS) due to absence of the word 'managerial' in the treaty definition of FTS. The High Court observed that the definition in the Income tax Act includes 'provision of services of technical personnel' and concluded that the case before hand fits therein. It added that the Secondees are not only providing services but rather tiding Centrica India through the initial period and ensuring that going forward, the skill set of Centrica India's other employees is built and these activities can be carried out in future without the assistance of Secondees. For this reason it concluded that the criteria of 'making available technical knowledge' is met and even under treaty the services constitute 'FTS'. *In the process of its analysis the High Court observed that the criteria of 'making available knowledge', is not a pre-requisite to qualify as FTS in India UK treaty. This observation though, with due respect, appears to be incorrect yet until reversed, is likely to result in harsh consequences on transactions with UK based companies.*

FTS constituting Service PE

The court in principle agreed that 'substance' *and not* the 'form' of the employment relationship has to be looked into so as to determine the existence of a service PE. However extending their conclusion regarding 'rendition of service', the court concluded that overseas entities were

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legal as well as economic employers of Secondees and did have a service PE in India.

Conclusion

The conclusion of the court regarding 'economic employment' vis-à-vis 'legal employment' is not in sync with the OECD as well as other commentaries on the subject. With due respect, it appears that the court fell in error by applying (out of context) the passages from Klaus Vogel. In the absence of any other authoritative decision on the aspect of secondment, the view taken in this decision is likely to result in unwanted litigation. Other taxpayers affected by these observations need to review their position and put in place an effective counter strategy.

It is also noteworthy that Service PE clause under treaties is attracted *only* where services *other than* FTS are provided. Hence, the view of the court that the services of Secondees also created a Service PE, with due respect, *may require reconsideration*. Further, adding to the confusion, the last paragraph of the judgment dismissing the writ states that *'the ruling of the AAR stands'*. As the AAR had ruled that the services do not constitute FTS and High Court held that to be FTS, this statement at the end is thus *self-contradictory*. Until clarified, the position regarding transactions with UK companies is likely to face unwarranted resistance from tax authorities.

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Can Trade Notice make a provision retrospective in application?

By **Mahesh Raichandani**

The subject of imposition of service tax on construction and sale of residential/commercial property has long been a matter of concern for the real estate and construction industry as well as for buyers of such property. It gained much eminence after Budget 2010 which introduced significant amendments towards applicability of service tax on sale of residential/commercial properties.

With effect from 1-7-2010, an explanation was inserted below the definition of taxable service of 'construction of complex' service [Section 65 (105) (zzzh) of Finance Act, 1994] and 'commercial or industrial construction' service [Section 65 (105) (zzq)] by the Finance Act, 2010. The explanation introduced below both sections is similarly worded. The explanation introduced below sub-clause (zzq) of Section 65(105) reads as under:

> "*Explanation.* — For the purposes of this sub-clause, the construction of a new building which is intended for sale, wholly or partly, by a builder or any person authorized by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or the person authorized by the builder before grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer;"

The deeming provision through the said explanation was effective from 1-7-2010. There were a number of instances where the building

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was partially completed as on 1-7-2010.

The Service Tax Commissionerate, Mumbai issued Trade Notice No.14/2013-14/ST-I dated 5-12-2013 on leviability of service tax on construction of buildings/flats partly completed as on 1-7-2010 wherein it has been clarified that service tax is liable to be paid on all payments made after 1-7-2010 irrespective of the fact that a portion of construction has already been completed as on or before 1-7-2010. The trade notice reads as under (relevant extracts):

"a) Where a buyer has entered into an agreement to buy a flat after 1-7-2010 and payment was also made after 1-7-2010, but the building was partially constructed as on 1-7-2010. Whether service tax is payable on full value paid by buyer or only on part value which represents proportion of construction completed after 1-7-2010.

b) A buyer had entered into an agreement to purchase the flat prior to 1-7-2010 and the building has been partially constructed as on 1-7-2010. In that situation, if the invoice has been raised after 1-7-2010 and payment has also been made after 1-7-2010, but if the said invoice or payment pertains to the portion of construction which has been completed prior to 1-7-2010, whether service tax is payable.

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3. .....*It is clarified that in both the situations mentioned above, Service Tax would be leviable for the amount paid after 1-7-2010. Even though self service is not taxable, the said service never got completed because the building was only partly constructed as on 1-7-2010. Therefore, payment made by the prospective buyers on or after 1-7-2010 would be deemed against services to be provided by the builder. Further, in case of agreement entered after 1-7-2010 also, the payment made by the prospective buyer would be treated as payment towards services to be provided by the builder because the said buyer would get enjoyment of the services (construction of flat) provided by the builder including for the portion of building already constructed as on 1-7-2010.* Further, a combined reading of erstwhile Rule 6 of Point of Taxation, Rules, 2011 and definition of construction services would also reinforce for the same view.

4. Therefore, it is clarified that in both the situations mentioned in para one above, the service tax is liable to be paid on all payments made after 1-7-2010 irrespective of the fact that a portion of construction has already been completed as on 1-7-2010."

The trade notice has impliedly taken a view that the said explanation would apply retrospectively i.e. physical construction activity undertaken even prior to 1-7-2010 would attract service tax. The levy of service tax is on provision of service. In other words, the taxable event is provision or rendering of the service. This is a well settled principle of service tax law [*Reliance Industries Ltd.* v. *CCE* - 2008 (10) S.T.R. 243 (Tri. - Ahmd.)].

By introducing the explanation, the activity of sale of immovable property (in respect of which any part of consideration is received before the grant of completion certificate) was deemed to be taxable as 'construction service'. Thus, the explanation created a fiction with effect from 1-7-2010 and such transaction became liable to service tax for the first time from 1-7-2010. This provision which is in the nature of expanding the scope of construction service would not have retrospective effect. This proposition is supported

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by various judicial pronouncements.

With the introduction of the explanation, the construction and real estate sector had to battle several issues like whether part occupancy certificate would qualify as a completion certificate, valuation of the service potion in works contract, apportionment of credit of property sold during construction and after receipt of completion certificate. The view expressed in the trade notice has just added salt to the wound of the construction and real estate sector. The department is likely to follow the trade notice scrupulously and proceed to raise demand notices against the assessee.

The trade notice levies service tax on that portion of the construction which has been done prior to 1-7-2010. A measure which demands tax on the construction rendered prior to the introduction of the levy would be detached from the fundamental concept of the subject of the levy i.e. provision of service. The matter needs clarification.

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CENTRAL EXCISE

Ratio decidendi

Cenvat Rule 6/Rule 57CC not applicable where exempted by-product emerge during manufacture of dutiable final product:

The Supreme Court has held that Rule 57CC of the *erstwhile* Central Excise Rules, 1944 or Rule 6 of Cenvat Credit Rules, 2004, requiring maintenance of separate accounts for inputs used in dutiable and exempted goods or pay 8% of the value of exempted goods, would not be applicable in case an exempted by-product emerges during production of dutiable final product. The court in this regard noted that no part of inputs was used in the manufacture of exempted by-product and that the by-product emerged as a technological necessity where assessee had little control. Department's contention that Rule 57CC and not Rule 57D would be attracted as the term 'final product' would cover by-product produced, was hence rejected by the court. The Apex Court further, relying on earlier judgment in the case of *Swadeshi Polytex Ltd.* [1989 (44) ELT 794] approved the decisions in the cases of *Rallis India Ltd.* [2009 (233) ELT 301 (Bom.)] and *Sterlite Industries* [2005 (191) ELT 401 (Tri.-Chennai)]. [*Union of India* v. *Hindustan Zinc Ltd.* – Judgment dated 6-5-2014 in Civil Appeal No. 8621 of 2010 & others, Supreme Court]

CESTAT, Ahmedabad has also allowed assessee's appeal against demand of 5% on bagasse, press mud and bio-compost emerging during manufacture of sugar. The Tribunal in its order passed on 2-4-2014 relied upon Gujarat High Court judgment in the case of *Sterling Gelatin*. It held that the items emerging during manufacture cannot be said as manufactured by the assessee. It was also noted that CBEC Circular No. 904/24/2009-CX, relied by the lower authorities was already quashed by the Allahabad High Court. [*Chalthan Vibhag Khand Udyog Sahakari Mandali Ltd.* v. *Commissioner* – Order Nos. A/10484-10494/2014, dated 2-4-2014, CESTAT Ahmedabad]

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Valuation – Presumption of FOR sale: CESTAT Delhi has held that there cannot be any presumption of sale being on FOR destination basis just because customer of the assessee wanted the supply at their premises. The Tribunal in this case held the freight up to the buyer's premises as not includible, further observing that freight amount was separately mentioned and the invoice or supply order did not mention sale as on FOR basis. It was noted that the goods (gases in this case) were transported in specially designed tankers owned by the assessee and there was no allegation that the part of value of the goods was being recovered as freight charges. [*Bathinda Industrial Gases* v. *Commissioner* - Final Order No. 51352/2014, dated 5-3-2014, CESTAT Delhi]

Rebate on exports – CBEC Circular to be ignored: Allahabad High Court has directed the department to ignore Circular No. 354/70/97-CX, dated 13-11-1997 while considering rebate claims under Notification No. 19/2004-CE (NT). The court noted that the circular revised the procedure of acceptance of proof of export as prescribed in Notification No. 19/2004-CE (NT) and it was not permissible for an executive order to lay down something else than what was prescribed in the notification. Noting that an executive order cannot prevail over statutory rules, the court quashed the impugned order and directed reconsideration of rebate claim ignoring the said circular. [*Polyplex Corporation Ltd.* v. *Joint Secy., Finance* – Judgment dated 28-4-2014 in Writ Tax No. 1165 of 2012, Allahabad High Court]

Suo-motu re-credit of excess duty paid, available: CESTAT Ahmedabad has allowed suo motu re-credit of duty paid in excess in earlier month. The Tribunal in this regard relied upon High Court judgments in the case of *Motorola India Pvt Ltd.* [2006 (206) ELT 90] and *S. Subrahmanyan & Co.* [2013 (296) ELT A123]. It was held that in the light of the latter judgment of the jurisdictional High Court, in favour of the assessee, the decision of Larger Bench of Tribunal in the case of *BDH Industries* [2008 (229) ELT 364] would not be applicable. [*Balmer Lawrie and Co. Ltd.* v. *Commissioner* – 2014-TIOL-625-CESTAT-AHM]

Cenvat credit of sugar cess paid as CVD, available: The Karnataka High Court has held that sugar cess is a duty of excise and is not a fee because such cess levied and collected is credited to the Consolidated Fund of India and hence takes the character of a duty or a tax. Further, the manufacturer was found eligible for Cenvat credit of this sugar cess paid as part of CVD on import of raw sugar. [*Commissioner* v. *Shree Renuka Sugars Ltd.* – 2014 (302) ELT 33 (Kar.)]

Floor sweepings arising during manufacture of biscuits, not dutiable – Cenvat credit attributable to inputs in such goods, available: CESTAT, Mumbai has held that floor sweepings emerging during the manufacture of biscuits are waste and hence, no duty is required to be paid on such floor sweepings even if they fetch some price in the market. It was also held that the appellants are not required to reverse Cenvat credit attributable to inputs contained in floor sweepings as the same had emerged during the course of manufacture of final product i.e. biscuits. [*Harinagar Sugar Mills* v. *Commissioner* – 2014-TIOL-713-CESTAT-MUM]

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Pasting warranty stickers & chassis number on DVD/ VCD player is not manufacture: The Tribunal has held that the activity of putting warranty stickers and pasting chassis number on imported DVD/ VCD players or multiplayers which were already in packed form and bearing MRP stickers, does not amount to manufacture under Central Excise law. It noted that the department had not contended that the import was in bulk and that the goods were put in some containers thereafter. The Bench noted that there has to be some activity as defined in Section 2(f) to be covered under the expression "any other treatment". [*Beltek (India) Ltd.* v. *Commissioner* – 2014 (302) ELT 156 (Tri-Del)]

Providing details as per statutory requirements is not manufacture: The Madras High Court has held that inscription of name and other details by the assessee on the product, being a statutory requirement, does not amount to manufacture under Chapter Note 5 to Chapter 38 of Central Excise Tariff Act, 1985. During the period of dispute, Note 5 to Chapter 38 read as *"In relation to products of this Chapter, labelling or re-labelling of containers and repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to manufacture"*. Further, relying on the Supreme Court judgment in the case of *Johnson & Johnson Ltd.* [2005 (188) ELT 467], the High Court held that since assessee had only undertaken re-labeling and had not broken bulk packs into smaller packs, the activity did not amount to manufacture. [*Commissioner* v. *Indian Additives Ltd.* – 2014 (302) ELT 544 (Mad.)]

CUSTOMS

Notification & Public Notice

Re-export to Iran – Restrictions relaxed: Re-export of certain food, medicine and medical equipments, falling under Chapters 2, 3, 4, 7 to 11, 15 to 21, 23 & 30 and Headings 9018 to 9022 of the ITC (HS), to Iran has been relaxed. Condition of 15% value addition in case of re-export of such goods against payment in Indian Rupees, has been dispensed with. This relaxation would however be not applicable in case of re-export of bird eggs covered under Heading 0407 and 0408 and rice classifiable under Heading 1006 of the ITC (HS) Classifications. However, according to Notification No. 79 (RE-2013)/2009-2014, dated 30-4-2014 amending Para 2.35 of FTP, such re-exports would not be eligible for any export incentives.

Export of pharmaceuticals - Self certification of bar-coding effective from 15-5-2014: Date of effect for implementation of self-certification procedure, concerning conformity of bar-coding requirements on secondary and tertiary level packaging, in respect of export consignment of pharmaceuticals and drugs has been postponed to 15th of May, 2014. This procedure was to come into effect from 1st of April, 2014. Public Notice No. 58(RE-2013)/2009-2014, dated 15-4-2014 has been issued by the DGFT in this regard.

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Ratio decidendi

SAD refund – No time limit for claiming refund: Delhi High Court has read down Notification No. 93/2008-Cus. amending Notification No. 102/2007-Cus., and imposing time limit for claiming refund of Special Additional Duty (Special CVD) under earlier notification. It was noted that right to refund under Notification No. 102/2007-Cus., could be exercised once sale of imported goods which was an entirely market driven event and under limited control of importer, was complete, but as per later amending notification limitation period would commence before the right to refund accrued. The court also held that provisions for refund under Section 27 of Customs Act were always understood as inapplicable for refund of SAD and that limitation period could only be introduced by legislation. The phrase "so far as may be" in Customs Tariff Act was held to mean that specific provisions relating to mechanism applicable for refund were only applicable and not period of limitation. Interestingly, the question before the court was whether the amending Notification No. 93/2008-Cus., specifying limitation period, retrospective and hence applicable to imports made prior to said notification. [*Sony India Pvt. Ltd.* v. *Commissioner* – Judgment dated 16-4-2014 in CUSAA 3/2014, Delhi High Court]

EOU – LoP once renewed cannot be curtailed: Deliberating on the principle of promissory estoppel, the Gujarat High Court has held that permission once granted to an EOU cannot be curtailed later on to cut down the period of permission. Noting that the policy laying down prohibitions on reprocessing of garments/used clothings/secondary textile materials in EOU came into force in 2004, but the licence of assessee-EOU was renewed number of times thereafter, the court held that once the permission was granted and on the basis of which assessee was managing his affairs, it would not be open for the authorities to curtail the period of licence. However, the court held that no EOU has a right to enjoy LoP in perpetuity and that renewals have to be governed by the current Foreign Trade Policy. Contention of the assessee-EOU that Clause 7 of Appendix 14-I-C of the Handbook of Procedures, imposing prohibitions on reprocessing, etc., would apply to the new units only, was not accepted by the court. [*Geetanjali Woollens Pvt. Ltd.* v. *Union of India* – Special Civil Application No. 16768 of 2013 decided on 3-4-2014, Gujarat High Court]

Simultaneous penalty on partner and partnership firm under Section 112(a) – Issue referred to Larger Bench of High Court: Question as to whether under Section 112(a) of the Customs Act, 1962 simultaneous penalties can be imposed on both the partner and partnership firm, has been referred to Larger Bench by the Bombay High Court. The court in this regard observed that there was divergent view on the issue by two different division benches of the court in the cases of *Jupiter Exports* [2007 (213) ELT 641 (Bom.)] and *Textoplast Industries* [2011 (272) ELT 513 (Bom.)]. [*Amritlakshmi Machine Works* v. *Commissioner* – Order dated 23-4-2014 in Customs Appeal No. 100 of 2012, Bombay High Court]

It may be noted that recently there was divergence of views in the CESTAT also on the

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disputed question and penalty under Section 112(a) on a partner of the partnership firm was set aside by the Tribunal by its Majority Order. It was noted that the penalty would not be justified when for the same offence it has been imposed, under same provisions, on the partnership firm. The Tribunal also observed that penalty under Section 112(b) was not imposable on partner when the goods had not been cleared and hence there was no question of the partner acquiring possession or being concerned in carrying, removing, etc. them. [*Siddhant Enterprises* v. *Commissioner* – 2014 (302) ELT 292 (Tri.-Del.)]

Mobile phone import – Customs cannot examine ownership of IMEI No.: Customs authorities cannot examine the issue as to whether the International Mobile Equipment Identity (IMEI) numbers stand validly given on imported mobile handsets or as to whether the brand name owner of the imported phones was the actual owner of the said IMEI numbers. CESTAT, Delhi while holding so, rejected the contention of the department that such numbers on the designer phones belong to other OE manufacturers and hence were not valid. It held that the only requirement was that mobile handsets should be carrying IMEI numbers, which the consignment under dispute was having. The Tribunal observed that brand name owner in the present case was only re-designing and embellishing the casing of existing handsets manufactured by the original equipment manufacturers. [*Navshiv Retail Pvt. Ltd.* v. *Commissioner* – Order No. FO/51629/2014-SM, dated 17-4-2014, CESTAT Delhi]

Refund – Unjust enrichment in case of amount deposited before adjudication: CESTAT, Ahmedabad has held that doctrine of unjust enrichment would not be applicable in case where the disputed amount was deposited prior to adjudication of demand and adjusted against confirmed demand, but the demand was subsequently set aside. It was observed that the appropriation became null and void on setting aside of demand and the nature of deposit remained pre-deposit further as the demand was contested. [*N.K. Overseas* v. *Commissioner* – Order No.A/10832/2014, dated 11-4-2014, CESTAT Ahmedabad]

Penalty under Section 114A not imposable when demand absent: Delhi High Court has upheld the CESTAT Order setting aside penalty under Section 114A of the Customs Act, 1962 in the case where no demand of customs duty under Section 28(8) of the said Act was raised. The court in this regard further upheld the tribunal's action of not imposing penalty under Section 112 as those provisions were not invoked earlier. Earlier the customs department had initiated proceedings based upon information that the goods did not match the declaration and had confiscated the goods while imposing penalty equal to duty on the importer. The importer had meanwhile paid the duty, in addition to what paid claiming exemption, and provisionally cleared the goods. [*Commissioner* v. *Care Foundation* – Judgment dated 11-3-2014 in CUSAA 9/2013, Delhi High Court]

Hazardous waste – Customs officers are not experts: Observing that Customs officers who had examined the imported goods were not experts in the field of electronic items, Mumbai

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Bench of CESTAT has set aside confiscation of goods claimed to be old hard disc drives. It was noted that three reports given by Customs officers were at variance with each other as while the first report talked of old and used goods, second report stated the goods to be old and third reported the goods as old, obsolete and refurbished. The Tribunal in this regard also relied upon a report by Arihant E-recycling, approved by Maharashtra Pollution Control Board, that no data or files were found in the drives and that such situation is possible with new hard drives. [*Stainloyz International* v. *Commissioner* – 2014 (302) ELT 401 (Tri.-Mumbai)]

SERVICE TAX

Ratio decidendi

VCES – Amount paid after 1-3-2013 but prior to 10-5-2013 can form part of declaration: At issue was the correct interpretation of term "tax dues" defined in Section 105(1)(*e*) of the Finance Act, 2013. It was contended by the department that the amount paid after 1-3-2013 but prior to 10-5-2013 when the VCES came into operation could not be said to have been declared under the scheme. The assessee contended that though the amount was paid after a search on its premises on 8-3-2013, the impugned amount was 'unpaid' as on 1-3-2013 and qualified as 'tax dues' as per the scheme. The High Court held the legislature excluded from the purview of declaration only those taxes which were already paid by 1-3-2013. Further, reliance could not be placed on CBEC Circular dated 8-8-2013 which stated that if any tax has been paid prior to the enactment of the scheme, liability of interest and penalty would be adjudicated as per the Finance Act, 1994 as a circular or clarification cannot override the provisions of the statute. Thus, such amount paid after 1-3-2013 but prior to 10-5-2013 will also be included in the declaration filed under VCES. [*Sadguru Constructions* v. *UOI* – 2014-TIOL-630-HC-AHM-ST]

Cenvat credit on outward transportation of MRP based goods: Chhattisgarh High Court has granted stay against the order of the Delhi Bench of CESTAT, wherein Cenvat credit of service tax paid on outward transportation up to customer's premises was denied. The case involved FOR sales of goods which were assessed to excise duty under Section 4A of the Central Excise Act, 1944 i.e. on MRP basis. [*Ultra Tech Cement Ltd.* v. *Commissioner* – 2014-TIOL-543-HC-CHHATTISGARH]

No extension of time for initial deposit of declared dues under VCES: The assessee failed to pay 50% of the declared tax dues under VCES, 2013 before 31-12-2013 and therefore, their application was rejected for non-compliance of relevant provisions. Observing that the right of the assessee to claim the benefit of the scheme is dependent upon its depositing the initial 50% within the time period, the court held that the authorities had no discretion under the scheme in grant of extension of time to make initial pre-deposit of 50% of the declared tax amount. The scheme was a separate package and could not be divided as sought by the assessee. [*Teknow Overseas* v. *Asst. CST (VCES)* – 2014-TIOL-471-HC-DEL-ST]

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Refund not deniable merely on late submission of supporting documents: The assessee, an exporter, sought a refund of service tax paid on the commission to the foreign agents for the services received from them in respect of exports made. The claim was made (within time) on the last day for application with regard to the particular quarter. However, the refund was rejected due to non-filing of proof of payment of service tax along with bank realization certificate, which were filed subsequently i.e. after the last date. It was held by the tribunal that when there was no dispute on fact of exports, or merits of claim, refund cannot be denied merely because the bank realisation certificate and proof of payment were furnished only subsequently. [*R.L. Fine Chem* v. *Commissioner* – 2014-TIOL-737-CESTAT-BANG]

Construction for High Commission / Embassy not taxable: The appellant had constructed building and staff quarters for Tanzanian High Commission and exemption from service tax was claimed as per notification relating to UNO and international organizations. The CESTAT held that service provided for construction of building and staff quarters of High Commission would not be taxable as such service was not meant for commerce or industry. [*Bhayana Builders Pvt. Ltd.* v. *Commissioner*, Order dated 28-3-2014, CESTAT New Delhi]

Deputation of staff to group companies – Service tax not attracted: The assessee in order to reduce his cost of manufacturing, deputed some of its staff to its subsidiaries/group companies for stipulated work or limited period. The staff continued to work under the control and supervision of the assessee. The actual cost of salary, remuneration and perquisites to the assessee was reimbursed by the group companies/subsidiaries without any element of profit or finance benefit. The court examined the definition of manpower supply and recruitment agency in the background of the above facts and held that there was no element of client and service provider relationship between the assessee and the group companies/subsidiaries. [*Commissioner* v. *Arvind Mills Ltd.* – 2014-TIOL-441-HC-AHM-ST]

Discount obtained not chargeable to service tax: The appellants were discharging service tax under BAS. In addition, the appellants were collecting the amounts due to the principal and were remitting the same after retaining an amount as early payment incentive. The department contended that such early payment incentive would be chargeable to service tax. Rejecting the contention, the tribunal held that early payment incentive was not for any service but a discount to the assessee. [*Tradex Polymers Pvt. Ltd.* v. *Commissioner* – 2014 (34) S.T.R. 416 (Tri.- Ahmd.)]

Export of services - Relevant date for refund is date of receipt of foreign exchange: Holding that the claim for refund was filed within time, the tribunal opined that in case of export of services, export is complete only when foreign exchange is received in India. In case of export of service refund can be filed within the limitation period prescribed under Section 11B of Central Excise Act. Section 11B is made applicable for claiming refund under Rule 5 of the Cenvat Credit Rules as per condition 6 of Notification No. 5/2006-C.E. (N.T.). Therefore relevant date for claiming

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refund in case of export of services is date of receipt of foreign exchange. [*Bechtel India Pvt. Ltd.* v. *Commissioner* – 2014 (34) S.T.R. 437 (Tri.-Del.)]

Excess service tax cannot be adjusted in subsequent months or quarters: The appellant had adjusted excess service tax after a period of one year without furnishing any adequate reason for inability to adjust in subsequent month /quarter The department contended that such adjustment could not be allowed since adjustment can be done only for the subsequent month/quarter under intimation to the department. Agreeing with necessity for strict adherence to law for availing exemption/concession the tribunal refused to grant benefit of such adjustment. [*JCT Electronics* v. *Commissioner* – 2014-TIOL-624-CESTAT-AHM]

Good used in rendering service not part of gross amount if VAT paid separately: The appellants were engaged in the business of manufacture as well as repair of transformers which involved replacement of certain components like HV/LV coils and also the used transformer oil for filling. The invoices showed separately the service charges on which service tax was discharged and the value of the transformers oil and other consumables and of the components parts replaced, on which sales tax/VAT was discharged. The tribunal did not agree with the department that service tax was to be paid on the gross amount. [*Samtech Industries* v. *Commissioner* – 2014-TIOL-643-CESTAT-DEL]

VALUE ADDED TAX (VAT)

Notifications

Madhya Pradesh VAT Act – Schedule amended: Telephones, cellular handsets and phablets are now liable to VAT at the rate of 13% under Madhya Pradesh Value Added Tax Act, 2002. Notification No.F-A-3-11-2014-1-V-(17), dated 26-4-2014 issued for the purpose by Madhya Pradesh Govt., inserts serial number 6 in Part-III of Schedule II, appended to Madhya Pradesh VAT Act, 2002.

Haryana VAT Act – Schedule amended: Serial number 27A of Schedule C of the Haryana Value Added Tax Act, 2003 has been substituted. After amendment by Notification No. S.O. 49 /H.A.6/2003/S.59/2014, dated 16-4-2014, the condition regarding sale to State/Union Territory and Central Government Departments, PSUs and municipal bodies has been removed. The goods specified in this entry i.e. Earthmoving equipments viz. Wheel Excavators, Track Excavators, Backhoe Loaders, Loadall, Wheel Loading Shovel, Skid Steer and Road Roller, attract VAT at the rate of 5.25% under Haryana VAT.

Ratio decidendi

Contract for supply and installation of lifts is Works Contract: The Constitution Bench of the Supreme Court has held that "the dominant nature test", "overwhelming component test" and "the degree of labour and service test" are not applicable in case of works contracts falling under clause (29A)(b) of Article 366 of the Constitution of India and that the principles stated in *Larsen and Toubro* v. *State of Karnataka* [(2014) 1 SCC 708], correctly enunciate the

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legal position in this regard. The reasoning of incidental facet of labour and service in case of contract for supply and installation of the lift was held to be incorrect by the Apex Court while it overruled its three-judge Bench Order in the case of *Kone Elevators (India) Ltd.* [(2005) 3 SCC 389] which had held that the contract for supply and installation of lift to be a sale simpliciter, as the skill and labour employed for converting the main components into the end product was only incidental. The court in this regard noted that if there are two contracts, namely, purchase of the components of the lift from a dealer, it would be a contract for sale and similarly, if a separate contract is entered into for installation, it would be a contract for labour and service. It was held that the composite contract for supply and installation has to be treated as a works contract, as it is not a sale of goods simpliciter. [*Kone Elevator India Pvt. Ltd.* v. *State of Tamil Nadu* – Writ Petition (C) No. 232/2005, decided on 6-5-2014, Supreme Court Constitution Bench]

Price realized after adjusting subsequent credit/debit notes is 'sale price': Madhya Pradesh High Court has held that sale price is the price fixed after deduction in primary invoice on the basis of credit notes issued subsequently, because that was the price which was realised by the assessee effectively and fixed under the price fixation mechanism. The petitioner in this case was engaged in sale of LPG to oil marketing companies and raised provisional bills since the price of LPG is fixed by the Petroleum Planning and Analysis Cell ("PPAC") and communicated on quarterly basis. Debit or credit notes were being raised subsequently depending upon the revised price and tax liability was also revised as per the final price. The department in this case was of the view that credit notes raised subsequent to the sale would not qualify as a discount under the MPVAT Act and/or the Central Sales Tax Act, 1956. The court however allowed the writ petition noting that the price is controlled by PPAC (since domestic LPG is being sold to consumers at a subsidized price) with petitioner having no liberty in this regard. It was held that the authority committed an error in disallowing the deductions from total turnover. [*GAIL India Ltd.* v. *State of Madhya Pradesh* – 2014-VIL-99-MP]

Build Own Operate Transfer contract is a works contract: The Andhra Pradesh High Court has held that a contract for imparting computer education in schools including leasing of computer hardware, software and connected accessories on Build Own Operate Transfer (BOOT) basis is a works contract. The question before the court was whether the contract was purely a service contract or a works contract. The petitioner here contended that although the petitioner provided computers and software for teaching purposes, the same was purely incidental to the service contract and that the computers and software installed remained the property of the petitioner till the ownership is transferred at the end of 5 years. The court however relying upon the Supreme Court judgment in the case of *Larsen & Toubro Ltd.* [2013-VIL-03-SC-LB] held that the contract in question involves both a contract of service and a contract of sale of goods. It was held that that contract is a composite contract and according to legal fiction provided

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under Article 366(29-A)(b) of the Constitution of India, it is permissible to separate the transfer of property in goods from the contract of service. The court hence held the contract in question to be works contract observing further that mere fact that the ownership of the computers and the accessories was passed on to government at the end of the contract does not alter the nature of the contract. [*NIIT Ltd.* v. *Deputy Commissioner* – 2014-VIL-109-AP]

INCOME TAX

Ratio decidendi

PSM to be regarded as most appropriate method in cases of highly integrated and interrelated controlled transactions: The taxpayer alongwith other group entities was engaged in rendering internet and related network services to the group's customers. The activities included direct connection, installation/ configuration of routers, etc., as part of end to end connectivity provided by the group, which involved more than one associated enterprise (AE) to complete a transaction, each entity making a unique and valuable contribution. On these facts the ITAT upheld the profit split method as most appropriate for the transaction of transmitting data from a destination in one country, to a destination in a different country requiring deployment of assets and functions of different entities, located in different geographical locations. [*Global One India Ltd* v. *ACIT* – Order dated 15-4-2014 in ITA No.5571/Mum/2012, ITAT Mumbai]

Reimbursement of software cost to HO is not liable to TDS as 'royalty': The Indian branch of the multinational bank benefited from software used by the bank globally. The data sent by the branch was processed by head office in Belgium using the software. The proportionate cost of the software was allocated to and reimbursed by the Indian branch. On the issue as to whether the reimbursement of software cost constitutes royalty, the ITAT held that the branch did not have any independent right to use or control over the main frame of the computer software installed in Belgium hence the reimbursement was effectively data processing charges. [*ADIT* v. *Antwerp Diamond Bank NV Engineering Centre* – Order dated 14-03-2014 in ITA No.7347/Mum/2007, ITAT Mumbai]

Installation charges are part of purchase price and not liable to be assessed separately: The taxpayer bought machines from various parties and required the sellers to supervise the erection/ installation, without any separate consideration. The revenue authorities contended that a part of the purchase price of the machinery would include installation charges, which is liable to TDS in India. The ITAT held that erection activities relate to sale of complex machinery, the charges for which would be embedded in the cost of machines and would not be assessable to tax in India whether embedded in the purchase price or charged separately. [*Mahindra Forgings Ltd* v. *ADIT* – Order dated 27-2-2014 in ITA No.1985/ Pune/2012, ITAT Pune]

Disallowance under Section 14A unwarranted where investment is made in subsidiary companies: The taxpayer had substantial portion of its investment in

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strategic joint ventures and subsidiaries and also contended that no expenses were incurred for maintaining the portfolio of these investments. On these facts, the ITAT held that since the purpose of investment was out of commercial expediency and was not to earn the dividend income, no disallowance under Section 14A should be made. In holding so, the tribunal also considered that the assessing officer had not brought out anything to show that the appellant incurred any expenditure for maintaining these investments. [*JM Financial Ltd*. v. *ACIT* – Order dated 26-3-2014 in ITA No. 4521/Mum/2012, ITAT Mumbai]

Section 80IA deduction has to be reduced for computing deduction under Section 80HHC: The taxpayer was eligible for and claimed deduction both under Section 80HHC and Section 80IA, both independently computed. The revenue authorities contended that amount of Section 80IA deduction has to be reduced from eligible profits for computing deduction under Section 80HHC. Accepting the department's contention, the High Court held that Section 80IA(9) would operate to limit the combined deductions to a maximum of the profits and gains from an eligible business of the undertaking or enterprise. Even if Section 80HHC contained a protective shell making it immune from any outside influence, it does not have the effect of negating application of Section 80IA(9). [*CIT* v. *Atul Intermediates* – Order dated 25-3-2014 in Tax Appeal No. 508 of 2007, Gujarat High Court]

Additional claim can be made before appellate authorities otherwise than by filing revised return: The claim for the deduction under Sections 80IB and 80HHC was not made by the assessee in its return, however it was claimed before the Commissioner (Appeals) for the first time. The revenue authorities contended that such a claim was not permissible otherwise than by filing a revised return. The Gujarat High Court held that raising any ground or legal contention before the appellate authority would be permissible when facts to examine the same were already on record. [*CIT* v. *Mitesh Impex* – Order dated 2-4-2014, in Tax Appeal No. 2562 of 2009, Gujarat High Court]

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