Lakshmikumaran & Sridharan tax

TAX

amicus

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

November 2014 / Issue – 41

Contents

November
2014

Article

Offshore sale transactions – A lacuna in the Indian Sales Tax regime

By **Puneeth Ganapathy**

The purpose of this article is to analyze the applicability of the Central Sales Tax Act, 1956 ('CST Act') and State VAT Acts to sales transactions that involve sale of goods to offshore locations. For the purpose of this analysis, offshore locations refer to offshore sites or installations falling beyond the territorial limits of India, but within the Exclusive Economic Zone (EEZ) or Continental Shelf of India as provided in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 ('CSEEZ Act').

The focus of this article is to reconcile two particular judgments that have led to the peculiar position concerning the applicability of sales tax on an offshore transaction. First, the High Court of Bombay in *Commissioner, Sales Tax, Mumbai* v. *Pure Helium India Pvt. Ltd* [(2012) 49 VST 14 (Bom.)] (*'Pure Helium'*) has held that goods being transferred to the Bombay High region, beyond the territorial limits of India will not be considered as 'in the course of export' since Bombay High is not a foreign destination and is within the EEZ of India. Consequently, a sale made to the regions within Indian EEZ will not be treated as sales 'in the course of export'. On the other hand, the High Court of Gujarat in its judgment in *Larsen and Toubro Ltd.* v. *Union of India* [(2011) 45 VST 361(Guj)] (*'Larsen and Toubro'* or *'L&T'*) held that a sale of goods to Bombay High was not a sale in the course of inter-State trade or commerce.

It is to be noted that these two decisions are not at all at loggerheads. While both decisions are based on transactions of sale of goods to the Bombay High region, the questions of law determined therein are entirely different. In *Pure Helium,* the High Court was only concerned with addressing the question as to whether such transactions of sale to offshore locations such as Bombay High could be said to be in the course of export under Section 5 of the CST Act. The judgment also consequently considered whether such transactions could be taxed as inter-state sales. On the other hand in *L&T,* the Gujarat High Court only specifically determined the second question considered in *Pure Helium,* i.e. the limited question as to whether such transactions of sale could be said to be in the course of inter-state trade or commerce under Section 3 of the CST Act.

In *Pure Helium*, the High Court referred with approval to *Aban Loyd Chiles Offshore Limited* v. *Union of India* [2008 (227) E.L.T. 24 (S.C.)], wherein such transfers to offshore sites was not held to be 'export'. This was held in the context of the Customs Act, since the areas lying in the EEZ have been specifically extended to the Customs Act by a notification referred to in the judgment itself. In applying this decision, the High Court held that

> "Export for the purposes of Section 5(1) of the CST Act 1956 cannot have a meaning which is divorced from the applicability of the Customs Act 1962 to a territory in pursuance of a notification issued in exercise of the powers conferred upon the Union Government in the Maritime Zones Act 1976."

The court referred to the settled cases of *Burma Shell Oil Storage and Distributing Co. of India Ltd.* v. *Commercial Tax Officer* [(1960) 11 STC 764 (SC)] and *State of Kerala* v. *Cochin Coal Co.* [(1968) 21 STC 403 (SC)] in reiterating that for the exemption under Section 5(1) to apply, there must be a 'foreign destination' that the goods are intended to be exported to and the goods will not be in the course of export merely on account of being removed from the territory of India.

With specific reference to the decision of the Supreme Court in *Burma Shell Oil Co.* and *Cochin Coal Co.*, it is to be noted that the extra-territorial concept of EEZ had not been recognized under Indian law in the Maritime Zones Act, 1976 when such decision was made. Therefore the emphasis on 'foreign destination' as referred to in the aforementioned cases has to be read with reference to the specific factual circumstances of these cases. In both the cases, the question involved was whether goods being sold for consumption during the voyage would be treated as goods for export. The courts held that there must be a destination for there to be an export. Since the Maritime Zones Act, 1976 had not yet come into existence, the only understanding of foreign destination was that of a foreign country, and areas with recognized limited sovereign rights such as the EEZ had not yet been contemplated. Further, as correctly held in *Aban Loyd Chiles Offshore Limited* itself, *"in respect of the continental shelf and exclusive economic zone, India has certain limited sovereign rights which cannot be equated to extending the sovereignty of India."* Hence, the areas within the EEZ have been legally recognized as being beyond the conventional sovereign territorial limits of India.

Therefore, it can be said that the aforementioned cases relied upon by the High Court of Bombay in *Pure Helium* only squarely dealt with the issue of sales for consumption during a voyage or journey with no destination, whether foreign or otherwise. The existence of the EEZ and Continental Shelf area is a relatively new concept that cannot be necessarily applied in conjunction with the cases referred to by the High Court. Therefore, the question as to whether a sale transaction to offshore destinations within Indian EEZ and Continental Shelf is or is not in the course of export, can only be decided by legislative intervention.

As noted above, the Gujarat High Court in *L&T* held that a sale transaction involving sale of goods to an offshore location within the Indian EEZ such as Bombay High was not an inter-State sale. However it additionally specifically held that,

> "it clearly emerges that when the sale of goods took place at Bombay High, for which the goods moved from Hazira to Bombay High, such movement does not get covered within the expression "movement of goods from one State to another" contained in clause (a) of Section 3 of CST Act…since, in our opinion, *Bombay High does not form part of any state of Union of India.."*(emphasis supplied)

Thus, in essence, the reason for holding that the transaction was not an inter-State sale was based on the determination that Bombay High did not form part of any state in India. This reasoning also marks the point of convergence between the judgments of the Bombay and Gujarat High

Courts. On the same lines, the High Court of Bombay in *Pure Helium* had noted as follows:

> *"A movement of goods from the State of Maharashtra to Mumbai High does not constitute a movement from one State to another State. Mumbai High does not form part of any State in the Union of India.* Hence, we hold that the basis on which the revenue sought to assess the sale as an inter-State sale involving a movement of goods from the State of Maharashtra to Mumbai High was contrary to the mandate of the provisions of Section 6 of the CST Act." (emphasis supplied)

As a result, both the High Courts have expressly agreed on the view that such offshore locations such as Bombay High, cannot be considered to be a part of any state in India. Therefore, a sale made to Bombay High, within the limits of the EEZ, cannot be treated as either a sale in the course of export under Sec. 5(1) of the Central Sales Tax Act, 1956 nor can it be treated as an inter-State sale under Sec. 3, since the Bombay High region is not within any state of India.

This leads to the peculiar position that the sale within the EEZ and Continental Shelf limits of India can neither be considered to be a local sale nor an inter-state sale nor a sale in 'the course of export'. However, this aspect too has been specifically considered in *Larsen and Toubro*, wherein the court held as follows:

> "In the case of *Murli Manohar and Co. and Anr. v. State of Haryana and Anr.* (supra), the Apex Court did observe …that "We are unable to conceive of a fourth category of sale, which could be neither a local sale nor an inter-State sale nor an export sale".. (However), It was not a case where the sale of goods occasioned the movement from the Indian State to a territory which is not part of India and which is for the limited purpose of claiming rights to exploit the natural resources and exploration etc. the Indian Union claims limited sovereign rights."

In conclusion, all such transactions of sale, wherein the goods are appropriated at offshore locations such as Bombay High, within the EEZ and Continental Shelf limits of India, will not attract sales tax, either under the Central Sales Tax Act or under the respective State VAT Acts. The question then arises as to the manner in which this lacuna can be plugged, since taxes from sale transactions ultimately form a large part of the revenue available to states. It was held by the a 5 judge bench of the Supreme Court in the case of *State of Andhra Pradesh* v. *National Thermal Power Corporation* [(2002) 5 SCC 203] that the situs of a sale cannot be artificially fixed in such a manner as to create a territorial nexus to tax an inter-state sale, unless permitted by appropriate central legislation.

However, even this restriction on the legislative powers of a State has been imposed, if read closely, only against fictionally trying to tax transactions of inter-state sale or import sales as intra-state sales. It can therefore be argued that this restriction on a State artificially fixing situs will only apply when there is colorable penetration of the powers available to the Centre under the CST Act. However, transactions involving sales to offshore locations within the Indian EEZ and Continental Shelf regions as discussed are presently neither covered by the CST Act nor by the respective State VAT Acts. Consequently, it is possible for States to assert that since there is no invasion of Central taxing powers over sale

transactions, they may be able to plug the lacuna of offshore sales, by treating them as local sales from the place of movement of the goods. This position will however, run the natural risk of a constitutional challenge and the better view will be for the necessary amendments to be made in the CST Act. Consequently, until this position is adequately taken care of by necessary amendments in the CST Act or by the respective state VAT Acts, the latter option running the risk of a constitutional challenge, all such sale transactions as specifically discussed hereinabove will *prima facie* not attract sales tax under any legislation.

[The author is an Associate, Lakshmikumaran & Sridharan, Mumbai]

CENTRAL EXCISE

Circulars

Cenvat credit – CBEC clarifies 'Place of removal': Central Board of Excise and Customs (CBEC) has clarified that wherever Cenvat credit is available upto the place of removal, the definition of place of removal as now provided in the Cenvat Credit Rules would apply, irrespective of the nature of assessment of duty. In respect of determination of 'place of removal', CBEC in its Circular No. 988/12/2014-CX, dated 20-10-2014 clarifies that place where sale has taken place or when the property in goods passes from the seller to the buyer is the relevant consideration to determine the place of removal. It is stated that payment of transport charges, inclusion of transport charges in value, payment of insurance or who bears the risk, are not the relevant considerations in this regard.

Excisability – Intermediate compound capable of being marketed, excisable: Intermediate masala mix, odoriferous compounds or agarbathi mix arising during the course of manufacture of agarbathi are excisable if they are capable of being marketed. CBEC Circular No. 989/13/2014-CX.3, dated 7-11-2014 while holding so, also clarifies that such goods would be liable to central excise duty irrespective of the fact whether the compound is actually marketed or not.

Ratio decidendi

Cenvat credit on furnace oil used in production of steam/power supplied to second unit of same assessee: Karnataka High Court has allowed Cenvat credit on furnace oil used in the production of steam or power which is also supplied to another unit of the same assessee situated in the same compound. The court in this regard noted that the definition of 'factory' in Rule 2(e) of the Central Excise Act is an inclusive definition and that for the purpose of said Act, 'factory' means more than one premises. It was hence held that Cenvat credit would be available to the assessee using said input in both the units. It was also held that the term 'within the factory of production' cannot be confined to a single unit. The assessee in the present case was having one DTA and one EOU unit situated in the same factory premises. [*Commissioner* v. *Biocon Ltd.* – 2014 (309) ELT 66 (Kar.)]

Manufacture – Cutting of fabrics & wadding and inspection, packing & inserting logo: CESTAT Bangalore has observed that activity of cutting fabrics and wadding according to sizes required

is not manufacture as such activity does not result in any new product with distinct name, character and use. The Tribunal further, while remanding the matter to Commissioner (Appeals) for decision on merits, also observed that inspection, packing and insertion of logo in quilts received from the job worker is also *prima facie* not 'manufacture'. [*Manpho Exports* v. *Commissioner* – 2014 (308) ELT 562 (Tri.-Bang.)]

Valuation – Charges for repair of moulds: Charges for repair of moulds used in manufacture of castings are not includible in value of goods manufactured by the assessee according to Delhi Bench of CESTAT. The manufacturer in this case was receiving moulds from its customers and before returning them, was charging some amount for getting the moulds repaired from outside. The Tribunal in this case, noting that repairing activity undertaken by assessee on behalf of its customers is a separate and different activity not associated with manufacture of castings, held that such charges cannot be considered as additional consideration for the purpose of addition in value of goods. [*Precision Tools & Castings Ltd.* v. *Commissioner* – 2014 (308) ELT 579(Tri.-Del.)]

Demand relating to manufacture in bonded warehouse: CESTAT, Mumbai has held that demand of central excise duty on imported goods contained in packages of above 10 grams or 10 ml, on which activity of labeling/affixing of MRP, as per statutory requirement, was undertaken in Customs bond, is not sustainable. The Tribunal in this regard noted that import is complete only after these activities are undertaken and that there is no additional duty liability as CVD had been discharged on the MRP affixed. The Tribunal however, in respect of goods in packages of 10grams/ml or less, held that the activity of labeling or relabeling would amount to manufacture as there is no statutory requirement to undertake the said activity under provisions of Packaged Commodities Rules. [*L'Oreal India Pvt. Ltd.* v. *Commissioner* – 2014 (308) ELT 746 (Tri.-Mumbai)]

No demand when department not advising filing of remission application though destruction informed: CESTAT, New Delhi has held that issuance of show cause notice raising demand cannot be upheld in a case where the appellant had intimated the department about loss of goods, but did not receive any advice from the department for filing of formal remission application. Tribunal in this regard relied upon its earlier orders in the cases of *IG Petrochemicals Ltd.* and *Mira Chemicals.* [*Punjab Chemicals & Crop Protection Ltd.* v.*Commissioner* – 2014 (308) ELT 522 (Tri.-Del.)]

High Protein Poultry Mash – Classification of: The assessee, instead of clearing the waste poultry material as such, had processed it to make High Protein Poultry Mash (HPPM). Relying on Notes to Chapter 23, Central Excise Tariff Act, 1985, and commercial parlance test, the Tribunal classified this resultant HPPM as a "preparation of a kind used in animal feeding" classifiable under Heading 2302 of Central Excise Tariff or Heading 2309 of the Customs Tariff and not as "residues and waste from food industries" under Heading 2301 of the Central Excise Tariff. [*Supreme Suguna Foods* v. *Commissioner* - 2014-TIOL-2034-CESTAT-MAD]

SERVICE TAX

Circular

Money transfer – Service tax liability clarified: CBEC has clarified certain issues relating to service tax liability in respect of services provided by money transfer service operators (MTSO). By Circular No. 180/06/2014-ST, dated 14-10-2014, it has been clarified that service tax is not payable on the amount of foreign currency remitted to India from overseas since remittance comprises money and the same does not in itself constitute any service as per the provisions. The bank in India or any other entity acting as an agent to MTSO facilitates the provision of money transfer service by the MTSO to a beneficiary in India and for such service, the agent in India receives commission or fee and such agent being an 'intermediary' is liable to service tax. If the bank or agent or sub-agent charges any amount separately from the recipient in India, the same is also liable to service tax.

Ratio decidendi

Interest on delayed refund admissible for services provided in SEZ: The issue before the CESTAT, Ahmedabad Bench was whether interest on refund paid belatedly was admissible when services were provided to an SEZ unit and refund was claimed under Notification No. 15/2009-S.T. The department contended that the said notification did not provide for such interest. The tribunal noted that the services rendered in SEZ units were exempted under the SEZ Act and the said notification was only operationalising the exemption. Pointing out that the CBEC Circular dated 20-5-2009 had directed sanction of refund within maximum period of 45 days in such cases, the Tribunal held that interest shall be payable if such time-limit was not followed. It also held that refund claims under this notification have been placed on higher platform than such claims under Section 11B of Central Excise Act. [*Reliance Industries* v. *Commissioner* – Final Order Nos. 11789-11793/2014, dated 21-10-2014]

Security deposit refundable on termination of lease, not taxable: Security deposit collected from lessee while renting out immovable property is refundable at the time of termination of lease / rent agreement and therefore, the same would not form part of taxable service and hence, not liable to service tax. However, the tribunal held in the case before it that rent would be treated as cum-tax. [*Samir Rajendra Shah* v. *Commissioner* – 2014-TIOL-2202-CESTAT-MUM]

Packaging not liable to service tax when the same forms part of manufacture: The demand of service tax was under Packaging service. The CESTAT, held that as per Fertilizer Control Order, 1985, fertilizer cannot be marketed without packaging in the manner specified and therefore, packaging of fertilizer is a statutory requirement and the same would form integral part of manufacturing activity and therefore, service tax would not be payable on such packaging activity. It noted that manufacture gets completed once packaging is made and the appellant-manufacturer is not liable to service tax for packaging. [*New Era Handling Agency* v. *Commissioner* – 2014-TIOL-2107-CESTAT-MUM]

Cenvat credit prior to registration admissible: The department sought to deny credit of input services and capital goods availed prior to registration under central excise when manufacturing activities had not started. Opining that this was too technical a ground to deny credit which is otherwise admissible, the Tribunal held that the assessee could avail credit of excise duty paid on capital goods receiving at the time of setting up of factory and input services used for erection, installation and commissioning of such capital goods. It reasoned that unless the factory is set up an assessee will be unable to manufacture excisable products. [*Beico Industries* v. *Commissioner* – 2014 (36) S.T.R. 551 (Tri.- Ahmd.)]

Recovery before adjudication not permissible: Power to make provisional attachment to safeguard revenue under Section 73C of the Finance Act, 1994 cannot be activated before adjudication. The petitioner-assessee challenged the action of the department seeking to recover unpaid service tax when the proceedings under show cause notice were pending. The assessee had raised several objections which had not been adjudicated upon. Quashing the orders for recovery the High Court opined that issuing recovery orders within two days of issuing SCN was not permissible and recovery of unpaid tax was to be made under Section 87 of the said Act. [*Technomaint Contractors Limited* v. *Union of India* – 2014 (36) S.T.R. 488 (Guj.)]

No interest on Cenvat credit reversed before utilisation: At issue before the Tribunal was inclusion of value of free supplies in taxable value and interest payable on credit wrongly availed but reversed before utilisation. Relying on *Bhayana Builders* [2013 (32) S.T.R. 49 (Tri. – LB)], the Tribunal held that diesel supplied free of cost by the service recipient would not form part of taxable value. As regards credit wrongly availed, the department argued that interest was chargeable from the date when it was taken upto date of reversal but the Tribunal relying on Karnataka High Court ruling in *Bill Forge* [2012 (279) E.L.T. 209 (Kar.)] held that interest was not payable in this case. [*Gurmehar Construction* v. *Commissioner* – 2014 (36) S.T.R. 545 (Tri.-Del.)]

No service tax liability on testing of own product samples received from job workers: The assessee contended that no consideration was received from the job workers for the technical testing carried out in its facility and as such it had tested its own goods and no service tax liability arose. The department took a view that testing of samples both from sister concerns overseas and job workers within India would be taxable. The Tribunal held that on facts, consideration for the services to sister concerns abroad had been received and qualified as export of services. As regards job workers within India no service had been provided nor any consideration received, to make the transaction liable to service tax. [*Commissioner* v. *Nestle India* – 2014 (36) S.T.R. 563 (Tri.- Del.)]

Commitment charges includible in taxable value: Commitment charges imposed on clients who do not draw the loan amount at their disposal are includible in taxable value i.e. liable to service tax. CESTAT, Delhi while holding so observed that these charges are recovered to compensate for

loss of interest that the bank would have earned had the customer utilised the loan amount. The charges were held as integrally connected with lending which is a taxable service. [*Punjab National Bank* v. *Commissioner* – Final Order No. 53832/2014, dated 23-9-2014]

CUSTOMS

Notifications & Circular

Testing of sample from each consignment of imported formulations not required: Sample out of each consignment of technical grade/ material of imported formulations is not required to be supplied for testing once such sample has already been supplied for the purpose of analysis and scrutiny prior to registration. CBEC Circular No. 7/2014-Cus., dated 7-3-2014 has been amended by Circular No. 10/2014-Cus., dated 17-10-2014 in this regard.

LPG import for electricity generation – Time period for submission of certificate extended: Condition No. 100 of Notification No. 12/2012-Cus. has been amended to increase the time limit from 6 months to one year (12 months) for submission of certificate by an importer of LPG from the jurisdictional Deputy or Assistant Commissioner of Central Excise of the generating company, certifying that the imported LPG or natural gas has been utilized for generating and supplying electricity. Serial No. 139A of said notification presently grants exemption from BCD to such imports. Notification No. 30/2014-Cus., dated 20-10-2014 has been issued to provide for such relaxation in time period.

Dried silk worm pupae – Conditions for export to EU notified: Export of dried silk worm pupae to European Union is now allowed subject to fulfillment of certain conditions. 'Shipment Clearance Certificate' by CAPEXIL for every consignment is required. Further, after the shipment, the exporter shall also be required to furnish to the buyer a consignment wise 'Health Certificate' issued by specified authorities. Serial No. 41A has been added to Chapter 5 of Schedule 2 (Export Policy) of ITC (HS) Classification of Export & Import Items in this regard by DGFT Notification No. 95 (RE-2013)/2009-2014, dated 22-10-2014.

Natural sands – Import policy revised: Import of natural sands will now be subject to provisions of Plant Quarantine (Regulation of Import into India) Order, 2003. DGFT Notification No. 97 (RE–2013)/2009-2014, dated 7-11-2014 issued in this regard amends import policy of goods of Heading 2505 of Schedule I of ITC (HS).

Ratio decidendi

Exemption notification not violated when import licence amended retrospectively: CESTAT Mumbai has held that Customs authorities cannot demand duty on the ground of violation of a condition attached to a notification in respect of the un-amended licence when DGFT has amended the licence with retrospective effect. The licensing authorities, in this case, had allowed shifting from zero-duty EPCG licence to 10% EPCG and had amended the licence retrospectively. [*Bhilwara Spinners Limited* v. *Commissioner* - 2014-TIOL-1966-CESTAT-MUM]

Valuation – Price difference between time of shipping and time of sale: CESTAT Mumbai has held that transaction value of the imported goods is correct where the invoice price was not found to be incorrect as per prevailing market price during that time. The Tribunal in this regard held that 'sale', 'time of delivery' and 'place of importation' are necessary ingredients to determine the value of goods and that all the three ingredients have to be read in conjunction. The goods in the present case were shipped initially to another importer who did not take delivery. The goods were subsequently sold to the appellant-importer at lower value. [*V.K. Industrial Corporation Ltd.* v. *Commissioner* - 2014 (308) ELT 700 (Tri.-Mumbai)]

CWG - Exemption to suppliers, contractors, not retrospective: Notification 13/2010-Cus., dated 19-2-2010 was amended by Notification 84/2010-Cus., dated 27-8-2010 to include suppliers, contractors, vendors and sub-vendors of the Organizing Committee of Common Wealth Games, 2010 for exemption from duty on specified goods. CESTAT Delhi has held that such an amendment was not retrospective as it sought to add additional categories of importers by way of insertion for the benefit of Notification 13/2010-Cus. The Tribunal also observed that amendment was made by way of insertion of words "suppliers or contractors…" which meant that these category of importers were included for the first time on 27-8-2010. [*G. L. Litmus Events Pvt. Ltd.* v. *Commissioner* - 2014-TIOL-2142-CESTAT-DEL]

'Diagnostic Centre' included in 'Hospital' for benefit of Notification 64/88-Cus.: The Supreme Court of India has held that, by virtue of explanation to Notification 64/88-Cus., meaning of the term 'hospital' would include a diagnostic centre also. The court noted that the word 'includes' in a definition or explanation would extend the meaning of the word as declared by the said clause, even if the same goes beyond its natural meaning. However, since the exemption was conditional upon grant of a certificate from the Directorate General of Heath Services (DGHS) and the same being withdrawn later, the court in the present case, denied benefit of exemption as the conditions were not fulfilled. [*Bharat Diagnostic Centre* v. *Commissioner* – 2014-TIOL-86-SC CUS-LB]

Exemption available even if not claimed at the time of clearance: Benefit of an exemption notification can be extended to the importer later, if the same was not availed at the time of clearance according to CESTAT, Mumbai. It was held that since the assessment of duty liability had to be made by Customs, irrespective of the fact that the importer did not claim benefit of exemption, the same should be extended to him. [*Commissioner* v. *PSL Ltd.* – 2014-TIOL-1937-CESTAT-Mum.]

Goods not exported on ground of being sub-standard when not liable for confiscation: Goods brought to the docks for export, but not exported after being found as sub-standard by the surveyor of buyer, were not liable for confiscation under Section 113(k) of the Customs Act, 1962. CESTAT Mumbai ruling as above noted that provisions of the said section were not violated when the appellant had taken proper care before the exportation of goods. It was noted that goods are liable to confiscation on account of willful act,

negligence or default of exporter only. [*Al-Gyas Exports Pvt. Ltd.* v. *Commissioner* – 2014 (308) ELT 513 (Tri.-Mumbai)]

No confiscation under Sections 111(d) and 111(m) when goods freely importable and correctly valued: Imported goods cannot be confiscated under Sections 111(d) and 111(m) of the Customs Act, 1962 in cases where goods are freely importable and valuation is proper. CESTAT Mumbai in this case rejected the argument of the department that the imports were made by using another person's Import-Export Code (IEC). It was hence held that penalty under Sections 112(a) and 114AA of the Customs Act cannot be imposed in such circumstances. [*Shivkumar S. Dubey* v. *Commissioner* - 2014-TIOL-1907-CESTAT-MUM]

Insecticide Act not applicable for goods imported for re-export: Provisions of Insecticide Act, 1968 are not applicable in respect of goods imported for the purposes of re-export, i.e. which are not cleared for home consumption. The Tribunal while holding so has observed that Section 17 of the Insecticide Act uses the word "manufacture" i.e. manufacture or home consumption and therefore, the provisions of said Act are not attracted in the case of goods imported under Customs bond for re-export. Kerala High Court Order in the case of *Maliakkal Industry Enterprises* [2013 (290) ELT 330 (Ker.)] and DGFT clarification dated 23-6-2003 were also relied in this regard. [*Royalex* v. *Commissioner* – 2014-TIOL-1916-CESTAT-MUM]

No unjust enrichment when assessments provisional in case of conversion to coastal run vessel: CESTAT Mumbai has held that provisions of unjust enrichment will not be attracted on refund of excess duty paid at the time of provisional assessment when foreign going vessel is converted to coastal run. CESTAT in this regard observed that if contentions of the department were held to be correct then whole scheme of provisional assessment will be rendered meaningless. [*Commissioner* v. *Atlantic Shipping Pvt. Ltd.* – 2014-TIOL-2149 CESTAT-MUM]

VALUE ADDED TAX (VAT)

Notifications

Jharkhand VAT Rules, 2006 – Amendment with respect to developers: Jharkhand Value Added Tax (Amendment) Rules, 2014, have been issued with effect from 1-4-2014. The major changes, by Notification S.O. 49, dated 10-10-2014, are provided here.

(a) Definition of 'Developer/Builder': Rule 2(IVB) has been inserted to define 'developer/builder' as a person/contractor engaged in and undertaking construction of civil structures, flats, dwelling units, building, premises, complexes, commercial or otherwise, whether wholly or partly (either himself or through an authorized person) for sale and transfers them in pursuance of an agreement along with land or interest underlying the land to a buyer, where the value of land or interest underlying the land is included in the total consideration received or receivable.

(b) Cost of land: Rule 22 provides for determination of taxable turnover of goods involved in works contract. Now, Rule 22(1A) has been inserted to provide deduction for the cost

of land for construction contracts where along with immovable property, the land or interest in land underlying the immovable property is to be conveyed. The value of the goods at the time of the transfer shall be calculated after deduction of the cost of the land from the total agreement value. The cost of land shall be determined in accordance with the guidelines determined by any authority of the state government for the purpose of payment of stamp duty in respect of transfer and / registration of such land, as applicable on the date on which the agreement to sell the property is executed.

Proviso to this new Rule 22(1A) provides that after payment of tax on the value of goods determined under the said rule, it shall be open to the dealer to prove before the prescribed authority that actual cost of land is higher than the value determined by the government. In case the actual cost of the land is higher than that determined in the manner provided above, then upon proving the same, the dealer will be entitled to refund/adjustment of the excess tax paid.

(c) Value of goods: As per the newly inserted Rule 22(1B), the value of goods involved in the works contract *will depend upon the stage at which the developer enters into a contract with the purchaser.* The following table has been provided for this computation:

S. No.	Stage during which the developer enters into a contract with the purchaser	Amount to be determined as value of goods involved in works contract
1.	Before issue of the Commencement Certificate	100%
2.	From the Commencement Certificate to the completion of plinth level	95%
3.	After the completion of plinth level to the completion of 100% RCC framework	85%
4.	After the completion of 100% RCC framework to the Occupancy Certificate	55%
5.	After the Occupancy Certificate	Nil

Rule 22(1B) provides that if the dealer fails to establish the stage during which the agreement with the purchaser is entered, then the entire value of goods as determined after deductions under Rule 22(1) and 22(1A) from the value of the entire contract shall be taxable.

Jharkhand VAT Act, 2005 – Amendments with respect to developers: Developers/builders, who are liable to pay tax on sales effected by them by way of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract in the nature of construction work alongwith immovable property, land or interest of land is involved, have been given option to pay tax at the rate of 1% under composition. In such cases total value of consideration in execution of works contract in respect of the developer's share will be taken into account subject to specified conditions. Notification No. S.O. 50, dated 10-10-2014 issued for this purpose also provides that if the goods purchased or received in the

course of inter-state trade and commerce from other states or imported from outside India have been used in the execution of the works contract, then under composition, the developer shall pay tax on their purchase price at the rate applicable on the sale of such goods in Jharkhand along with interest.

Daman and Diu VAT Regulation, 2005 – Amendments: Entry 41 of the Third Schedule to the Daman and Diu Value Added Tax Regulation, 2005 has been amended by Notification No. DC/VAT/Rules/Amdt./Sch. III/2014/57-3/692, dated 29-10-2014. The entry before the amendment read as "*IT products including computers, telephone and parts thereof, teleprinter and wireless equipment and parts thereof.*" After the amendment, the said entry specifically excludes "*car telephone, transportable telephone, cellular telephone or mobile phone*" from its purview.

Ratio decidendi

Adjustment of State Sales Tax against CST: Calcutta High Court has allowed adjustment of excess tax paid under the West Bengal Sales Tax Act against the equal deficit of Central Sales Tax. The petitioner effected sales liable to tax under the CST as well as sales which were liable to tax under the WBST Act. However, due to a clerical error, excess tax was paid under the WBST Act and there was an equal amount of short payment of tax under the CST Act. Noting that in the instant case, both taxes are credited in the same fund which creates a gross credit in the fund, the court held that short payment of CST against a corresponding increased payment of sales tax does not reduce the gross credit. It was also held that since there was no monetary loss to the government, the question of charging interest did not arise. The court while allowing the writ petition made it clear that such adjustment can be made only when taxes paid in excess or short paid are credited into a known account or fund and can be easily adjusted and that this *ratio* would not apply in case of interdepartmental adjustment or completely different type of taxes. The department here had relied upon the decision of the Division Bench of the High Court of Mysore in the case of *Cotmac Private Ltd.* v. *Commercial Tax Officer* [1967-VIL-01-KAR] wherein it was held that any excess tax refundable to a dealer was adjustable against any tax due by him and that the tax refundable under one Act cannot be adjusted against tax due under another Act. [*Hindustan Unilever Limited* v. *Deputy Commissioner, Commercial Taxes Corporate Division* - 2014-VIL-305-CAL]

Karnataka VAT – Input tax rebate on consumables and slotted angle framework: Karnataka High Court has allowed input tax rebate on consumables and capital goods (slotted angle framework here) in respect of assessee engaged in business of manufacturing and jobwork of PCB. The court allowed the input tax rebate on consumables relying upon the judgment in the case of *State of Karnataka* v. *Ashok Iron Works Private Limited* [2014-VIL-127-KAR] wherein the court referring to Section 10(2) of the Karnataka VAT Act, 2003, had held that an assessee using consumables in job work was entitled to deduction of input tax from the taxable turnover of the said business since the

goods were used in the course of his business. Further, noting the difference between slotted angles and slotted angle framework which includes slotted angles, gusset plates, bolts and nuts, the court rejected the department's contention that slotted angles were not eligible for input tax rebate since specifically covered under Entry 5 of Schedule V of KVAT. It was noted that slotted angle framework, used by the assessee in order to keep his manufactured goods, was in the nature of capital investment, and hence the assessee was eligible to claim input tax rebate on the purchase of slotted angle framework. [*State of Karnataka* v. *Vinyas Innovative Technological Pvt. Ltd.* - 2014-VIL-304-KAR]