Lakshmikumaran & Sridharan tax

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An e-newsletter from
Lakshmikumaran & Sridharan, India

March 2016 / Issue – 57

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March
2016

Articles

Union Budget, 2016 – An analysis of certain changes in Central Excise

By **Victor Das**

The last two Budgets were witness to the Government trying to put a quietus to the storm generated over retrospective taxation and to increase tax compliance through certain amendments to law and procedures. The Union Budget-2016 carries the imprimatur of the government's emphasis on "Transform India". Towards this objective, the Govt. has launched various initiatives like 'Skill India', 'Digital India', 'Startup India Plan' and sought to move towards a 'pensioned society', besides the grandiose 'Make in India' and 'Swachh Bharat' initiatives. Leaving such macro policy initiatives aside, this article seeks to examine some of the important changes brought about as part of Budget, 2016 and the Finance Bill, 2016.

Changes in Rule 6 of the Cenvat Credit Rules, 2004

The changes proposed in Rule 6 of the Credit Rules on first glance are humongous and are accompanied by various complicated formulae. However, it appears these are constructive amendments carried out with a view to remove certain ambiguities and disputes pertaining to apportionment of credit towards manufacture of exempted goods or for provision of exempted services. The changes incorporate the following principles:-

- Option 1 - The assessee can pay an amount equal to 6% of value of the exempted goods and 7% of value of the exempted services. This amount will be capped at a maximum of the total credit available with the assessee at the end of the period to which the payment relates.
- Option 2 – Pay an amount as determined under Rule 6(3A). Credit on common inputs/input services is identified and the same is apportioned based on the exempted/dutiable turnover. Credit on common inputs/input services is allowed only proportionately.
- No credit is to be allowed on inputs/input services used exclusively in the manufacture of exempted goods / services.
- Full credit is allowed on the inputs/input services used exclusively in the manufacture of dutiable goods / taxable services.

Rule 6 has been streamlined to provide clarity and make it less complicated. The amendment which provides for capping of payment at 6% or 7% at a maximum of the amount of Cenvat Credit available, is long overdue. The Karnataka High Court in *CCE, Bangalore-III* v. *Himalaya Drug Co.* - 2011 (271) E.L.T. 350 (Kar.) had held that payment of such amount is not required when separate accounts are not maintained but proportionate Cenvat credit attributable to inputs used in exempted product is reversed. However, it would be pertinent to remember that even after discharging 6% or 7% of the value of exempted goods / services, Cenvat Credit with

respect to inputs / input services exclusively used for exempted goods / services continues to be separately ineligible in tandem with the erstwhile Rule 6 and the credit scheme itself.

At this point, it would be useful to recall the disputes in the past few years on the point as to whether for the purposes of the computation of the proportionate credit as prescribed under Rule 6(3A), the ratio is to be applied to the amount of 'total credit' or to 'common credit'. The Department was of the view that total Cenvat credit has to be taken into account and not the common Cenvat credit. The Department's view was prima facie agreed with by the CESTAT in *Thyssenkrup Industries Pvt. Ltd.* v. *CCE* - 2014 (310) ELT 317 (Tri-Mum). This dispute has now been taken care of by the present amendments.

The newly amended Rule 6 also clears the way for banking and financial institutions to exercise any of the options for reversal of Cenvat credit in addition to the option of payment of 50% of the Cenvat credit which was mandatory earlier. Rules 6(1), (2) and (3) of CCR have been overhauled to rationalize the admissibility of input service credit. The sequence for reversal of credits has also been defined. Despite such overhauling, the essential DNA of Rule 6 remains and therefore, one has to remain alert while working under Rule 6 even in the amended scenario.

Cesses – New Infrastructure Cess & restriction on credit utilisation for NCCD

A new levy, namely Infrastructure Cess has been introduced on motor vehicles falling under Chapter Heading 8703 of the First Schedule to the Central Excise Tariff. The proposed rates are 1%, 2.5% and 4% depending on the fuel used to run the vehicle. Infrastructure Cess can neither be paid from Cenvat credit nor can Cenvat credit be taken of the same. This may lead to a spike in vehicle prices which might give a slight fillip to the Government's stated objective of liberalizing the passenger road transport sector and decongesting cities.

Further, from 1 March, 2016, the 5th proviso to Rule 3(4) of the Credit Rules has been amended according to which Cenvat Credit of any duty specified in sub-rule (1) except NCCD cannot be utilized for payment of NCCD on any product. This means that now, credit earned in respect of Basic Excise Duty (BED) cannot be used for payment of NCCD on final product. NCCD liability can be offset by using only NCCD credit. This amendment overcomes the judgment of the Guwahati High Court in *CCE, Dibrugarh* v. *Prag Bosimi Synthetics* – 2013 (295) ELT 682 (Gau.) wherein it was held, *inter alia*, that Cenvat credit obtained from other sources like BED can be utilized for payment of NCCD on the final product.

Revision of returns & Reduction in number of returns

The number of returns required to be filed by an assessee in a year has been stated as reduced from 27 to 13, i.e. 12 monthly returns and 1 Annual return. The facility of revising one's returns was already available to assessees under Service Tax. The Finance

Bill, 2016, proposes to extent this facility to Central Excise assessees as well. An assessee who has filed returns within the prescribed period may file revised returns by the end of the calendar month in which the original return was filed. The 'relevant date' for recovery of duty in cases where revised returns are filed shall be the date on which the revised returns were filed. Also, it has been proposed that an assessee who has filed Annual Returns within the prescribed period may also submit revised returns within a period of one month from the date of submission of such annual returns. These changes may have marginal impact on otherwise arduous compliance burden of the assessees.

From Input Service Distributor to Input Distributor

The Finance Bill, 2016 enables manufacturers with multiple manufacturing units to maintain a common warehouse for inputs and distribute inputs with credit to the individual manufacturing units. Already, the institution of an Input Service Distributor was existing eponymously under Rule 2(m) of the Credit Rules with appurtenant procedural responsibilities & obligations. With this amendment, an implicit nod to the establishment of an 'Input Distributor' has been given by the Government without referring to it as such.

Cenvat credit on office equipment/appliances allowed

Amendments to Credit Rules have removed the restriction with regard to 'the equipments and appliances used in an office' as contained in Rule 2(a)(A)(viii)(1) of the present Credit Rules. This is a beneficial amendment which enlarges the scope of the definition of capital goods.

Conclusion

The Budget proposals reiterate the intent to adopt the much-awaited tax reform of GST. However, the Finance Minister in his speech did not indicate anything regarding the proposed date of its implementation or the roadmap for introduction of a draft legislation. Notwithstanding the same, the amendments discussed above eschew flamboyance and aim to rationalize and streamline the existing legal regime so as to prepare for the introduction of GST.

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TN VAT Act – A look at the recent amendments

By **Varun Chablani**

The Government of Tamil Nadu has brought out certain amendments to the Tamil Nadu Value Added Tax Act 2006 ('the Act') and the Tamil Nadu Value Added Tax Rules, 2007 ('the Rules'), with effect from 29th January, 2016. From a holistic reading of the amendments it is clear that the legislature has taken a strict position on eligibility of input tax credit, punishment for wrongful availment, etc. Though the assessees may have some teething troubles in acclimatising with the changes in law, it seems to be in tune with the process of

streamlining the law to be more GST ready. An analysis of the important amendments is presented below.

Change in eligibility of availment of Input Tax Credit

Section 19 allows dealers to take Input Tax Credit (ITC) of local taxable purchases made by him. Previously, ITC was allowed of the amount of tax paid or payable under the Act. Now, this has been changed to 'paid'. The impact of this amendment is that until the purchasing dealer has paid the tax component to the selling dealer, the tax component charged in the seller's invoice cannot be considered as 'input tax'. Further, there has been another amendment in Section 19(1), by way of insertion of a proviso, which puts the burden of proof on the purchasing dealer to establish that (i) the tax, due on such purchases, has actually been paid by the seller and (ii) the goods have actually been delivered to the buyer. The former has been made to neutralise the effect of various judgments, like *Althaf Shoes (P.) Ltd.* [2012] 50 VST 179 (Mad), which have held that non-payment of tax by the seller cannot be a reason to deny ITC to the purchaser, so long as the seller's invoice shows the tax amount. This is in line with the proposed GST law, wherein credit of GST paid can be availed only where the supplier has paid the tax, and the burden to establish the same will be on the purchaser.

Restriction on benefits for sales to SEZs in the State

As per Section 18(1)(ii), sale of goods to registered dealers in SEZs in the state is zero rated. After the amendment, this benefit has been limited to *'for the purpose of use in manufacture, trading, production, processing, assembling, packing or for use as packing material or packing accessories'*. It has also been clarified[1] that (i) sales made to dealers for setting up, operation and maintenance of SEZ unit are not zero rated and (ii) sales made to SEZ developers for development, operation and maintenance of an SEZ are merely exempted from payment of tax.

Works Contract - Restriction relating to benefit of compounded rates

Section 6 gives the benefit of payment of tax at compounded rates for dealers engaged in works contract. The restriction previously was that the dealer cannot purchase goods from outside the state or import them. The restriction *'purchases goods from outside the state'*, which was there all along in the provision, encompasses both interstate purchases as well as local purchases which are stock transferred from outside the state. Now, the amendment restricts the dealer from availing the benefit even where the dealer *receives goods from outside the state*. In other words, even receipt of goods on stock transfer basis will bar the dealer from availing the benefit under Section 6.

[1] Notification IV No. G.O. MS.No. 15, dated 29-1-2016

Restriction on 1% benefit for dealers involved in second and subsequent sales

As per Section 3(4), dealers who effect second and subsequent sales of goods purchased within the state, whose turnover of taxable goods is less than Rs. 50 lakhs, are required to pay tax only @ 1%, so long as the tax is not collected from the customer. After the amendment, this provision is applicable only to such dealers who purchase goods from registered dealers in the state. In other words, a dealer who purchases only from unregistered dealers, will not be eligible for this benefit. Conversely, even if he makes even a single purchase from a registered dealer, the benefit under the provision is eligible.

There is no restriction in the provision to the effect that to avail the 1% benefit, sales have to be of purchases from registered dealers. That is to say, even if such dealer purchases from unregistered dealers (as long as at least some purchases were, actually, made from registered dealers), he will still be required to pay tax only @ 1% on all second / subsequent sales, not just those sales out of purchases from registered dealers. There appears to be an incongruity in the way the provision is worded, as the intention would have been to restrict the benefit only to those second / subsequent sales which emanate from purchases from registered dealers.

Increase in maximum penalty in certain cases

In assessment proceedings under Section 27(2) of the TN VAT Act, the corresponding penalty imposable has been increased to 300% (previously, it was 50% penalty on the first detection and 100% thereafter). This appears to be an extremely onerous condition on the assessee, as the provision for reassessment under Section 27(2) is very wide, and is not limited to any act of *malafide* or suppression, unlike Section 27(1). Even in the case of Section 27(1), (prerequisite is the dealer having *escaped assessment to tax*), the corresponding penalty provision, i.e., Section 27(3) does not go beyond 150%. Due to this, there is a clear anomaly in the provision.

Registration, maintenance of records and filing returns

Registration procedure has been computerised and both application for registration and payment of registration fee have been made online. TIN and RC will now be issued electronically in Form D within two working days of the application, if the application is properly made. Amendment to the RC also needs to be done electronically. A dealer is deemed to be registered if he does not receive either the RC or any notice from the authority within two working days. TIN shall be automatically assigned to the dealer. Dealers maintaining the records electronically are to maintain and furnish electronic Form G1. Name and version of ERP software is required to be provided in the form, along with the service provider maintaining the software and details of the computer systems in which the software is installed.

Filing of returns and payment of tax are to be made electronically. Substantial changes have been made in the forms for filing returns.

Dealers exclusively dealing with goods exempt under the Fourth Schedule should also file the return in Form I-1 (which was previously applicable only for dealers who were making exempt sales in terms of Section 30). If, after filing the returns, the dealer realises that it had failed to claim the ITC (other than by way instance of the assessing authority), revised returns can be filed within the later of (i) end of the financial year or (ii) ninety days from date of purchase. This is also in line with the time limit for availment of ITC as prescribed as per Section 19(11).

Documentation required during movement of goods

Another major amendment is the documentation required during movement of goods in the State. Previously, the documents required were (i) Bill of Sale / Delivery Note in Form JJ (ii) Goods Vehicle Record / Trip Sheet / Log Book. The amendment stipulates the additional documents as (i) the transporter's waybill in Form MM (ii) if the movement is by a C&F agent, a declaration by him in Form KK. Specific documentation requirements have also been given for movement of goods in cases where the (i) export is made from the state, (ii) export is made from outside the state (iii) goods are cleared by Customs on import. Further, where certain notified goods[2] are coming from other state, an advance inward waybill is required to be furnished.

Other changes

Certain other changes like increase in time period for maintenance of books accounts has been increased from 5 years to 6 years, assessment of casual dealers based on scrutiny of returns and procedures for filing appeals, revisions and reviews have been made.

Conclusion

While processes like registration, payment and filing of returns are sought to be relaxed by reducing interface with the tax administration and opting for electronic mode, measures like increase in penalty and restrictions in respect of sales to dealers in SEZ are not in line with impending GST eco-system. But the extensive amendments at least point to the seriousness of the administration in addressing certain issues under TN VAT.

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[2] As notified in G.O. MS. No. 15 dated 29-1-2016

CENTRAL EXCISE

Budget 2016 – Central Excise

Interest on amount paid under provisional assessment: Interest on amount paid under provisional assessment would now have to be computed from the due date under Rule 8(1) of the Central Excise Rules till the date of actual payment, whether the amount is paid before or after finalisation of provisional assessment. Rule 7 of the Central Excise Rules, 2002 has been amended in this regard, with effect from 1-3-2016, by Notification No. 8/2016-C.E. (N.T.), dated 1-3-2016. The amendment effectively neutralizes the recent decision of the Bombay High Court, as upheld by the Apex Court, wherein the High Court held that interest becomes leviable once the assessment is finalized, but where differential duty is paid prior to the finalisation of the assessment, then no interest is payable.

Excise Returns – Quantum of returns reduced and provisions being made for revision: Number of returns required to be submitted by an assessee under Central Excise Rules, 2002 have been reduced. Instead of two annual returns, i.e. Annual Financial Information Statement and Annual Installed Capacity Statement, only one annual return (form yet to be notified) will be required to be filed. Rule 12 of the Rules is being amended, from date yet to be notified, to provide for revision of return by the end of the calendar month in which the original return is filed. Annual Return will be allowed to be revised within a month of submission of original return. Similarly Rule 17 relating to EOUs is also being amended, to provide for revision of returns.

Cenvat Credit Rules, 2004 – Amendments: Cenvat Credit Rules, 2004 are being amended from 1-4-2016. Some of the important changes are highlighted here.

Amendments in definitions:

- Wagons covered under sub-heading 860692 and equipment and appliances used in office located within factory, are being included as capital goods.
- Goods used in pumping of water are being included as inputs and capital goods.
- Capital goods of value upto Rs. 10,000/- per piece will qualify as inputs.
- Service by way of transportation of goods by a vessel from India to a foreign port is being excluded from the purview of 'exempted service' (from 1-3-2016).

Credit availability and utilisation:

- Option of maintaining separate accounts under Rule 6 for availment of credit on common inputs and input services is being omitted
- Option of payment of 6% or 7% under Rule 6 available, but is now subject to a maximum of total credit available in the account at the end of the period

to which the payment relates

- Rule 6(3A) providing formula is also amended.
- Capital goods exclusively used for manufacture of exempted goods or provision of exempted services – Credit will not be not available for 2 years from the date of commencement of commercial production or provision of services.
- ISD will be able to distribute Cenvat credit to 'outsourced manufacturing units', defined as job worker who is required to pay duty under Valuation Rule 10A on the goods manufactured for the ISD or job worker who manufactures goods bearing brand name of ISD and is required to pay duty on the value determined under Excise Section 4A.
- Manufacturer having one or more factories would be allowed to take credit on inputs received under an invoice issued by a warehouse of the manufacturer
- NCCD payment – Only NCCD credit utilizable with effect from 1-3-2016.
- New Infrastructure Cess payment cannot be made by utilizing credit.
- Tools (Chapter 82) sent to other manufacturers/job workers for production of goods according to his specifications, eligible for credit.
- Period of the applicability of the AC/DC Order permitting manufacturer to clear goods directly from premises of job worker extended from 1 year to 3 years.

Returns pruned

- Monthly return for information regarding receipt and consumption of principal inputs, abolished

Recovery of credit

- Rule 14(2) prescribing procedure based on first-in-first-out method for determining whether credit has been utilized, is being omitted.

Notification

Exemption to goods for manufacture of excisable goods – New Rules amended: Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable and Other Goods) Rules, 2016, which were notified recently and were to come into effect from 1-4-2016 are now effective from 16-3-2016. Notification No. 22/2016-C.E. (N.T.), dated 15-3-2016 issued for the purpose, also omits option of provision of 'security' along with the general bond. Hitherto, these new Rules and the 2001 Rules provided for execution of general bond with surety or security. It may be noted that new Rules provide that if the recipient manufacturer is found to be non-existent, the demand of duty, in case of non-use of goods as intended, will be raised on the supplier manufacturer.

Ratio Decidendi

Cenvat credit when admissible on invoices issued by unregistered unit: CESTAT Delhi has held that Cenvat credit cannot be denied

for technical lapse of absence of registration certificate, with the input supplier, at the time of issuance of invoice. It observed that the disputed goods had suffered duty and were received/used in the factory for production of the final product. [*South Eastern Coalfields Ltd.* v. *Commissioner* – Final Order No. 50014/2016, dated 5-1-2016, CESTAT Delhi]

Cenvat credit utilization for payment of duty on inputs procured duty free but not utilized as per conditions, correct: Delhi Bench of the CESTAT has held that duty paid, by recipient, on inputs initially procured duty free, but where the same were not utilized according to the conditions of exemption, by utilizing Cenvat credit, is correct. It was also held that credit again taken of such duty payment, which was again utilized in payment of duty on final product wherein the said inputs were used, was also correct. [*Shree Rajasthan Syntex Ltd.* v. *Commissioner* – Final Order No. 50200-50202/2016, dated 9-2-2016, CESTAT Delhi]

Cenvat credit on furnace oil not required to be reversed on clearance of sludge: Taking note of the fact that sludge arises due to storage and handling and that the same cannot be put to use as furnace oil, CESTAT Delhi has upheld the Order of Commissioner (Appeals) holding that reversal of credit availed on furnace oil is not required on removal of sludge. Commissioner (A) in the impugned order had held that when the assessee clears furnace oil sludge, he does not clear inputs (furnace oil) as such, as the sludge cannot be equated with the furnace oil. It was held that clearance of the furnace oil sludge is not covered under Rule 3(4) of Cenvat Credit Rules, 2002. [*Commissioner* v. *Prism Cement Ltd.* – Final Order No. 50070/2016-EX(DB), heard on 1-1-2016, CESTAT Delhi]

Demand on shortage of Cenvatted inputs when not sustainable: CESTAT Ahmedabad has allowed assessee's appeal in a dispute involving demand on shortage of Cenvatted inputs. The Tribunal in this regard found force in the contention of the assessee that no excise duty can be levied on clearance of inputs on the ground that there is shortage, since the said duty is leviable on 'manufacture', and there is no manufacture of inputs in the instance case. It was held that levy of Central Excise duty on the value on such inputs has no sanction of law. [*Stove Industries Ltd.* v. *Commissioner* - Order No. A/10124/2016, dated 22-2-2016, CESTAT Ahmedabad]

Captive consumption exemption to moulds: Exemption on captive consumption under Notification No. 67/95-C.E. is available to moulds manufactured, where the invoices for the same were raised and payments were received from buyers, but such moulds were not cleared out of factory. CESTAT Delhi in this regard noted that ownership of the goods is not relevant and that the only criterion for grant of exemption is that the capital goods manufactured in a factory are used within the factory of production. [*Ozla Plastooraft (P) Ltd.* v. *Commissioner* – Final Order No. 50217-50218 /2016, dated 11-2-2016, CESTAT Delhi]

Cenvat credit on containers when value thereof not included in value of final product: Rejecting the contention of the Revenue Department that since the value of chlorine containers was not included in the value of the final product, Cenvat credit would not be available on the same, CESTAT Ahmedabad has allowed Cenvat credit on such containers used in the manufacture of final goods. It observed that there was no material available on record that any proceeding was initiated against the assessee for non-inclusion of the value of the containers in the assessable value of the final product. [*Kadakia Alkalies & Chemicals Limited* v. *Commissioner* - Order No. A/10118/2016, dated 23-2-2016, CESTAT Ahmedabad]

Provisional release of currency seized as proceeds of clandestinely removed goods, permissible: CESTAT Delhi has held that currency/cash seized as proceeds of clandestine manufactured and cleared excisable goods, could be provisionally released on certain conditions. The Tribunal in this regard rejected the contentions of the department that there is no provision under the Central Excise Act, 1944 to provisionally release the currency. It was noted that since the seized goods were already allowed to be provisionally released, applying a different treatment for the currency which is seized as goods, was not correct. Regarding revenue interest, the Tribunal was of the view that provisional release of the currency was sought only to discharge liability along with interest, and therefore, the same would be in the interests of revenue. [*Pramod Auto Parts (P) Ltd.* v. *Commissioner* – Final Order No. 53204/2015, dated 7-10-2015, CESTAT Delhi]

Exemption to sub-contractor: CESTAT Delhi has allowed exemption to the assessee in a case where the certificate from the competent authority was issued in the name of another firm which also mentioned that the purchase order was placed on yet another firm, who placed the purchase order on the assessee. The dispute involved exemption under Notification No. 3/2004-C.E. to machineries, appliances and components required for setting up of water supply plants. [*K.E.I. Industries Ltd.* v. *Commissioner* – Final Order No. 50171/2016, dated 3-2-2016, CESTAT Delhi]

CUSTOMS

Budget 2016 – Customs

Demand – Limitation period proposed to be enhanced to 2 years: Section 28 of the Customs Act, 1962 is proposed to be amended to enhance the period of limitation for issuance of show cause notice, under normal conditions (i.e. not invoking extended period after alleging suppression, etc.). Clause 117 of the Finance Bill, 2016 refers to this proposed change. Similar amendments are also proposed in provisions relating to Central Excise.

Exemption effective from date of issue of notification: Provisions relating to exemption from Customs duty (Section 25 of the Customs Act, 1962) are proposed to be amended to

omit the requirement of publishing and offering for sale any notification issued by the CBEC. According to the amendments, as proposed by the Finance Bill 2016, notification, unless otherwise provided, would come into force on the date of issue by the Central Government for publication. The new provision puts to rest certain disputes where the notifications, though issued by the government, were not published and made available for sale.

Interest for delayed payment of duty, reduced: Interest payable by the importers/exporters on delayed payment of duty has been reduced to 15%. Notification No. 33/2016-Cus. (N.T.) has been issued in this regard to supersede Notification No. 17/2011-Cus. (N.T.) which prescribed 18% as rate of interest in such cases.

Deferred payment of Customs duties: Customs Act, 1962 is proposed to be amended to provide for deferred payment of Customs duties for certain class of importers and exporters. Clauses 117, 118 and 119 of the Finance Bill 2016 propose to amend Sections 28, 47, 51 and 156 of the Customs Act, 1962 in this regard. Class of importers and exporters has to be specified by the government by way of notification, which it seems would be issued once these provisions are brought into force after enactment of the Bill. Further, Central Government has been given power to make rules on due date and manner of making such deferred payment.

Warehousing – Various changes proposed: Various Sections contained in Chapter IX of the Customs Act are proposed to be amended by Clauses 121 to 134 of the Finance Bill, 2016, so as to amend provisions relating to warehousing. While provisions have been proposed to add new class of warehouses for enabling storage of specific goods under physical control of the department (new Section 58A), provisions for payment of fees to Customs for manufacturing facility under bond, are being omitted. However, now (from the date of enactment of the Bill) permission would be required from Principal Commissioner of Customs or Commissioner of Customs in this regard. Hitherto, sanction of Assistant/Deputy Commissioner was required for the said purpose. Further, requirement of notifying warehousing stations has been dispensed with by deleting Section 2(45) and Section 9.

Notifications and Circulars

Iron and steel products – Minimum Import Price notified: Import Policy Conditions for 173 HS Codes falling under Chapter 72 of Schedule 1 to the ITC(HS) 2012 have been amended to introduce Minimum Import Price (MIP) for imports of these products. However, imports under Advance Authorizations; all API grade steel conforming to X-52 and higher API grades for manufacturing of pipes used for pipeline transportation systems in petroleum and natural gas industries; and imports / shipments under LoC already entered into before the date of the said notification, have been exempted from this new condition. DGFT Notification No. 38/2015-20, dated 5-2-2016 issued for this purpose, would be valid for six months or until further orders. Further, clarifications regarding the same have also been issued by DGFT through Trade Notice No. 17/2015, dated 10-2-2015.

SCOMET items - Online uploading of documents and export of spares: In order to reduce transaction time in the Inter-Ministerial Working Group consultation process, applicants/ stakeholders involved in export of SCOMET items shall now be required to upload online the requisite documents along with their applications. According to DGFT Trade Notice No. 20/2015-20, dated 19-2-2016, submission of hard copies has now been done away with except for certain prescribed documents. Further, provisions have been introduced in the Handbook of Procedures, 2015-20 (HBP) for export of SCOMET items under 'stock and sale basis' [Paragraph 2.79A of the HBP] and export of spare parts covered under SCOMET along with the main equipment [Paragraph 2.79B of the HBP]. DGFT Public Notice No. 60/2015-20, dated 3-2-2016 has been issued in this regard.

Receipt in INR allowed for SEZ supplies by Advance Licence holders, under erstwhile FTP: Advance Authorizations holders now have an option to redeem their authorizations where such persons or DFIA holders have made supplies to SEZ units and have realised proceeds in INR as per Paragraph 4.1.6(a) of erstwhile FTP 2009-14. DGFT Trade Notice No. 16/2016, dated 10-2-2016 issued in this regard notes that the condition of realisation of payment from Foreign Currency Accounts of the SEZ unit was incorporated only in FTP 2015-20.

Ratio Decidendi

IEIS - Clarification limiting benefit of IEIS quashed: The Bombay High Court has quashed and set aside the clarification issued by DGFT by which it imposed a cap on the value of duty credit scrip under Incremental Export Incentivisation Scheme (IEIS), to Rs. 20 lakhs. The Court further held that Notification No. 44(RE-2013)/2009-2014, dated 25-9-2014 cannot be interpreted to mean introduction of cap or limit to the value of duty credit scrips and that the said notification merely provided for greater scrutiny in cases of claims in excess of Rs. 20 lakhs. The Court noted that any other interpretation would render clause (ii) introduced by 2014 notification redundant. [*JSW Steel Ltd.* v. *Union of India* – Writ Petition Nos. 1750/2015 and 2122/2015, decided on 25-1-2016, Bombay High Court]

Value not to be enhanced when evidence absent for under-invoicing or extra payment to supplier: CESTAT Delhi by a majority order has held that there can be no enhancement to the assessable value where there is no evidence of under-invoicing or recording of any extra payment to the supplier. Decision in the case of *H.K. International* [2011-TIOL-2001-CESTAT-DEL] was relied upon by the Tribunal in this regard. [*JMD Oils Pvt. Ltd.* v. *Commissioner* - 2016-TIOL-347-CESTAT-DEL]

Demand from bona fide purchaser of fraudulently obtained DEPB scrips: The CESTAT, relying on the Supreme Court judgment in the case of *Aafloat Textiles (India) Pvt. Ltd.* [2009-TIOL-42-SC], has held that buyer of the license has to establish that he made enquiry and took requisite precautions to find out the genuineness of the license, failing which, he would be liable to pay duty.

The Tribunal in this regard distinguished earlier order in the case of *Hico Enterprises* [2005-TIOL-1100-CESTAT] which was affirmed by the Supreme Court (three Judges Bench), on the basis that the *Aafloat* Judgement came later. [*DCW Ltd.* v. *Commissioner* - 2016-TIOL-381-CESTAT-MAD]

No refund where amount not shown as recoverable in balance sheet of that financial year: CESTAT Mumbai has upheld the rejection of the refund claim on the ground that the amounts were not shown as recoverable in the balance sheet of that particular financial year, even though it was appearing as a recoverable in the balance sheet of subsequent years. Observing that the appellant-importer who was also a registered dealer had actually passed on the credit to buyers as evident from the invoices produced, the Tribunal denied the refund. [*Vikash Globalone Ltd.* v. *Commissioner* - 2016-TIOL-339-CESTAT-MUM]

SAD refund when date of sale invoice is prior to date of bill of entry: CESTAT Delhi has allowed the refund of SAD under Notification No. 102/2007-Cus., in a case where the same was rejected as the local sale invoice for the goods was dated prior to the date of bill of entry and clearance of goods from the Customs. The assessee argued that there was no bar in raising a sale invoice prior to the date of import of goods. Allowing the refund claim, the Tribunal considered delivery challan which was post the date of import of goods; agreement with buyer which allowed raising of prior-invoice and Chartered Accountant's certificate certifying the sale of imported goods. [*Radius Infotech* v. *Commissioner* – 2016-TIOL-383-CESTAT-DEL]

Refund - Seeking amendment of bills of entry and re-assessment amounts to challenging assessment: The assessee failed to claim the benefit of exemption under Notification No. 21/2002-Cus., in the bill of entry and paid higher basic customs duty. Bill of entry was assessed on 22-2-2011 and assessee sought amendment to bill of entry by letter dated 24-2-2011 and re-assessment of bill of entry by letter dated 2-3-2011. Refund claim was also filed on 8-3-2011 which was rejected relying on decisions of Apex Court in *Priya Blue Industries* and *Flock (India) Pvt. Ltd.*, on the ground that assessment of bill of entry was not challenged. The Delhi Bench of CESTAT however allowed the appeal of the assessee holding that they had challenged the assessment by filing letters for amendment and re-assessment. The case was remanded to lower authority to decide the re-assessment and thereafter consider refund claim on merits. [*Grasim Industries Ltd.* v. *Commissioner* – 2016-TIOL-406-CESTAT-DEL]

No unjust enrichment where payment of excess interest is due to clerical error: In cases where the payment of excess interest was due to clerical error or due to mistake as to rate of interest applicable, unjust enrichment is not attracted as the excess payment is in the nature of deposit. The Tribunal holding so took note of the fact that the amount was shown as recoverable on the asset side under the head 'Deposit and Others' in the balance sheet and

certified to be so by Chartered Accountant. [*Wind World India Ltd.* v. *Commissioner* - 2016-IOL-268-CESTAT-MUM]

SAD refund - Mismatch between description of goods in B/E and sales invoice is no reason to deny refund: When all the conditions and requirements of Notification No. 102/07-Cus., read with Circular No. 6/2008-Cus., dated 28-4-2008 have been complied with, mere change in description of goods in domestic sales invoice is not a ground to deny benefit of SAD refund under said notification, according to CESTAT, New Delhi. It observed that the change in description may be due to various reasons. [*Orange Overseas Pvt. Ltd.* v. *Commissioner* - 2016-TIOL-302-CESTAT-DEL]

No criminal prosecution if person exonerated in civil proceedings on merits: The High Court of Delhi in this case while quashing the criminal complaint filed against the petitioner under Sections 132 and 135 of the Customs Act, 1962 has held that criminal prosecution cannot be allowed to continue against the accused person if he has already been exonerated by the competent authority in civil proceedings on merits of the case based on the same facts and circumstances. The High Court also held that Sections 132 and 135 are attracted in situations where the false declaration results in evasion of duty. Earlier, the first appellant authority in proceedings for absolute confiscation of undeclared foreign currency had ordered the release of currency to petitioner on payment of redemption fine and reduced penalty by holding that foreign currency was not declared to be 'prohibited goods' under the provisions of Customs Act, 1962 and Foreign Exchange Management Act, 1999 and the rules and regulations issued thereunder. [*Prem Kumar* v. *Customs* – 2016-TIOL-265-HC-Del-Cus.]

Penalty on goods already exported: The Madras High Court has held that even in cases where goods have already been exported, the provisions for confiscation under Section 113 of the Customs Act will get attracted, and thus, imposition of penalty in such cases under Section 114 of the Customs Act is justified. The Court in this regard noted that the Commissioner had found that the goods were exported contrary to the prohibition imposed by law. [*Commissioner* v. *Kamalabhai* - 2016-TIOL-151-HC-MAD-CUS]

Earning of foreign exchange not ipso facto establishes compliance of EXIM Policy: Chennai Bench of the Tribunal has held that when Advance Authorization is given to import raw material duty-free for use in manufacture and export of manufactured goods to earn foreign exchange, the exported goods should be made out of the same raw material. It was hence held that if there is a discrepancy in fulfilling this condition, mere discharge of export obligation and earning of foreign exchange shall not *ipso facto* establish a case of compliance of conditions of EXIM Policy. [*Commissioner* v. *Sharada Industries* - 2016-TIOL-280-CESTAT-MAD]

Paddle Wheel Aerators classifiable under Customs Tariff Heading 8436: Chennai Bench of the CESTAT has held that paddle

wheel aerators and its parts, though not specifically mentioned in the HSN under Heading 8436 of Customs Tariff, is rightly classifiable under said heading, and not under residuary heading 8479. It was held that the meaning of agriculture covers not only cultivation of land and growing crops but includes animal husbandry, raising of livestock, etc., and hence would cover fisheries or aquaculture also. [*Suyog Agro Poultry Products Pvt. Ltd.* v. *Commissioner* - 2016-TIOL-385-CESTAT-MAD]

Warp cut pile fabrics are classifiable under Customs TI 5801 37 20: CESTAT Kolkata has held that warp cut pile fabrics are correctly classifiable under Tariff Item 5801 37 20 of Customs Tariff, irrespective of whether 'velvet' effect is obtained or not. The Tribunal rejected the contention of the Department that all categories of 'velvet' fabrics have to be classified under TI 5801 37 11, irrespective of the fact whether pile yarn is cut or uncut. It was noted that velvet effect can be obtained both by 'uncut pile' as well as 'warp cut fabrics' and that more important in the classification of a fabric under TI 5801 3711/19 and TI 5801 3720 will be the 'cut' or 'uncut' nature of 'warp pile'. [*Chemsilk Commerce Pvt. Ltd.* v. *Commissioner* - 2016-TIOL-314-CESTAT-KOL]

SERVICE TAX

Budget 2016 – Service Tax[1]

Krishi Kalyan Cess proposed: Finance Bill, 2016 proposes to levy a new cess 'Krishi Kalyan Cess' (KKC) from 1-6-2016 for purpose of financing and promoting initiatives to improve agriculture. The cess will be levied as service tax on all or any of the taxable services at a rate of 0.5% on the value of such service. Cenvat credit of KKC would be allowed to be used for payment of the proposed cess on the service provided.

Changes proposed in the Negative List: Specified educational services are proposed to be omitted from the negative list from the date of enactment of the Finance Bill, 2016. The exemption granted to these services will be continued by amending Notification 25/2012-ST to include the same. Also transportation of passengers by stage carriage is proposed to be omitted from the negative list from 1-6-2016 though exemption will continue where such services are rendered by a non-air-conditioned contract carriage. Transport of goods by a vessel from a place outside India upto the customs station of clearance is proposed to be made taxable from 1-6-2016. Where services are availed from foreign shipping line by a business entity located in India, service tax would be payable under reverse charge mechanism. Transport of goods by an aircraft is also being removed from the negative list but exemption will continue by way of amendment to Notification 25/2012-ST to include the same.

[1] For changes made to exemptions by way of notifications, please refer to our Budget Updates released on 1-3-2016.

Changes in normal period for demand and rate of interest for delayed payment: The time period for issuance of show cause notice in cases of normal period under Section 73 of Finance Act, 1994 is proposed to be increased from 18 months to 30 months. This will be effective from date of enactment of the Finance Bill, 2016. Also, interest @ 24% will be payable where service tax is collected but the same is not deposited with the government.

Ratio decidendi

Service tax applicability on funds sent to branch office abroad, under 'reverse charge': Deliberating on four issues, namely, status of overseas branches vis-a-vis the head office; jurisdiction to classify the service under Section 65(105); receipt of BAS from branches; and inclusion of reimbursable expenses for computation of gross receipts, and intricacies of the 'reverse charge', the Mumbai Bench of the CESTAT has held that any service rendered to the other contracting party by branch as a branch of the service provider would not be within the scope of Section 66A of the Finance Act, 1994. It was held that merely because there is a overseas branch which had contributed to the activities of the assessee in discharging its contractual obligations, definition of BAS would not apply. According to the Tribunal, transfer of funds, by gross outflow or by netted inflow, is nothing but reimbursement, and taxing of which is not contemplated in Finance Act, 1994. The Tribunal held that mere existence of branch for overall promotion of objectives of the primary establishment in India, which is essential as exporter of service, does not render transfer of financial resources to the branch taxable under Section 66A. The Tribunal in this regard also held that mere identification of a service and the legal fiction of separate establishment are not sufficient to tax the activities of the branch. [*Tech Mahindra Ltd.* v. *Commissioner* – Order A/86474-86477/16/STB, dated 15-3-2016, CESTAT Mumbai]

Sale on commission basis is eligible input service – Amendment is retrospective: Explanation inserted in Rule 2(l) of Cenvat Credit Rules, 2004 by Notification No.2/2016–CE(NT) dated 3-2-2016 that sales promotion includes services by way of sale of dutiable goods on commission basis is declaratory in nature and is effective retrospectively. The Tribunal upheld admissibility of Cenvat credit of service tax paid on commission to overseas agent for sales promotion under 'International Marketing Agreement'. The department contended that prior to the issue of the notification, commission for effecting sales was not an eligible input service and that decision of the jurisdictional High Court was binding in this regard. However, the Tribunal held in favour of the assessee. [*Essar Steel India* v. *CCE &ST*, 2016-TIOL-520-CESTAT-AHM]

Refund claim by registered office in respect of tax paid by branch office, entertainable: Agreeing with the reasoning in the order of the lower appellate authority that want of jurisdiction cannot be a ground to deny refund, the Tribunal held that the refund claim filed by Delhi office of the assessee who had

erroneously paid service tax (in Pune) was admissible. The department objected to the claim stating that the invoice was in the name of the registered office at Delhi though the transaction was between the office in Pune and a third party. The Tribunal found force in the arguments of the assessee that the registered office and branch office were part of one legal entity and when there was no dispute as to erroneous payment, refund should not be denied. [*CCE* v. *Fujitsu Consulting*, 2016 (41) S.T.R. 728 (Tri.- Mumbai)]

Cenvat credit admissible on branch office rent: The department argued that the assessee could not take credit of service tax paid on rent paid for branch offices. The assessee successfully contended that the branch offices were used not only for procuring orders but also for rendering service of erection, commissioning, installation, repair and maintenance and rent being an input service for a taxable output service, Cenvat credit should be admissible. [*Carrier Airconditioning & Refrigeration Ltd* v. *CCE*, 2016 (41) S.T.R. 824 (Tri.-Chand.)]

Cenvat credit of service tax on photocopies of documents, when admissible: The issue revolved around the department's objection to the order of the lower appellate authority wherein he had allowed Cenvat credit based on certificate issued by Container Corporation of India and photocopies of Inland Weigh Bills provided by the assessee. The originals had been handed over to the railways. The Tribunal held that the department could not deny credit for non-production of the originals so long as the certificates issued by CCI were not disputed and photocopies of samples of IWB had been produced. [*CCE, C & ST* v. *Concast Ferro Inc.*, 2016 (41) S.T.R. 864 (Tri,-Bang.)]

Refund of service tax on marine insurance premium policy, admissible: Insurance is integral to export to protect property i.e. goods cleared from factory gate till they reached the destination of buyer abroad. Reasoning thus, the Tribunal set aside the order of the lower authorities which denied refund of service tax paid on marine insurance policy service. [*Alstom T&D Ltd* v. *Comm. LTU*, 2016 (41) S.T.R. 646 (Tri.-Chennai)]

Rent-a-cab service provided by sub-contractors – Contractor cannot be held liable: The department contended that the assessee – a rent-a-cab operator was liable to discharge service tax on cabs sublet by him, wherein the sub-contractors had not paid the same. Upholding the order of the lower authority, the Tribunal held that one who provided the service would be liable and the responsibility to pay tax cannot be shifted to the assessee because the services had been rendered using his vehicle. It also noted that the department did not contend that letting of vehicles to sub-contractors was covered by the definition of rent-a-cab service. [*CCE & ST* v. *Trinity Travels*, 2016 (41) S.T.R. 685 (Tri.-Bang.)]

Cenvat credit availed by assessee in different roles as manufacture and service provider, when admissible: Opining that Cenvat credit cannot be denied to an assessee who is both a manufacturer and service provider with different registrations, the Tribunal held that in

the instant case where the assessee undertook manufacture and laying of pipes he could avail credit on inputs as manufacturer and this would not lead to violation of the conditions of the composition scheme. The department argued that that since the duty paid goods had been procured from its own manufacturing unit for laying of pipes, the condition of non-availment of Cenvat credit under the composition scheme for works contract had been violated. However, the Tribunal agreed with the assessee that the role as manufacturer ended on clearing of the goods and thereafter he was a service provider. The Tribunal further observed that in case the goods had been procured from a third party there would have been no dispute as to availment of credit. [*Megha Engg. & Infrastructure Ltd* v. *Commissioner*, 2016 (41) S.T.R. 842 (Tri.-Bang.)]

Commission received from borrower of loan not taxable under BAS: The appellant was a finance broker who earned commission on loan availed by the borrowers. The appellant had a list of empaneled financiers and it communicated the details to potential borrowers. The department contended that this activity was taxable under Business Auxiliary Services. Noting that the appellant does not enter into any contract with either the borrower or the financier and that the commission is received from the borrower who does not have any product or service to market, the Tribunal held that the activity did not satisfy the definition of BAS. [*Fulchand Tikamchand* v. *CCE*, Order No. A/85755/16/STB dated 3-9-2015, CESTAT, Mumbai]

Credit admissibility on service received at premises not registered at time of receipt: The assessee had purchased land adjoining the registered premises under auction sanctioned by Gujarat High Court and subsequently included the same in the RC. The department denied credit of input service received for construction of compound wall citing receipt of service at unregistered premises. Granting relief to the assessee the Tribunal held credit cannot be denied for mere non-inclusion of land purchased in the excise registration at the time when the services were availed, being only a procedural lapse which was rectified subsequently. [*Hindustan Petroleum Corporation Ltd.* v. *CCE*, Appeal No. E/1165/10, Order of CESTAT, Mumbai]

Option to pay reduced penalty ends on expiry of 30 days from adjudication order: With emphasis on the plain reading of the statute the High Court of Delhi held that an appellate authority cannot at the appellate stage give the option to the assessee to pay reduced penalty within a time that is beyond what is stipulated in third proviso Section 78 (1) of Finance Act, 1994. In the instant case the assessee was permitted by CESTAT to pay reduced penalty of 25% after about 2 years from date of the Order-in-Original. The department argued that this was contrary to the statute which provided for payment of reduced penalty 30 days from date of the adjudication order. The assessee submitted that the adjudication order did not mention that the option was available and relied on the Circular dated 22-5-2008 issued by the CBEC mandating such mention, to contend

that the order was legally unsustainable. The High Court stated that the statute did not mandate a mention of such option and the option being an incentive for prompt payment cannot be extended at a later stage and that the assessee cannot plead ignorance of law as regards penalty. [*Pr. CST* v. *Tops Security Ltd.*, 2016 (41) S.T.R. 612 (Del.)]

VALUE ADDED TAX (VAT)

Notifications & Circulars

Delhi VAT – New Return specified for courier companies: By Notification No. F.3(628)/Policy/VAT/2016/1424-36, dated 11-2-2016, issued under Section 27 of the Delhi Value Added Tax Act, 2004, all firms/companies engaged in the business of courier activities and having their offices functioning within the National Capital Territory of Delhi are required to furnish an online quarterly return *of details of transactions of delivering goods having value more than Rs. 10,000 at the doorsteps of their clients, either individually or at the business places or offices,* in the format Form CR-II subject to the following conditions:

- Every such firm/company shall have to enroll itself by logging on to website of the Department.
- The return should be filed on quarterly basis in Form CR-II by 28th day of the month following the quarter to which the return pertains.
- In case any discrepancy is noticed subsequently, the details furnished in Form CR-II can be revised up to the end of the quarter following the quarter to which the return pertains.

Lump-sum payment of tax by developers - Rajasthan VAT Rules amended: Rajasthan Government has, by Notification No. F.12(11) FD/Tax/2016-182 S.O. 251, dated 8-3-2016 (effective from 1-4-2016), amended Rajasthan Value Added Tax Rules, 2006. A new sub-rule (1A) has been inserted in Rule 17A which states that a developer or builder who as a works contractor, undertakes the construction of premises and transfers them along with goods and land or interest underlying the land in pursuance of an agreement, may opt for payment of tax in lump sum as per Section 5. An application in Form VAT-69A has to be filed electronically within thirty days from the commencement of the project and separate application has to be made for each project. An explanation has also been inserted in Rule 17A(1A) to explain "Commencement of Project".

Further, a new sub-rule (8A) has also been added in Rule 17A which states that a developer or builder shall not be allowed to opt out in respect of the project(s) for which an option has been exercised by him. However, the developer or builder who had opted for payment of tax in lump sum in lieu of tax prior to 1-4-2016, may opt-out upto 30-4-2016, otherwise, the certificate for payment of tax in lump sum issued earlier shall remain in force for the projects already undertaken by him.

Ratio Decidendi

Electronic Survey Instruments – Classification of: The Supreme Court of India has held that Electronic Survey Instruments are correctly classifiable under Entry 14 of Part F of Schedule I to the erstwhile Tamil Nadu General Sales Tax Act, 1959 and not under Entry 50 of Part B of Schedule I of the Act. The two entries read as:

> Entry 50 of Part B of Schedule I - *Electronic systems, instruments, apparatus, appliances and other electronic goods (other than those specified elsewhere in the Schedule) but including electronic cash registering, indexing, card punching, franking, addressing machines, and computers of analog and digital varieties, one record units, word processor and other electronic goods and parts and accessories of all such goods.*
>
> Entry 14 of Part F of Schedule I - *Binoculars, monoculars, opera glasses, other optical telescope, astronomical instruments, microscopes, binocular microscopes, magnifying glasses, diffraction apparatus and mountings there for including theodolite, survey instruments and optical lenses parts and accessories thereof.*

The assessee had contended that on account of being 'electronic' survey instruments, the goods would get covered under Entry 50 of Part B and not under the specific Entry 14 of Part F. The Court however opined that the exclusion of electronic variety of goods mentioned under Entry 14 of Part F such as survey instruments was conspicuously missing, whereas, in Entries 10 to 13 which covered goods such as typewriters, teleprinters, tabulating, calculating machines and duplicating machines etc., a specific exclusion of electronic variety of those machines was made. It was held that in the absence of such exclusion of electronic variety of survey instruments from Entry 14, electronic survey instruments were covered under Entry 14 of Part-F of Schedule I, chargeable to tax at the higher rate. [*Electro Optics (P) Ltd.* v. *State of Tamil Nadu* - 2016-VIL-09-SC]

Asafoetida is not a mixture of spices – Classification of: Rajasthan High Court has held that Asafoetida (hing) is taxable at a lower rate of tax under Entry 82 and not at a higher rate of tax under Entry 184 of the notification issued under the Rajasthan Sales Tax Act, 1994. The two entries read as:

> Entry 82 - *Dry fruits, supari, kirana items, masala (other than packed masala) like mirchi, dhaniya, sonf, methi, ajwain, suwa, haldi, kathodi, amchoor and asalia, jerra (cumin seeds) 4%*
>
> Entry 184 - *All kinds of eatables and non-alcoholic potables liquids such as fruits syrups, distilled juices, jams (chatani, murabbas), fruit juices, drink concentrates of all types and forms, essences, concentrates, corn flakes and wheat flakes, custard powder, baking powder, ice cream powder and packed masala*

The Department had earlier issued a clarification that packed masala meant a masala where two or more ingredients were mixed and sold in a packed condition and that spices sold singly would continue to be taxed at the lower rate. The Department hence contended that asafoetida, obtained from the roots of ferual plants, had to be mixed with additives like gum Arabic and wheat flour, and that since, asafoetide was mixed with other additives, it was taxable at the higher rate.

The Court however held that in preparing asafoetida, instead of spices, only gum Arabic and wheat flour were mixed and no new product emerged, and hence asafoetida was taxable at the lower rate as *masala (other than packed masala)*. It was also held that asafoetida was not a mixture of two and more spices. [*Commercial Tax Officer* v. *Ramdev Food Products Pvt. Ltd.* - [2016] 88 VST 161 (Raj.)]

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