Lakshmikumaran & Sridharan tax

TAX amicus

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

January 2014 / Issue–31

**Lakshmikumaran & Sridharan wishes you a very happy and prosperous New Year 2014**

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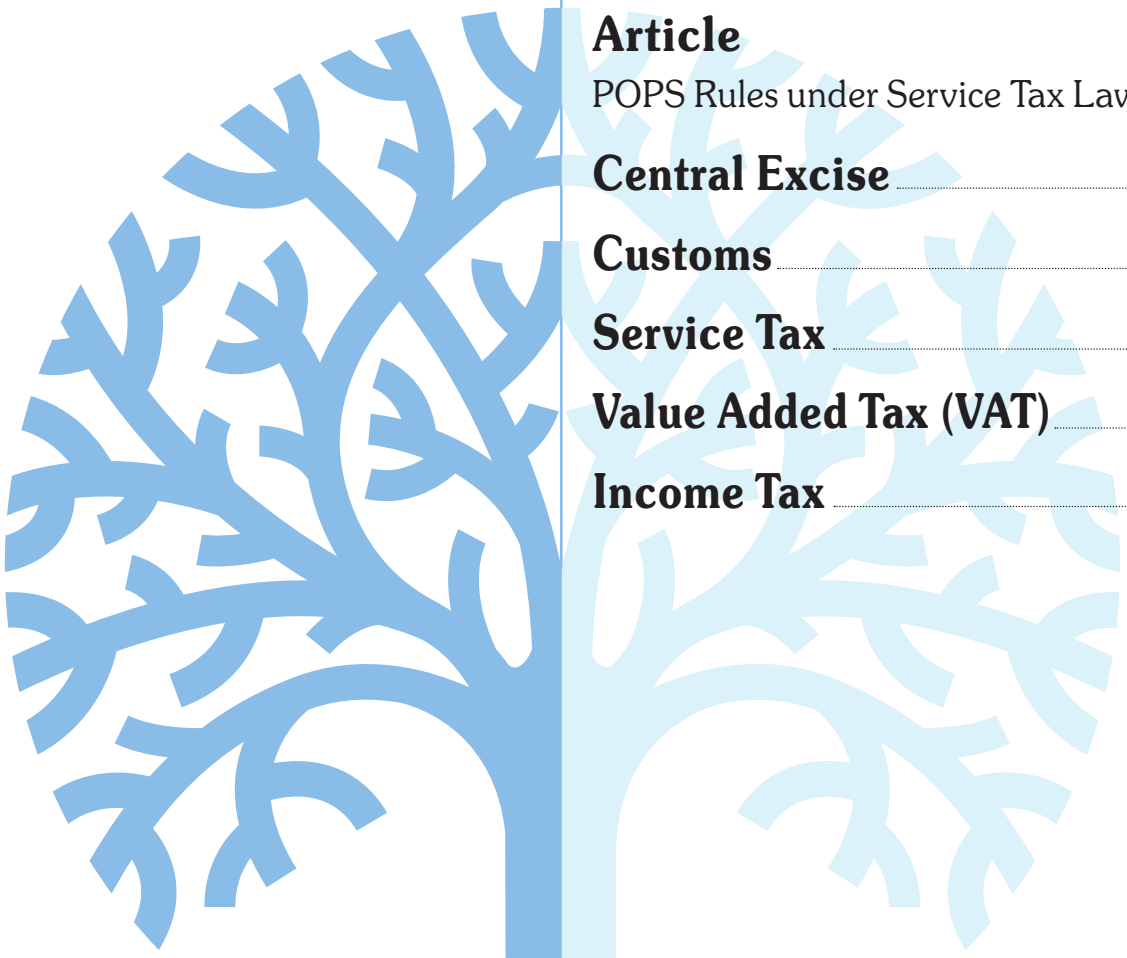

January
2014

Article

# POPS Rules under Service Tax Law

By **Narendra Kumar Singhvi & Chetan Agrawal**

*"The art of taxation consists in so plucking the goose as to obtain the largest possible amount of feathers with the smallest possible amount of hissing."* (Colbert, 1665)

From a narrow coverage of 3 services in 1994, Service Tax law as contained in Finance Act, 1994 ('the Act') today covers all activities falling within the definition of 'service' except those specified otherwise. At this young age, the service tax law has witnessed scores of changes, the important one being the recent overhaul in July, 2012 with a negative list of services and the rules for determining the place of provision of services.

With these rules in force, 'taxable territory' and 'place of provision of a service' have become the buzzwords in cases of cross-border services. Section 64 of the Act extends the applicability of provisions of the Act to whole of India except the State of Jammu & Kashmir. This is precisely what has been considered as 'taxable territory', in terms of the definition under Section 65B(52) of the Act. The charging provisions under Section 66B provide for levy of service tax on all services provided or agreed to be provided in the taxable territory. In simple words, all services provided in any part of India except the State of J&K are chargeable to service tax under the newly introduced provisions.

To determine the place of rendering/consumption of a particular service would have been a child's play but for the intangible character of services. The performance of a service may be in one territory, while the consumption of the same service being in another. As it has been rightly said that certainty to the rules of law by which men have to guide themselves is of greater importance than arriving at the rule which is best in itself,[1] it is necessary to adopt a uniform set of rules for determining the place of rendering/consumption of services. In the right spirit of this principle, the Government has introduced the Place of Provision of Services Rules, 2012 ('POPS Rules') for determining the place of provision of a service.

At this juncture, it is appropriate to refer to Article 245 of the Constitution of India, 1950 which provides that the law made by the Parliament shall not be deemed to be invalid on the ground of extra-territorial operation. This provision has been a matter of frequent judicial interpretation and has been consistently held to be integrally connected to the doctrine of territorial nexus. Kania, CJ once said that generally, States can legislate effectively only for their own territories; but for purposes of taxation and similar matters, a State makes laws designed to operate beyond its territorial limits.[2] He further said that some kind of tangible or intelligible nexus or territorial connection between the taxing State and the assessee is necessary in order to confer jurisdiction on the State to tax the assessee. These principles, inherent in the constitutional scheme of the sovereign India, apply to all statutes including the service tax law.

[1] *State of Gujarat* v. *Gordhandas Keshavji,* AIR 1962 Guj 128

[2] *A H Wadia* v. *Commissioner of Income Tax,* (1949) 51 BOMLR 287

In light of the above, what appears is that sufficient territorial nexus must be established for levying service tax on cross-border services. Under the present scheme of service tax law, particularly under Sections 64 and 66B of the Act, the levy of service tax extends to all services provided in the taxable territory and thus services provided outside the taxable territory are outside the ambit of service tax levy. Further, it has been also continuously held by the courts that service tax is a destination based consumption tax and is leviable only on services provided within the country.[3] Thus for taxing a service, it is not the place of performance but the place of consumption which is relevant and export would take place when the service is provided in India by some person but is received and consumed abroad. In the reverse situation, there will be service import.[4]

The Tribunal recently observed that where a service is provided and consumed outside the territorial locus of the Act, the consideration received therefor would not be subject to levy of service tax.[5] For this reason, the Tribunal held that a part of the outbound tour services provided and consumed outside India shall be vivisected and not be charged to service tax. It is clear that the Tribunal has gone a step ahead to hold that the consumption takes place at the location where the human needs are satisfied and not merely at the location of the service recipient, i.e. the usual place of residence.

On a combined reading of these principles, both statutory and judicial, what emerges is that the place of provision of a service is necessarily linked to the place of consumption of a service. This is also the probable reason, to our limited understanding, behind introduction of Section 66A in 2006 so as to tax the services which are imported and consumed in India.

Accordingly, the POPS Rules are also expected to be in conformity with this principle, i.e. the place of provision of a service determined under the scheme of POPS Rules must correspond to the consumption of a particular service. Let us illustrate whether the POPS Rules are actually in conformity with this principle.

Under the POPS Rules, where a service recipient located outside the taxable territory sends his machinery for repairs in the taxable territory, the place of provision of such services, under the applicable Rule 4, shall be the taxable territory, thus making it chargeable to service tax, despite the fact of consumption of such services in the hands of service recipient located outside the taxable territory. In a reverse situation, where a service recipient located inside the taxable territory sends his machinery for repairs outside the taxable territory, no service tax shall be payable for the place of provision of such services is outside the taxable territory under Rule 4, despite the fact of consumption of such services in the hands of service recipient located inside the taxable territory.

In another situation, where a real estate company participates in an event organized outside the taxable territory by an organizer located there,

[3] *All India Federation of Tax Practitioners* v. *Union of India,* 2007 (7) STR 625 (SC); *Association of Leasing and Financial Service Companies* v. *Union of India,* 2010 (20) STR 417 (SC)

[4] *Paul Merchants Limited* v. *Commissioner of Central Excise*, 2013 (29) STR 257 (Tri-Del)

[5] *Cox & Kings India Limited* v. *Commissioner of Service Tax*, 2013-TIOL-1907-CESTAT-Del

no service tax shall be payable for the place of provision of such service, under Rule 6, shall be outside the taxable territory. However, the actual consumption of such services takes place in the hands of the real estate company in the taxable territory. Similarly, under Rule 9, it is the place of location of service provider which is deemed to be the place of provision of the specified services, irrespective of the fact where exactly the service is consumed.

Rule 7, when applied to a situation like one before the Tribunal in *Cox & Kings* (supra), will result in making the whole consideration chargeable to service tax, irrespective of the fact of the service being provided and consumed outside the taxable territory. Similarly, when an Indian company receives services from an Indian service provider at its branch located outside the taxable territory, these services become chargeable to service tax under Rule 8 irrespective of the fact of consumption of those services by the branch located outside the taxable territory, more particularly in light of the deeming fiction under Explanation-3(b) to Section 65B(44) which makes such branch a separate person altogether.

These examples are apt for explaining whether the POPS Rules are in conformity with the principle of consumption based taxation of service. But determining the place of consumption is a complex task on account of intangible nature of services and the different modes by which a service can be provided and can be consumed, i.e. used by the recipient to satisfy his needs. In certain cases, considering the place of consumption as the place of taxing a particular service may also result in non-taxation/ double taxation of such service. Given this background and considering the settled proposition of law, the rules for determining the place of provision of a service seem to have been made in order to make the law operational.

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# CENTRAL EXCISE

## Notifications & Circulars

**Importers issuing Cenvatable invoices to get registration:** Importers who issue an invoice based on which Cenvat credit can be taken are required to take registration under the Central Excise law from 1-3-2014. Further, such importers would also get covered under the definition of first stage dealer from the same date. Central Excise Rules, 2002 and Cenvat Credit Rules, 2004 have been amended by Notification Nos. 17 and 18/2013-C.E.(N.T.), both dated 31-12-2013.

**Tariff value specified for goods falling under Heading 3304:** Goods specified under Heading 3304 of the Central Excise Tariff and not covered under MRP based valuation have been made assessable based on tariff value. Assessable value of such goods viz., beauty or make-up preparations and preparations for care of skin, including sunscreen or suntan preparations; manicure or pedicure preparations, shall now be equal to retail sale price (RSP/ MRP) declared on such goods less the abatement specified under Notification No. 49/2008-C.E.(N.T.). Notification No. 16/2013-C.E. (N.T.), dated 31-12-2013 has been issued in this regard.

**Reversal of Cenvat credit on input services in case of remission of duty on final product:** Cenvat credit availed on input services used in or in relation to the manufacture or production of

goods on which remission of duty has been granted under Rule 21 of Central Excise Rules, 2002, is also required to be reversed. Hitherto, only Cenvat credit on inputs used in manufacture or production of said goods was required to be reversed. Notification No. 1/2014-C.E. (N.T.), dated 8-1-2014 issued in this regard amends sub-rule 5(C) of Rule 3 of Cenvat Credit Rules, 2004.

**Export warehousing – Status holder manufacturer-exporters exempted from providing security:** Manufacturer-exporters who are also status holders with clean track record, are not required to furnish security equal to 25% of the bond amount for the purpose of export warehousing. Instead, such exporters would be required to furnish an LUT initially for a period up to six months which may be extended by a further period not exceeding six months. However, further extensions in the warehousing period in terms of paragraph 6(a) of the Circular No. 579/16/2001-CX dated 26-6-2001 will be allowed only on furnishing of security of 25% of the bond amount. CBEC Circular No. 976/10/2013-CX, dated 12-12-2013 issued in this regard also makes certain other amendments to Circular No. 579/16/2001-CX.

**Education Cess & SHE Cess on other cesses, clarified:** CBEC has clarified that Education Cess and Secondary & Higher Education Cess are not to be calculated on cesses levied under Acts which are not administered by Department of Revenue, Ministry of Finance. The clarification [Circular No.978/2/2014-CX, dated 7-1-2014] has been issued in the context of cesses like sugar cess and tea cess for which Revenue Department acts as collecting agency alone.

**Focus Market Scheme (FMS) and Incremental Export Incentive Scheme (IEIS) - Ineligible categories increased:** Export of meat and meat products, cotton, cotton yarn and goods which are subject to minimum export price or export duty will not be eligible for calculation of export performance or for computation of entitlement under Focus Market Scheme. Benefit of IEIS will not be further available in respect of export of cotton, cotton yarn and goods subject to MEP or export duty. Notification No. 30/2012-C.E. which provides exemption from excise duty to clearances made using such scrips has been amended by Notification No. 31/2013-C.E., dated 26-12-2013.

**Jammu & Kashmir – Exemption under Notification No. 1/2010-C.E. clarified:** Existing units in the State of Jammu & Kashmir, which have availed of exemption from excise duty under Notification Nos. 56/2002-C.E. & 57/2002-C.E. by way of substantial expansion can avail of exemption under Notification No.1/2010-C.E. again by way of second substantial expansion. CBEC Circular No. 977/1/2014-CX, dated 3-1-2014, issued in this regard while clarifying as above, stresses that conditions stipulated under the latter notification have to be satisfied for availing such exemption. The circular notes that the earlier notifications do not specifically provide any cut-off date (sunset clause) for setting up of new units or for units undertaking substantial expansion and that later notification does not bar such excise duty exemption if exemption was claimed under earlier notifications.

## Ratio decidendi

**Valuation - Liquidated damages on account of delay in delivery, deductible:** The Larger Bench of CESTAT has held that wherever as per the terms of contract and on account of delay in delivery of manufactured goods, the buyer is liable to pay lesser amount (i.e. after reducing liquidated damages) than the generally agreed price, the resultant price would be the transaction value and such value shall be liable to levy of excise duty. It was held that after amendment to Section 4, the eventual value payable, after factoring in

liquidated damages contractually stipulated for delayed supply, would be the transaction value and this would be the value relevant for levy of excise duty. [*Commissioner* v. *Victory Electricals Ltd.* – 2013 (298) ELT 534 (Tri.-LB)]

**Exports – Option to choose Rule 18 or Rule 19, once exercised, cannot be reverted:** Revisionary Authority in the Ministry of Finance has held that Rule 18 and Rule 19 of the Central Excise Rules, 2002 are two different sets of rules providing export benefits and that the manufacturer is free to opt any one. Once an option is exercised, it attains finality and cannot be reverted subsequently. In this case, the assessee exported goods without payment of duty under Rule 19 of the Central Excise Rules, 2002. However, subsequently duty was paid on such goods by debiting Cenvat credit account and rebate under Rule 18 was claimed. The authority disallowing rebate under Rule 18, however, allowed re-credit of such duty amount in Cenvat account of assessee. [*In Re: Radiall India Pvt. Ltd.* – 2013 (298) ELT 149 (G.O.I.)]

**Exemption under Notification No. 63/95-C.E. not available to job-worker:** CESTAT, Bangalore has held that benefit of exemption under Notification No. 63/95-C.E., dated 16-3-1995 is not available to the goods supplied by the job-worker to the manufacturer (Hindustan Aeronautics Ltd.) for incorporation in the goods to be supplied to Ministry of Defence. Circular F. No. 110/32/2009-CX, dated 27-10-2009 was considered by the Tribunal and it was observed that though the said clarification was not issued under any of the provisions of the statute and lacks legal sanction, the same was binding on the department. Tribunal's earlier order in the case of *National Engg. Industries Ltd.* [2010 (259) ELT 235 (Tribunal)] was relied by the Bench to disallow benefit of exemption notification. [*Turbotech Precision Engg. Pvt. Ltd.* v. *Commissioner* – 2013 (298) ELT 56 (Tri.-Bang)]

**Exemption under Notification No. 6/2006-C.E. when Project Import Regulations not fulfilled:** Exemption under Sl. No. 91 of Notification No. 6/2006-C.E. is available to gates and parts of gate classifiable under Chapter 73 of Central Excise Tariff and cleared against ICB. The said exemption is available subject to the condition that customs duty is exempt on the subject goods. The department denied the same on the grounds that Sl. No. 400 of Notification No. 21/2002-Cus. exempting customs duty covers goods falling under Heading 9801 of Customs Tariff which shall satisfy Project Import Regulations and that these regulations were not fulfilled as the subject goods were classifiable under Chapter 73 of Central Excise Tariff. The Tribunal however allowed assessee's appeal holding that since there was no Heading 9801 under the Central Excise Tariff, the goods manufactured in India could not be classified under Heading 9801 and hence, denial of exemption on the ground of non-fulfillment of condition of Project Import Regulations was held to be not sustainable. [*Om Metals SPML JV Unit 2* v. *Commissioner* – 2013 (298) ELT 79 (Tri.-Del.)]

**Rebate cannot be claimed on both inputs & finished goods simultaneously:** The Rajasthan High Court has held that rebate of excise duty under Rule 18 of Central Excise Rules, 2002 can be claimed either on inputs or finished goods and is not available on both of them simultaneously. The court in this regard held that merely with the aid of different provision of Rule 19, the word 'or' used in Rule 18 cannot be interpreted as 'and' to provide benefit for both inputs and final products. Availability of two different notifications (for benefit of rebate on inputs and final products) was also cited as reason to deny benefit of both at the same time. [*Rajasthan Textile Mills* v. *UOI* – 2013 (298) ELT 183 (Raj.)]

**Putting electrolyte for charging batteries in duty paid two wheelers is not manufacture:** Putting electrolyte in the dry batteries and then

charging them do not amount to manufacture as the said activity cannot be said to be conversion of incomplete or unfinished two-wheelers into complete or finished two-wheelers. The assessee in this case was receiving duty paid two-wheelers from manufacturers for selling them in the market. The said two-wheelers had dry batteries and assessee was putting electrolyte in these batteries and thereafter, charging the same. The department contended that the above activity amounted to manufacture as per Section Note 6 to Section XVII of Central Excise Tariff Act, 1985, according to which conversion of an incomplete or unfinished article, having essential character of complete or finished article, into complete or finished article, shall amount to manufacture. Assessee's appeal was allowed by the Tribunal. [*Sudarshan Motors* v. *Commissioner* – 2013 (298) ELT 235 (Tri.-Mum.)]

**Cenvat credit on PMP Plates, H.R. Coils, etc. used for repair & maintenance of machinery:** Appellate Tribunal in Delhi has held that steel items viz. PMP Plates, HR Coils, Angles & JST Joists used for repair & maintenance of sugar mill's machinery have to be treated as the items used in or in relation to manufacture of final products and should be eligible for Cenvat credit. It was noted that repair & maintenance is essential for smooth running of the plant & machinery. [*Commissioner* v. *Shahbad Co-op. Sugar Mills Ltd.* – 2013 (298) ELT 421 (Tri.-Del.)]

**Suo-motu credit of wrongly utilized Cenvat credit of AED:** The Bombay High Court has held that the assessee is entitled to *suo-motu* restore its AED credit taken prior to 1-4-2000, by making entry in its Cenvat register. In this case, the assessee utilized Additional Excise duty (AED) credit for payment of Basic Excise duty (BED). However, vide amendment in Finance Act, 2004, utilisation of AED credit for payment of BED was restricted. Thus, the assessee took *suo-motu* credit of such wrongly utilised AED and paid BED through PLA. The department denied such *suo-motu* credit of AED taken by the assessee. The Court upheld the impugned order of the Tribunal which had distinguished the Larger Bench Order of Tribunal in the case of *BDH Industries Ltd.* [2008 (229) ELT 364] on the grounds that in the LB Order, *suo-motu* credit of duty paid in excess was denied, whereas, the instant case, pertained to only restoring AED credit taken prior to 1-4-2000. [*Commissioner* v. *CEAT Ltd.* – 2013 (298) ELT 525 (Bom.)]

**Manufacture – Labelling and re-packing of gas:** CESTAT, Mumbai has held that there is no question of re-packing from bulk pack to retail pack when the gas has been supplied, in many cases, in buyer's cylinders. It was held that there is no 'manufacture' as it was not forthcoming from the SCN or the impugned order that assessee had done labeling or re-labeling. Department in this case had contended that the cylinders used for refilling had name 'Sanghi Oxygen' inscribed on them and that as per Circular No. 342/58/97-CX, dated 8-10-1997 activity undertaken by assessee was manufacture. The Tribunal in this regard noted that two requirements, of labeling or relabeling and repacking from bulk to retail packs, need to be satisfied for an activity to amount to manufacture. [*Commissioner* v. *Sanghi Oxygen (Bombay) Pvt. Ltd.* – 2013 TIOL 1844 CESTAT Mum.]

**Valuation of goods captively consumed in reconditioning:** CESTAT, Mumbai has held that Rule 8 of the Central Excise Valuation would be applicable in case where the goods cleared to another unit of the assessee were used in reconditioning work in such other unit. Noting that Rule 8 nowhere envisages that production or manufacture should be of excisable goods, the Tribunal dismissed the contention of the department that the goods should have been used in the manufacture of other excisable goods. [*Commissioner* v. *Diffusion Engineering Ltd.* – 2013 TIOL 1856 CESTAT Mum.]

# CUSTOMS

## Notifications & Circulars

**SAD on stock-transfer of goods from SEZ to DTA:** CBEC has clarified that exemption from Special Additional Duty (SAD or Special CVD) under Notification No.45/2005-Cus., will not be available in cases where the goods are cleared from the SEZ/FTWZ unit to DTA unit on stock transfer basis for self-consumption i.e. otherwise than for sale as such. Circular No. 44/2013-Cus., dated 30-12-2013 issued by the CBEC notes that Notification No. 45/2005-Cus. provides exemption from payment of SAD only if the goods cleared from SEZ to DTA are not exempted from VAT/sales tax.

**Effective rates of duty reduced on imports from various countries under Trade Agreements:** The effective rates of duty contained in various exemption notifications applicable to import of specified goods from various countries, which have signed Preferential Trade Agreements with India, have been further reduced. In respect of imports from Korea, Malaysia and various ASEAN countries, the rates have been reduced across the board. However, in the case of imports from Japan, the rates have been reduced for only two tariff lines. The following parent exemption notifications stand amended with effect from 1-1-2014:

1. *Republic of Korea* - Notification No. 152/2009-Cus. amended vide Notification No. 54/2013-Cus., dated 31-12-2013
2. *Malaysia* - Notification No. 53/2011-Cus. amended vide Notification No. 56/2013-Cus., dated 31-1-2013
3. *ASEAN countries* – Notification No. 46/2011-Cus. amended vide Notification No. 57/2013-Cus., dated 31-12-2013
4. *Japan* - Notification No. 69/2011-Cus. amended vide Notification No. 55/2013-Cus., dated 31-12-2013

**Focus Market Scheme (FMS) and Incremental Export Incentive Scheme (IEIS) - Ineligible categories increased:** Export of meat and meat products, cotton, cotton yarn and goods which are subject to minimum export price or export duty will not be eligible for calculation of export performance or for computation of entitlement under Focus Market Scheme. Benefit of IEIS will not be further available in respect of export of cotton, cotton yarn and goods subject to MEP or export duty. Notification No. 93/2009-Cus., which provides exemption from customs duty to imports made by using such scrips has been amended by Notification No. 52/2013-Cus., dated 26-12-2013 in this regard. It may be noted that Foreign Trade Policy in this regard was amended in September 2013. (*See Tax Amicus – October 2013 issue*)

**Export obligation default – Bar on use of specified scrips:** Para 3.17.11 of the Foreign Trade Policy has been amended whereby SHIS, SFIS and AIIS scrips cannot be used to pay customs duty in respect of shortfall of export obligation under Advance Authorisation and DFIA schemes. DGFT Notification No. 64(RE-2013)/2009-2014, dated 6-1-2014 provides for such restriction.

**'Group Company' redefined in Foreign Trade Policy (FTP):** Para 9.28 of FTP has been amended to include Limited Liability Partnerships (LLPs) in the definition of 'group company'. DGFT Notification No. 58(RE-2013)/2009-2014, dated 18-12-2013 issued in this regard also states that neither partnership firm nor proprietorship firm would come within the ambit of definition of 'group company'.

## Ratio decidendi

**SAD refund when declaration of non-availability of Cenvat credit worded differently:** Refund of Special Additional duty of Customs (SAD or Special CVD), as per Customs Notification 102/2007-Cus., was rejected by Commissioner (Appeals) on the ground that the importer did not mention in the invoices, the exact wordings used in the exemption notification, that no credit of the additional duty shall be available. The Tribunal however, allowing refund, held that the wordings used will not make a difference as long as the intent and purpose are satisfied. [*Singhania Chemicals* v. *Commissioner* – 2013-TIOL-1853-CESTAT-DEL]. *See also November 2013 and May 2013 issues of Tax Amicus for case law on similar question.*

**Penalty when duty paid before issuance of SCN:** CESTAT, Ahmedabad has set aside the penalty imposed under Section 112 of the Customs Act, 1962 when the differential duty was discharged by the importer prior to service of show cause notice. The Tribunal relied upon provisions of Customs Section 28(2). The importer in this case had availed benefit of concessional rate of duty under Notification No. 21/2002-Cus., and the goods were cleared after examination by Customs. Differential duty and interest were further paid after ineligibility to avail benefit under the notification was pointed out by the department which also issued a show cause notice subsequent to payment of duty. Confiscation of the goods which were cleared without seizure was also set aside by the Tribunal. [*Shreeji Shipping Ltd.* v. *Commissioner* – 2013-TIOL-1860-CESTAT-AHM]

**Conversion of Shipping Bills:** CESTAT, Mumbai has, in a recent case, allowed conversion of DEPB shipping bill to drawback shipping bill. The conversion was earlier rejected on the ground that procedure under Rule 12(1)(a) of the Drawback Rules was not followed at the time of filing the shipping bill. The Tribunal held that Rule 12 itself exempts an exporter from the procedure prescribed provided that it is granted by the Commissioner of Customs. It was also held that a DEPB Shipping Bill is subjected to higher level of scrutiny and the same was passed without any objection. The Tribunal relied on its own decision in the case of *Manawat Plastics*. [*Style Creations* v. *Commissioner* – 2013-TIOL-1883-CESTAT-MUM]

**Valuation – MRP based valuation for Additional Customs duty when not possible:** Plugs, sockets and Molded Case Circuit Brakers (MCCBs) were imported for exclusive use in industry as raw material. As these goods are notified under Section 4A of the Central Excise Act, 1944 [Notification No. 13/2002-CE (NT)], the Department contended that the imported goods are liable to levy of additional customs duty (CVD) based on MRP valuation. Rejecting MRP based valuation, the Tribunal however observed that the goods were not intended for retail sale and the packing was only meant for ease of transport. It was also held that no retail sale price was declared on the package, and since there is no corresponding provision in the Customs Tariff Act to determine the retail sale price when it is not declared, there can be no revaluation on MRP basis. Reliance was placed by the CESTAT in this regard on an earlier order in the case of *ABB*. [*Legrand (India) Pvt. Ltd.* v. *Commissioner* – 2013-TIOL-1800-CESTAT-MUMBAI]

**SAD refund when description of goods in sale invoice and B/E not tallying:** CESTAT, Delhi has allowed refund of Special CVD under Notification No. 102/2007-Cus., when the description

of goods in sale invoice and bill of entry was not tallying. Department's other contentions, that bill of entry number was not mentioned in the sale invoice for the purpose of correlation of the goods and that CA certificate cannot be relied upon, were also rejected by the Tribunal. It was held that a difference of the description 'rejected' or 'defects' cannot disentitle the benefit of exemption notification. Further, it was held that there is no condition in the notification that the bill of entry number should be mentioned in the sale invoice and as per CBEC Circular No.16/2008-Cus., CA certificate is admissible as evidence and the same cannot be discarded without any basis. [*Commissioner* v. *Shri Ram Impex India Pvt. Ltd.* – 2014-TIOL-01-CESTAT-DEL]

# SERVICE TAX

## Ratio decidendi

**Cenvat credit on services of renting of canteen area, gym instructor & AMC of ACs:** Reasoning that the benefit of Cenvat credit is concomitant with liability to service tax the Tribunal held that registration is not essential to avail credit of service tax on input service. The department advanced a view that the assessee could not utilise Cenvat credit on services used/ paid for prior to registration under the relevant category. Further, the Tribunal held that for the assessee engaged in Information Technology Software Service, AMC of airconditioners was an input service directly required for providing output service and there was no need to consider the phrase 'activities relating to business' as it existed during relevant period. Services of gym instructor were held as essential for the physical fitness of the employees and being necessary inputs, credit was held as admissible. Relying on precedent ruling, credit on renting service for canteen area was also allowed. [*Commissioner* v. *Verizon Data Services India P. Ltd.* – CESTAT, Chennai, Order dated 11-12-2013]

**Composite services provided in relation to outbound tours other than in tourist vehicle – Service tax liability:** Examining taxability under 'Tour operator' service (as per definition amended from 10.09.2004) in respect of services in relation to outbound tours the Tribunal held that composite services rendered including planning, scheduling as well as operating the tour in vehicles other than tourist vehicles which are covered by a permit granted under Motor Vehicles Act, would fall outside the scope of the said service. Further when part of services are provided and consumed outside India, it is not possible to vivisect the consideration in respect of the same. The Tribunal also held that Place of Provision of Services Rules, 2012 cannot have retrospective effect as in the instant case both the service provider and recipient were in the same taxable territory. [*Cox & Kings India* v. *Commissioner* – CESTAT, Delhi Order dated 10-12-2013]

**Invoice in the name of head office – Credit availment not invalid:** On facts, there was no dispute regarding receipt and utilisation of services. The Tribunal held that Cenvat credit could not be denied only because the invoices were in the name of the head office. It also drew attention to the CBEC circular clarifying that Modvat credit would be available when invoices are in the name of registered office or head office. [*Gwalior Polypipes* v. *Commissioner* – CESTAT, Delhi, Order dated 10-12-2013]

**Orders passed under VCES appealable:** Observing that all provisions of the Finance Act, 1994, except those specifically excluded would apply after incorporation of the Service Tax Voluntary Compliance Encouragement Scheme (VCES), the P&H High Court held that orders passed in the proceeding under VCES can be appealed against. [*Barnala Builders and Property Consultants* v. *Deputy Commissioner* – Punjab & Haryana High Court, Order dated 9-12-2013]

**Cenvat credit when manufacturing activity undertaken in rented premises:** The assessee sought to avail credit of service tax on rent paid for premises other than the registered premises and relied on invoices raised from such rented premises to prove that manufacturing activity was carried out in such premises. The Tribunal noted that the original authority had not disputed that renting activity was an input service and since manufacturing activity was undertaken in the premises other than the registered one, credit was held as admissible. [*Commissioner* v. *Eltek SGS* – TIOL-1868-CESTAT-DEL]

**Refund of service tax on commission on exports – Limitation runs from date of payment of tax, not export:** In this case, the appellant had hired the services of a foreign agent and was paying service tax under reverse charge. Since he was exporting goods out of India, he filed the claim for refund of service tax paid under reverse charge. The question before the Tribunal was what the relevant date for filing the refund claim is. The court held that since the law only requires making the payment of tax once the consideration is paid, the relevant date would be the date of payment of service tax. [*KKSK Leather Processors (P) Ltd* v. *Commissioner* – 2013 TIOL 1797 CESTAT Mad]

**Cenvat credit on input services – Registration of premises not mandatory:** Refund of service tax was rejected on the ground that input services were received at the premises which is not registered with the service tax authorities. The Tribunal relying on the case of *mPortal India Wireless Solutions Pvt. Ltd.* [2011-TIOL-928-HC- Kar.-ST] held that registration is not mandatory for claiming credit and accordingly, allowed the refund. [*ML Outsourcing Services Pvt. Ltd* v. *Commissioner* – 2013-TIOL-1829-CESTAT-Del]

**Issue of meal vouchers taxable under BAS:** The Mumbai Bench of CESTAT has held that the meal vouchers issued by the companies to the employees promote the goods and services of the affiliates of such vouchers. It was of the view that meal vouchers cannot be compared with credit/ debit cards as vouchers are not substitute of cash. Hence the appellant was held as liable to pay service tax under Business Auxiliary Services. [*Sodexho Pass India Services* v. *Commissioner* – 2013-TIOL-1838-CESTAT-MUM]

**Deemed service provider can utilise Cenvat credit for payment of tax on GTA service:** The department argued against payment of service tax on GTA services by utilising CENVAT credit. Reasoning that Cenvat credit Rules, 2004 do not distinguish between a deemed service provider and an actual service provider, the Tribunal held that whenever service tax liability is to be paid by the deemed service provider he can utilize the input credit to discharge the same. [*Commissioner* v. *Indo Afrique Paper Mills* – 2013-TIOL-1910-CESTAT-MUM-2013]

**Promotion of cricket neither of charitable nature nor public service:** Holding that neither of the ingredients - charitable purpose or public service was satisfied, the Tribunal upheld

the stand of the department that exclusion under Club or Association service would not apply to the appellant – cricket association. It opined that promoting cricket is not a charitable activity and also not an activity done in public interest. Moreover, charitable activity is for poor and needy whereas cricket is taken up by socially and financially well off people. [*Vidharbha Cricket Assn.* v. *Commissioner* – 2013-TIOL-1915-CESTAT-MUM]

**Clinical testing of formulations is not scientific or technical consultancy:** Services related to clinical testing of the formulations and analysis of samples is an activity falling within the ambit of "technical testing and analysis" and distinct from "scientific or technical consultancy" service. The Tribunal observed that scientific or technical consultancy would be in the nature of expert opinion or advice. Further since the services were provided wholly outside India, service tax liability would not be attracted. [*GlaxoSmithKline Consumer Healthcare Ltd.* v. *Commissioner* – 2013-TIOL-1934-CESTAT-Del]

# VALUE ADDED TAX (VAT)

## Notifications

**Punjab VAT Act amended:** Schedule A and Schedule E appended to the Punjab Value Added Tax Act, 2005, have been amended. Notification No. S.O. 117/ P.A.8/2005/S.8/2013, with effect from 1st January, 2014, adds Entries 15-20 to Schedule E and prescribes special rate of tax in respect of the commodities mentioned therein. These commodities are now taxable at the first point of sale i.e. manufacturer or first importer's stage, at the rates specified against the entries. Further, Notification No. S.O. 116/ P.A.8/2005/S.8/2013, also with effect from 1st January, 2014, adds Entries 86-91 to Schedule A, thus prescribing that these commodities shall be tax free at the wholesaler or distributor or retailer stage provided that tax has already been paid at the first point of sale i.e. manufacturer or first importer's stage. The commodities mentioned in these entries are the same as the ones inserted in Schedule E.

**Sale to government - Haryana VAT Act amended:** Haryana Ordinance No. 5 of 2013 has amended Section 7 of the Haryana Value Added Tax Act, 2003 and the words *"to goods sold to the government or"* have been omitted from Section 7(2). Further, Section 7(3)(b) has also been omitted. The amendments have been brought into effect from 6th of December, 2013. Effectively, benefit of concessional rate of tax on sale made to Government (not being a registered dealer) against Form VAT C-3 will no longer be available under the Haryana VAT Act.

**Haryana VAT - Zero rate benefit for clearance to SEZ:** Notification No. S.O.56/ H.A.6/2003/S.7/2003, issued under Haryana VAT Act, provided that the tax payable on the sale of goods by a VAT dealer to a unit established in a Special Economic Zone will be calculated at zero rate provided that the goods were used in the manufacture of goods for sale in the course of export of goods out of the territory of India. Now Notification No. S.O. 103/H.A.6/2003/S.7/2013, dated 6-12-2013 amends the 2003 notification to omit the entry relating to SEZs. It may be noted that Section 7(6) of the Haryana VAT Act provides that notwithstanding anything contained in the Act, no tax shall be payable by a dealer in respect of sale of any goods made to a registered dealer for

purposes like setting up, operation, maintenance, manufacture, trading, for use as packing material in an unit located in SEZ.

## Ratio decidendi

**Air bubble film rolls – Classification of:** The assessee claimed the goods to be classifiable as industrial inputs within Entry 60 of List A of 3rd Schedule under the Kerala VAT Act, 2003 covering "Flexible plain films, plates, sheets, foil and strips of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials (Polythelene, propylene, PVC)", which is aligned with HSN 3920. Department however sought to classify same under the residuary entry as packing material at 12.5% vide Entry 103 of SRO 82, dated 21-1-2006. The Kerala High Court noted various entries under HSN 3923 (for packing material) and, while ruling in favour of the assessee, held that even though entries under HSN Code 3920 does not specifically cover air bubble film rolls, sheets of ethylene has been covered and air bubble film rolls though has air bubbles in it, is nothing but a sheet of poly ethylene. It was also held that though the product is used as a packing material for goods, it cannot be termed as packing material in general. The air bubble film roll was hence held to be covered under HSN 3920 and classifiable as industrial input under KVAT. [*COF AB* v. *Commissioner of Commercial Taxes* – 2013-VIL-119-KER]

**Construction of floating restaurant is works contract:** Division Bench of the Kerala High Court has held that contract for construction of a restaurant that was supposed to be floating on the lake will amount to works contract and not outright sale of movable property. The department had relied upon the Hindustan Shipyard Ltd. decision and contended that the contract is for outright sale. The court in this case observed that though it is named as floating restaurant it is not constructed somewhere else and brought to the lake in question but, after putting up a dredge, the entire two storied construction is put up on the dredge. It was noted that the restaurant is stable and fixed to concrete poles and it would not move from the place where it floats. It was hence held that the restaurant was nothing short of a building except for the fact that instead of the building embedded to the earth, it floats on a platform and therefore it is called a floating restaurant. [*Floatles India Pvt. Ltd.* v. *The Commercial Tax Officer* – 2013-VIL-127-KER(DB)]

# INCOME TAX

## Ratio decidendi

**Derivative income to FII is 'capital gains' and not 'business income':** The assessee, being a sub-account of FII registered in Australia and operating in India, is allowed only to invest in securities. A 'derivative' is a security as per the clause (ia) to Section 2 of the Securities Contracts (Regulations) Act, 1956. The ITAT held that income arising to FII is to be taxed as per Section 115AD either as short term capital gain or long term capital gain depending upon the period of holding of such securities and not as 'business income'. [*Platinum Asset Management Ltd.* v. *DDIT* – (2013) 40 taxmann.com 180 (Mum)]

**Telecasting and broadcasting services are not FTS:** Payment to a foreign company for providing line production services in relation to shooting of a reality show which took place out of India is not Fees for Technical Services (FTS).

According to the Authority for Advance Rulings, these services being in the nature of broadcasting and telecasting, would be specifically characterised as 'work' as per Section 194C and it would not be appropriate to treat them as FTS as per Section 9(1)(vii) of the Act. Once these are not FTS, then the payment would be necessarily treated as 'Business Income' under the treaty and not taxable in India in the absence of PE of non-resident in India. [*Endemol India (P.) Ltd.* – (2013) 40 taxmann.com 340 (AAR-New Delhi)]

**Nature of services should be determined having regard to substance over form:** Services in the nature of finding out potential customers and filing a report regarding the market strategy and development studies are 'consultancy services' in substance even if styled as 'marketing services'. According to ITAT, tax is, therefore, leviable on payment for such services as per Section 9 read with Article 12 of the OECD Model Tax Convention. Hence, the assessee is liable to deduct tax under Section 195 of the Income Tax Act, 1961. [*English Indian Clays Ltd.* v. *ACIT* – (2013) 39 taxmann.com 50 (Coch-Trib.)]

**Agreement to license copyright for a period longer than statutory protection is effectively a sale agreement:** The assessee acquired world negative (picture and sound) rights including theatrical and commercial rights of distribution, exhibition and exploitation in Telugu films. Apart from that world satellite rights, satellite broadcasting service and Satellite television Broadcasting services and copyrights were also transferred to assessee for a period of 99 years without restrictions to geographical area. The Madras High Court held the transaction to be in the nature of sale and outside the ambit of TDS provisions as the term of agreement exceeded the term protected under Copyright Act, 1957. [*K. Bhagyalakshmi* v. *DCIT* – (2013) 40 taxmann.com 350 (Mad)]

**Inter-corporate deposits are not loans for Section 2(22)(e):** The assessee engaged in the business of bullion, accepted inter-corporate deposit from companies in which it holds more than 10% shareholding. The Assessing Officer held that the amount received by the assessee from two companies would fall within the realm of deemed dividend under Section 2(22)(e) of the Income Tax Act, 1961. The Tribunal held that inter-corporate deposits received cannot be considered as a loan or advance so as to attract Section 2(22)(e) of the Income Tax Act, 1961. [*DCIT* v. *P.C. Chandra Holdings Pvt. Ltd.* – ITA No. 1600/Kol./2011 (Kol Tribunal)]