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Lakshmikumaran & Sridharan wishes you a very happy and prosperous New Year 2017

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ARTICLES

Inter-State supplies under Model IGST Law – Treatment of FOR & Ex-works supplies

By **Sonal Singh**

One of the many disputes that have continued to exist in the present regime of taxation of sale of goods are the disputes pertaining to determination of the nature of transaction as inter-State sale subject to Central Sales Tax or local sale subject to VAT. Such disputes especially arise when assessee in a State sells goods to a buyer located in a different State. Sales of this nature are often made with variety of permutations of terms and conditions pertaining to transfer of title, transfer of risk, transfer of possession and obligation to transport the goods, etc.

These disputes could not be settled by the enactment of the CST Act despite one of its objectives itself being *'to formulate the principles for determining when a sale or purchase of goods takes place in the course of inter-state trade or commerce'*. Nor could these disputes be put to rest by the courts of law for the simple reason that, principle laid down by the CST Act for determining the nature of transaction is rather subjective and the determination can only be done after a careful factual analysis of the transaction itself. This means, no rule of thumb could apply to two transactions in the same manner.

Now, with the advent of Goods and Service Taxes ("GST") which aims to simplify indirect taxation in India it would be interesting to investigate whether the legislature has been mindful of this conundrum or not and if so, how has it sought to address it.

Inter-State supplies under Model IGST Law

Section 3 of the Model Integrated Goods and Services Tax Act ("Model IGST Act") states that supply of goods in the course of inter-State trade and commerce means any supply where the location of the supplier and the place of supply are in different States. Thus, in a marked departure from the principle laid down under Section 3 of the CST Act, which places emphasis on inter-State movement of goods occasioned by sale for deeming a sale to be in the course of inter-State trade and commerce, under the Model IGST Act determination of inter-State sale / supply hinges on dual factors i.e. *location of the supplier* and the *place of supply.*

Section 7 of the Model IGST Act details out various principles for determining the place of supply of goods which are applicable in different contexts. Two principles which are most relevant for the present analysis are contained in Section 7(2) and Section 7(4) of the Model IGST Act. As per Section 7(2) *if the supply involves movement of goods, whether by the supplier or the recipient or by any other person, the place of supply of goods shall be the location of the goods at the time at which the movement terminates for delivery to the recipient.* Section 7(4) provides that where the supply does not involve movement of goods, whether by the supplier or the recipient, the place of supply shall be the location of such goods at the time of delivery to the recipient.

Supply involving movement of goods

The first question that is required to be answered for determining the place of supply i.e. whether the supply involves movement of goods or not, can only be answered on a case to case basis. As regards time of delivery, in the absence of any definition of the terms 'delivery' or 'time of delivery' under the Model GST legislations, the definition provided in the Sale of Goods Act, 1930 ('Act') becomes relevant. Section 2(2) of the Act defines delivery as *voluntary transfer of possession from one person to another. Pollock and Wright on Possession* points out that 'in all cases the essence of delivery is that the deliveror, by some apt and manifest act, puts the deliveree in the same position of control over the thing, either directly or through a custodian, which he held himself immediately before the act.'

An obvious example of a transaction where the supply involves movement of goods is a transaction which is known as FOR destination sale. That is a transaction where as per the terms of the supply contract, the supplier is bound to move the goods up-to the place of the recipient which is where the supply gets completed upon delivery of goods by the supplier to the recipient. As the goods would be located at the recipient's premises at the time of termination of movement of goods for delivery to the recipient, the place of supply would be the place of the recipient.

Supply not involving movement of goods

Similarly, an obvious example of a transaction where the supply does not involve movement of goods is where the manufacturer/supplier of goods develops moulds and jigs required for the manufacture of goods, sells the moulds and jigs to the recipient before using them for manufacture of goods, but does not move the same and uses the moulds for manufacture of goods for sale to the recipient. By application of Section 7(4) of the model IGST Act the place of supply of such moulds and jigs will be the factory of the supplier.

Ex-factory or ex-works sale – Can it be treated as intra-State supply?

Now the provisions are to be analyzed to test a transaction which is popularly known as an ex-factory or ex-works sale of goods. Typically, in such transactions the supplier is responsible for making goods available at its factory site, the title, risk and possession of the goods are transferred by the supplier to the recipient at the supplier's factory gate, where after the recipient is responsible for transportation of goods up to the destination, bears the risk of any loss in transit and is free to dispose the goods in any manner it deems fit. Further, the address in the 'bill to' field of the invoice raised by the seller would be the recipient's location, where the goods may or may not be shipped to by the buyer.

While some may argue that the supply in this case does not involve movement because the movement of goods by the recipient is only a post supply activity invoking Section 7(4), it is also possible to argue that usage of the words 'whether by the supplier or by recipient' after the words 'where the supply involves movement of goods' has widened the scope to include such transactions where

the movement is a direct result of the supply of goods and therefore, the transaction in question will be governed by Section 7(2).

For the sake of exhaustiveness, it would be appropriate to examine the results by applying both the provisions. However, for application of both the provisions it is relevant to determine what constitutes 'delivery to the recipient'. As per the definition of delivery discussed *supra* the delivery to recipient would be the point where voluntary possession of goods is given to the recipient and the recipient is put in the same position of control over the goods which the supplier himself had immediately before such delivery.

Thus, in this example it can undoubtedly be said that the delivery takes place at the factory of the supplier. Now by application of Section 7(4) of the Model IGST Act, the place of supply of goods would be the factory site of the supplier. Interestingly, for the purposes of Section 7(2), termination of movement for delivery would also be the factory gate of the supplier resulting in the place of supply again being the factory site of the supplier. Thus, irrespective of the provision applied, in case of an ex-factory transaction the place of supply would be the supplier's factory, which being the same as the location of the supplier will make the transaction an intra-State supply of goods.

However, this interpretation of the provisions may result in various complications and contradictions. Firstly, if an ex-factory transaction is treated as an intra-State supply subject to levy of CGST-SGST in the supplier's State, then will a recipient located in a State outside such supplier's State, without business or registration in the supplier's State, be allowed to avail and utilize the SGST credit of the purchase while making output GST payment in its home State? If the SGST credit of one State is blocked for availment and utilization in another State, then GST model is not very different from the current VAT regime for the purpose of cross utilization of credit under different VAT legislations. Secondly, if the recipient dealer is expected to take registration in each of the States of suppliers and then stock transfer the goods to its own unit in the other State by charging IGST which can be paid by utilizing the CGST-SGST credit of the procurement, then the same will be in complete contradiction of not only prudent business practices but also the 'hub and spoke' model in which GST in India is expected to operate.

Place of supply – Can ultimate destination provide the solution?

In view of the above, one may take a view that it is the location of goods at the time of ultimate termination of movement by the recipient himself that would be relevant for determining the place of supply. However, it is not for the supplier to be sure of whether and where the recipient chooses to move the goods as the recipient is free to move or dispose the goods in any manner in transit itself. This will result in taxability of transaction in the hands of the supplier contingent upon events not under its control. In order to avoid such uncertainties, the buyer's 'bill to'/ 'ship to' address can be

assumed to be the place where the movement of goods will eventually terminate after making necessary modifications in the agreement curtailing the buyer's right of diversion. If the address of the recipient is outside the supplier's State, then the transaction will be deemed to be an inter-State supply irrespective of the terms of supply.

This view, though meritorious on account of its simplicity and objectivity, may be prone to dispute because it does not flow from an interpretation of the draft provisions as they currently exist. The view is especially disputable in light of the fact that the draft law makers have defined the phrase 'address of delivery' but refrained from using it in this provision. Further, if the intention was to make the 'bill to' address of the recipient as the place of supply then the draftsmen could have done so by adopting the phrase 'principal place of business' of the recipient which has been done in sub-section (3) of Section 7 and also other provisions of the Model IGST Act determining place of supply of goods and services in different contexts.

Thus, the Model IGST Act in its current form, though clearly had intended to and seeks to address the problem, has only ended up creating more peculiar ones.

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Challenges in availment of Input Tax Credit under GST

By **Gagan Gugnani**

The Revised Model GST Law (hence forth "RMGL") was made available in public domain in November, 2016. The commitment of the government is to roll out a simplified and easier indirect tax regime, yet the provisions reveal a different picture. The whole concept of availment of input tax credit (ITC) is set to change from present system of availment of credit as part of self-assessment scheme to electronic matching of credit with supplier wise, invoice wise and item HSN code wise matching. Basic conditions for availment of credit mentioned in Section16(2) of RMGL are as follows:

- Recipient is in possession of a tax invoice or debit note issued by a supplier registered under the GST Act, or such other taxpaying document(s) as may be prescribed.
- Recipient has received the goods and/or services.
- Tax charged in respect of such supply has been actually paid to the account of the appropriate Government, either in cash or through utilization of input tax credit admissible in respect of the said supply.
- Return under Section 34 has been filed.

Credit on advance payment

GST is required to be paid at the time of supply as per the provisions contained in Section 13/ Section 14 which talk about earlier of the two i.e. date of issue of invoice or date of receipt of payment. However, credit is allowed only when all the conditions of credit in Section

16 are satisfied. This will result in gap of crucial days between actual payment of GST by supplier and allowance of credit to recipient. This gap will be mainly in case of GST paid on advance receipt since condition for availment of credit requires that goods and/or services should have been received. Also, Section 28(3) provides that receipt voucher shall be issued in case of advance receipt. Receipt voucher, not being a tax invoice, will not be considered as eligible document for availment of credit. Thus, credit shall not be eligible in case of advance payment. However, definition of taxable service in Finance Act, 1994 covers service provided or to be provided. A view is generally taken that on payment of advance, services should be considered as received and credit is eligible. But under GST, even such view is not possible even though definition of supply covers supply of goods and/or services which are provided or agreed to be provided. But, as per Section 16 of RMGL does not state that supply should have been received for availing credit rather it requires goods/ services have been received. Thus, credit will not be eligible merely because advance payment has been made for goods or services.

Credit on receipt of last lot of goods

Where the goods against an invoice are received in lots or instalments, credit is eligible on receipt of the last lot or installment. This unnecessary condition could result in significant delay in availment of credit. If the goods are imported and from port goods are received in factory in lots, then credit is eligible only when the last lot is received.

Payment to supplier of services within three months

Second proviso to Section16(2) states that where the recipient fails to pay supplier of service the value of service within three months from the date of issue of invoice, then credit claimed is required to be reversed along with interest. This condition is similar to present condition in Cenvat Credit Rules under Rule 4(7). But in GST credit is required to reversed along with Interest. Further, if payment is made to supplier after three months, then the provision about credit eligibility of reversal made earlier is not mentioned in GST law. This omission appears to be unintentional and the final law is expected to provide for the same.

Capital goods used partly for taxable & partly for exempted supplies

Section 17 seeks to cover those situations where credit is claimed on goods/ services which are used partly for taxable supplies including zero rated supplies and partly for exempted supplies. The said provision is based on the very rational reason that only credit of those goods/ services is allowed which are used for taxable supplies. However, even the credit on capital goods needs to be apportioned in GST if they are used for both taxable and exempt supplies. Currently Cenvat Credit Rules do not require such apportionment of credit on capital goods. Only common credit in respect of input and input services is required to be apportioned as per Rule 6(2) and Rule 6(3) of Cenvat Credit Rules.

My vendor and vendor of my vendor must pay tax

A harsh condition for availment of the credit is contained in Section 16(2) as per which the supplier must have paid tax to the account of the appropriate government. This single condition can create several problems and disputes between supplier and receiver. Even though the receiver has already paid tax to supplier, yet he is not allowed to take credit if the supplier has not paid tax. This problem is somewhat similar to present reconciliation issues which assessees face in claiming TDS by Form 26AS. Some of the problems which may arise:

- Where vendor has not paid tax and assesse is not able to take credit.
- Second, suppose vendor has paid tax appropriately by cash/ credit. But vendor's return comes out to be invalid after 2 months of provisional credit claimed by him. This could be due to vendor of my vendor has not passed on the credit to my vendor. Consequently, my return becomes invalid. This chain of invalid return can go on and on. If any large scale assessee defaults, then recipient will have to pay credit claimed earlier along with interest. This mismatch of credit could spread across the entire supply chain.

GST of different State?

Suppose, CA firm in Delhi is auditing a company in UP. For this purpose, auditors visited Mumbai (for plant visit) and avail hotel accommodation services in Mumbai from Hotel XYZ. Now considering the place of supply provision as per Section 9(4)(b) in draft IGST Law, place of supply will be Mumbai. Therefore, Hotel XYZ will charge CGST+SGST of Maharashtra. Now the question that will arise is whether the said CA firm being Delhi registrant is eligible to take credit of CGST and SGST of Maharashtra. If not, then how will it be shown in auto populated GSTR2A of CA firm since the hotel will be uploading its invoices in its GSTR1 along with GSTIN of CA firm? If tax of one State is not allowed as credit to a registrant of a different state, then the whole idea of GST becomes questionable. It is ignoring the concept of seamless flow of credit. And what could be the reason for not allowing such credit?

Continuing the above example, now CA firm is required to pay IGST on its audit services since client's head office is in UP. The IGST on its output services will go to UP Government since consumption is in UP. Now for payment of IGST, CA firm is eligible to utilise credit of CGST & SGST which are paid by him to Delhi Government. But he is not eligible to utilise credit of CGST & SGST of Maharashtra Government. But again the question comes up, why cannot he utilise Maharashtra GST?

Thus, it is clear that input tax credit chain could be stuck and the ultimate motive of GST could be diluted. Hopefully, government will come out with appropriate changes so that the final law and rules do not lead to any blockage of genuine credits.

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GOODS & SERVICES TAX (GST)

CBEC commences enrolment for Central Excise & Service Tax assessees: Central Board of Excise & Customs (CBEC) has commenced enrolment process for existing Central Excise and Service Tax assessees. Through such process of enrolment, assessees are requested to verify their existing business details and update the same as available in the portal - www.gst.gov.in. For assessees who are registered under Central Excise Act but not registered under State VAT provisions, enrolment has begun from 7-1-2017 and for Service Tax assessees the same will commence from 14-1-2017. Those who have taken new registration under VAT/Service Tax/ Central Excise after January 2016, enrolment process will start on 1-2-2017. ACES portal will provide provisional access credentials and using the same, assessees can provide necessary information and on successful completion of the process, Application Reference Number (ARN) will be generated. This ARN will enable grant of provisional registration on the date of migration to GST. In a communication issued by CBEC, it is stated that dealers who have completed the process of enrolment based on log in ID and password provided by State VAT Department, need not undertake this process again.

CENTRAL EXCISE

Notifications

Central Excise Tariff amended with effect from 1-1-2017: First Schedule to the Central Excise Tariff, 1985 has been amended with effect from 1-1-2017. These changes, made by the Finance Act, 2016, were part of the Budget 2016 proposals and have been made consequent to the amendments made in the classification of many items in the Harmonised System of Nomenclature (HSN) by the World Customs Organisation (WCO). It may be noted that CBEC has also issued Notification No. 37/2016-C.E., dated 31-12-2016, effective from 1-1-2017, to amend number of exemption notifications as a result of the above amendments in the Tariff. Additionally, Notification No. 49/2016-C.E. (N.T.), dated 31-12-2016 has also been issued to further amend the First Schedule to the Central Excise Tariff from 1st of January, 2017.

Ratio decidendi

Valuation - Non-mention of turnover and cash discounts in the invoice not to lead to their disallowance: The issue before the Tribunal was whether the non-mention of turnover and cash discounts in the invoices of the appellant could lead to their disallowance. The original adjudicating authority had not given the benefit because these discounts were not shown in the invoices. The appellants argued that such discounts could not be shown in the invoices because the same were not known at the time of selling of the goods and were known only later. CESTAT Delhi upheld the view and

observed that turnover and cash discounts cannot always be shown in the invoice as these discounts are worked out on the basis of the turnover or on the basis of the promptness of payment. Holding that non-mention of such discounts in the invoice cannot be a criterion for disallowing the same, the Tribunal remanded the matter for consideration of documentary evidence. [*DD Industries Ltd.* v. *Commissioner* - 2016 (342) ELT 144 (Tri. - Del.)]

Manufacture - Process of production of 'isolated soya protein' from de-oiled cake amounts to manufacture: Deliberating on the process of making of protein isolate from soya flour, CESTAT Delhi has held that the process of production of 'isolated soya protein' from de-oiled cake would come under the definition of 'manufacture'. The Tribunal noted that the objective of the process of production was to increase the concentration of protein and elimination of carbohydrate. It was also observed that the net result in the process was the final product which had a new character, name, was nutritionally different from the starting raw material and had an entirely different use since the 'isolated soya proteins' was used as nutritional supplements, different from the use of the original soya flour. [*M.P. Glychem Industries Ltd.* v. *Commissioner* - 2016 (342) ELT 388 (Tri. - Del.)]

Valuation - Transportation charges not includible when goods supplied to self at site: In a case pertaining to valuation of goods cleared to self at site, CESTAT Mumbai has held that freight charges for transportation to site would not be includible. Revenue department in the dispute was of the view that since the nature of supply of the goods was not at factory gate, same being cleared on self basis to the site of the customer, all the elements incurred from the factory to the site, i.e. freight charges were includible in the assessable value. The Tribunal however observed that in the absence of sale, Rule 8 of the Central Excise Valuation Rules, 2000 would be applicable. It was held that since provision did not provide addition of any element over and above the 115% of the cost of production, addition of freight charges in such value was without authority of law. [*Commissioner* v. *Blue Star Ltd.* - 2017-VIL-02-CESTAT-MUM-CE]

Cenvat credit when captive power plant transferred to another entity: CESTAT Delhi, in a case involving sale of captive power plant situated inside the factory, has held that no amount was payable under Rule 3(4) of the Cenvat Credit Rules, 2002. The department was of the view that amount equal to the Central Excise duty leviable on inputs and capital goods installed in the captive power plant on which Cenvat credit was taken, was required to be paid in terms of Rule 3(4), as the sale was made to different entity. It was also contended that there was no need for physical removal. The Tribunal however, relying on Supreme Court decision in the case of *J.K. Cotton Spinning and Weaving Mills Ltd.*, wherein the Court had examined the meaning of word 'removal' and had held that 'removal' contemplated 'physical removal', dismissed the appeal of the Revenue department. [*Commissioner* v. *Bhilai Steel Plant* - 2017-VIL-01-CESTAT-DEL-CE]

Refund - No unjust enrichment when excess duty paid on clearances from factory to depot than on actual sale value charged from depot: Considering the fact that excess payment of duty was for the reason that the value applied on the clearances of the goods from the factory was higher than the actual sale value charged from the depot, CESTAT Mumbai has held that excess paid duty was not passed on to actual buyer of the goods and same was borne by the assessee. As regard the total amount being shown in the balance sheet as receivable, the Tribunal was of the view that it is not the only evidence required for establishing unjust enrichment. It also took note of the fact that there was no evidence showing that excess paid amount was otherwise collected either from the buyer or from any other person. [*CEAT Ltd.* v. *Commissioner* - 2016-VIL-966-CESTAT-MUM-CE]

Cenvat credit on steel items used for fabrication of items embedded to earth and laying foundation and for supporting structures: CESTAT Delhi has rejected the contention of the department that Cenvat credit is not available on steel items used in fabrication of supporting structures for capital goods, as resultant fabricated items are immovable structures and hence, cannot be considered as goods. The Tribunal in this regard was of the view that immovability or otherwise of the resultant capital goods is not a criteria stipulated in the Cenvat Credit Rules for consideration. Certificate from Chartered Engineer that goods were not permanently fixed to earth and Supreme Court decision in the case of *Rajasthan Spinning and Weaving Mills Ltd.* applying the 'user test', were also taken into consideration by the Tribunal while arriving at the decision. [*Ultratech Cement Ltd.* v. *Commissioner* - 2016-VIL-953-CESTAT-DEL-CE]

Exemption under Notification No. 67/95-C.E. and obligation under Cenvat Rule 6: Benefit of exemption under Notification No. 67/95-C.E. in respect of packing boxes used captively for manufacture of exempted goods was denied by the Revenue department on the ground of non-fulfillment of Rule 6(2) of Cenvat Credit Rules. CESTAT Mumbai however allowed the benefit of the said notification, observing that the assessee had not taken any Cenvat credit on inputs used either in the final product or in the intermediate product i.e. packing boxes, and hence had complied with provisions of Rule 6(1). The CESTAT was of the view that the notification prescribes fulfillment of conditions of Rule 6 only and that Rules 6(1) and 6(2) are alternative to each other. [*Funskool (India) Ltd.* v. *Commissioner* - 2017-TIOL-44-CESTAT-MUM]

Cenvat credit available in case of change in name of a consignee in invoices: Punjab & Haryana High Court has held that when the arrangement is genuine and there is no loss of revenue, mere change in the name of the consignee in the invoices of sister concern to the respondent's name makes no difference for the purpose of Cenvat credit. Both the sister concerns were engaged in the manufacture of aerated water and though the goods were actually meant for the sister concern, the same were, in pursuance of an internal

arrangement, forwarded to the assessee-respondent. While dismissing the appeal of the Revenue department, the Court noted that there was nothing to show that the sister concern had availed credit. [*Commissioner* v. *Amritsar Beverage Ltd.* - 2016 (342) ELT 552 (P&H)]

Food processor basic unit along with accessories to be assessed together and chargeable to duty on MRP basis: CESTAT Delhi while interpreting Sl. No. 72 of the Notification No. 13/2002-C.E., read along with Section 4A of the Central Excise Act, 1944, has held that basic units of food processors and their accessories are to be assessed together as "electro mechanical domestic appliances with self-contained electric motor" under MRP basis. The appellant, manufacturing domestic kitchen appliances under the brand name, were paying duty on MRP basis only on the food processor basic unit and bundled the accessories into a separate packing with a separate MRP. The appellant paid duty on the accessories under the transaction value claiming that the MRP based assessment under Section 4A of the Central Excise Act would not be applicable to the accessories as they do not contain self-contained electric motor. The Tribunal however observed that the accessories can function only in conjunction with the basic food processor unit, which contained the motor and the basic unit would have been of no use without the accessories. [*Goodwill Kitchen Appliances Pvt. Ltd.* v. *Commissioner* - 2016 (342) ELT 426 (Tri. - Del.)]

'Fly ash' formed during production of electricity not 'manufactured': Considering the fact that fly ash formed during production of electricity was produced as a by-product, Madras High Court has held that such fly ash cannot be said to be a product "manufactured" to fall within the scope "manufacture" as defined under Section 2(f) of the Central Excise Act, 1944. It was further held that merely because the goods 'fly ash' finds a place in the specific or residuary entry in the schedule it cannot be termed as an excisable commodity, since it satisfies the test of marketability. Relying on the view of Supreme Court, the High Court noted that the twin tests of 'manufacture' and 'marketability' have to be satisfied in order to bring a product within the ambit of excise duty and satisfaction of solitary test alone would not be sufficient to levy excise duty on the commodity. [*CBEC* v. *Mettur Thermal Power Station* - 2016-VIL-697-MAD-CE]

CUSTOMS

Notifications

Customs Tariff amended with effect from 1-1-2017: First Schedule to the Customs Tariff Act, 1975 has been amended with effect from 1st of January, 2017, to update the tariff according to the changes made in the Harmonised System of Nomenclature (HSN) by the Worlds Customs Organisation (WCO) also from the same date. It may be noted that while these changes were part of the Budget 2016 proposals, some consequential changes have also been made now in various exemption notifications. Notification Nos. 63

to 68/2016-Cus., all dated 31-12-2016 have been issued for this purpose. Further, some changes have also been made in Chapters 29, 38, 44, 55 and 94 of First Schedule by Notification No. 150/2016-Cus. (N.T.), dated 31-12-2016 which are also effective from 1st of January, 2017.

Free Trade Agreements – Exemptions revised: Rate of duty in case of specified goods imported from Korea, Malaysia and Japan under the Comprehensive Economic Partnership/Cooperation Agreements, have been further brought down with effect from 1-1-2017. Additionally, the tables in exemption notifications have been revised completely to make changes according to the revised HSN 2017. Notification Nos. 64, 65 and 66/2016-Cus., all dated 31-12-2016 have been issued in this regard. It may also be noted that with effect from 1st of January 2017, imports under Indo-ASEAN Free Trade Agreement will also be eligible for deeper tariff concessions as per Notification No. 63/2016-Cus. which amends Notification No. 46/2011-Cus.

Ratio decidendi

Valuation – Royalty in respect of goods manufactured in India, not includible: CESTAT Delhi has dismissed the appeal of the Revenue department, for enhancement of value on account of royalty being paid by the assessee to the related party for the goods manufactured in India using technical know-how of foreign supplier. Reliance in this regard was placed by the Tribunal on the decision in the case of *Brembo Brake India P. Ltd.* and it was observed that royalty under Rule 10 of the Customs Valuation Rules can only be included in the assessable value if in case of imported goods, it is a condition of sale, and even where the imported goods have undergone process after importation. The Tribunal was of the view that payment of royalty for manufacturing goods under licence in India, cannot be termed as royalty paid for the imported goods. [*Commissioner* v. *SICPA India Ltd.* - 2017-VIL-34-CESTAT-DEL-CU]

Valuation - Section 14 not applicable in respect of goods already exported: Observing that Section 14 of Customs Act, 1962 empowers valuation of 'export goods', defined under Section 2(19) of the Customs Act, 1962 as "goods which are to be taken out of India to a place outside India", CESTAT Allahabad has held that said provisions of the Customs Act are not applicable in respect of goods which have already left the shore of India. The Tribunal in this regard observed that as the goods which have been exported do not satisfy the definition of 'export goods', Section 14 is not applicable to goods, export of which has already taken place. [*Pawan Kumar Singh* v. *Commissioner* - 2017-TIOL-13-CESTAT-ALL]

Refund when appeal against assessment absent: In a case involving non-claim of exemption where the bill of entry was assessed on the basis of information furnished and duty was paid, CESTAT Delhi has allowed the claim for refund filed subsequently. The Tribunal in this regard observed that duty was paid not in pursuance of order of assessment and hence there was no scope on the part of assessee to

file any appeal against assessed bill of entry. Supreme Court decision in the case of *Priya Blue* was hence found to be not applicable while it was held that the case fell under the category of duty 'borne by him' contained in provision of Section 27 of the Customs Act, 1962. [*Commissioner* v. *Lalit Kumar* – Final Order No. 55907/2016, dated 16-12-2016, CESTAT Delhi]

Valuation - NIDB data is not substitute for evidence: Holding that NIDB data is not substitute of evidence, CESTAT Chennai has remanded the matter back to the adjudicating authority. The Tribunal was of the view that the authority should first determine what was the goods imported, whether there was any mis-declaration of description and determine value of import providing reasonable opportunity of hearing. NIDB data was used by the Customs department as representative data to disturb the value declared by the importer. The Tribunal however held that material supporting the NIDB data should be placed before the assessee for rebuttal. [*Gangai Sriee Exports* v. *Commissioner* – Final Order 42455/2016, dated 16-12-2016, CESTAT Chennai]

Refund of SAD when actual user condition for goods imported violated: CESTAT Delhi has held that refund of SAD under Notification No. 102/2007-Cus. is permissible even in cases where the goods imported under actual user condition, were sold in violation of such condition. The Tribunal in this regard observed that it was not department's case that the conditions of said notification were not fulfilled. It was also noticed that the said notification does not bar sale of imported goods if such goods are imported under actual user condition. [*Commissioner* v. *Micromax Information Ltd.* – Final Order No. 55557/2016, dated 11-11-2016, CESTAT Delhi]

Drawback not deniable based on notification contrary to provisions in Customs Act and Drawback Rules: Exported goods were manufactured by a 100% EOU from duty paid inputs and no Cenvat credit of such duty paid was claimed. Drawback claim was denied by relying on Notification No. 26/2003-Cus. (N.T.). Relying on the decision of Karnataka High Court in the case of *Karle International* [2012 (281) ELT 486 (Kar.)], which was in respect of identically worded notification, the Tribunal held that denial of drawback solely on the ground of a notification which disallows drawback to a 100% EOU as against the express provisions of Section 75 of the Customs Act, 1962 and the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995 cannot be appreciated and accepted. [*Fancy Images* v. *Commissioner* - 2017-VIL-23-CESTAT-DEL-CU]

SCN required before prohibiting Customs Broker to work in specified jurisdictions: CESTAT Delhi has held that show cause notice is required to be issued before prohibiting a Customs Broker to work in a specified jurisdiction. The Tribunal was of the view that even though Regulation 23 of CBLR does not provide for issuance of SCN, same needs to be provided in order to satisfy principle of natural justice. Number of precedents laying

emphasis on *audi alteram partem*, were relied by the Tribunal and the matter was remanded for re-adjudication after putting the assessee to notice. [*Mega Logistics* v. *Commissioner* – Final Order No. 52572/2016, dated 16-9-2016, CESTAT Delhi]

Classification of goods - No mis-declaration when classification wrongly declared: In a case where the importer had declared classification of goods in bill of entry, as per their understanding, CESTAT Delhi has set aside confiscation of goods, in the absence of any evidence on malafide intention on part of the assessee. Observing that change in classification was a result of different interpretation by the Customs authorities, and that in an issue of classification under the Customs Tariff, two different views are entirely possible, it was held that such declaration cannot be taken to mean mis-declaration on the part of the importer. [*Kohler India Corporation Pvt. Ltd.* v. *Commissioner* - Final Order No. 55963/2016-CU(DB), dated 9-11-2016, CESTAT Delhi]

Litigation policy for appeal to Tribunal – Individual BE's to be considered: CESTAT Delhi has held that redemption fines and penalties in all bills of entry are not to be added for consideration of litigation policy, in order to file appeal to the Appellate Tribunal, just because adjudicating authority had disposed more than one B/E by a common order. Revenue department's contention that cumulative effect of both the redemption fines and both the penalties imposed in respect of each bill of entry is to be taken note of while deciding the amount of Rs.10 lakh, was hence rejected by the Tribunal. Rejecting department's appeal, it was held that merely because the adjudicating authority, for convenience sake had disposed of two adjudication orders in respect of 2 bills of entry by one common order, it cannot be adopted as a reason to club the redemption fines and then to decide the matter as to whether the same is covered by Litigation Policy or not. [*Commissioner* v. *Apurva Internationals* – Final Order No. 55179/2016, dated 16-11-2016, CESTAT Delhi]

SERVICE TAX

Ratio decidendi

Cenvat credit on input service distributed by head office, attributed to product manufactured in another factory, admissible: In a case involving distribution of Cenvat credit on input services by the head office, CESTAT Mumbai has allowed the credit in respect of advertising, event management, etc., which were not related to the product being manufactured at the unit of the assessee to whom the credit was distributed. The Tribunal in this regard noted that there is no condition of one to one correlation between the credit distributed and the quantum of service received and used by a particular factory. Karnataka High Court judgement in the case of *ECOF Industries Pvt Ltd.* was also relied by the Tribunal for the purpose. [*Nestle India Ltd.* v. *Commissioner* - 2016-VIL-961-CESTAT-MUM-CE]

Cenvat credit for construction of drain in and around factory, admissible: CESTAT Delhi has allowed appeal of the assessee in the dispute involving Cenvat credit on construction of drain in and around the factory. The department was of the view that construction was undertaken to prevent water from entering the factory premises and thus had no nexus with the manufacture or sale of goods. Noting that the maintenance and cleanliness of the factory is a statutory requirement under the Factories Act, and that expenses for such service were included in cost of production, the Tribunal allowed the credit. It may be noted that the period involved in the dispute was from July to October 2009 when the definition of 'input service' covered 'activities relating to business'. [*Hindustan Zinc Ltd.* v. *Commissioner* – 2016 (45) STR 571 (Tri. – Del.)]

Refund – Unjust enrichment and limitation: In a case involving revision of price for transportation of natural gas, by credit notes, after revision of such price by the Petroleum and Natural Gas Regulatory Board of India (PNGRB), in terms of the PNGRB (Determination of Natural Gas Pipeline Tariff) Regulations, 2008, the CESTAT Delhi has held that since only on issuance of credit note the provisional prices were finalised, the said date will be considered as relevant date in terms of clause (eb) of Explanation-B to Section 11B of the Central Excise Act, 1944 as applicable to service tax also. The Tribunal noted that the above-mentioned Regulations provided that the prices (transportation charges) are provisional. Refund was further held as not hit by bar of unjust enrichment inasmuch as the same was reflected under the head "Loans and Advances" as "Receivable-Govt./Statutory Bodies", as also evident from the certificate issued by chartered accountants. [*Chambal Fertilisers and Chemical Ltd.* v. *Commissioner* - 2017-VIL-27-CESTAT-DEL-ST]

Suo motu credit in Cenvat account when not fatal: CESTAT Chandigarh has rejected the contention of the Revenue department that self book adjustment is not permissible and that the assessee should have filed the refund claim instead. The case involved payment of duty in cash on being pointed out by department, and consequently the assessee became entitled to Cenvat credit earlier utilized for payment of Service tax. While allowing assessee's appeal, the Tribunal noted that proper intimation was given to the Assistant Commissioner through a letter. The Tribunal found no reason for demand while it observed that the permission of the Asstt. Commissioner was deemed to have been granted during the personal discussion between the appellant and the authority. Further, noting that taking of credit back on deposit of tax amount in cash is only a book adjustment, CESTAT rejected department's reliance on Larger Bench decision in the case of *BDH Industries Ltd.* which was upheld by Bombay High Court. [*Samrat Forgings Ltd.* v. *Commissioner* - 2017-TIOL-22-CESTAT-CHD]

Refund of Cenvat credit when claims not filed on quarterly/monthly basis: Noting that condition of quarterly/monthly filing of refund claims for Cenvat credit cannot be read to

mean that refund will be payable only after the claims are filed on a quarterly/monthly basis, CESTAT Bangalore has allowed the appeal of the assessee. The Tribunal in this regard noted that the condition in Notification No. 5/2006-C.E. (N.T.), is in the nature of an option given to the assessee and that failure to do so cannot be a ground for rejection of refund claim. [*AXA Business Services Pvt. Ltd.* v. *Commissioner* – Final Order No. 21079/2016, dated 4-11-2016, CESTAT Bangalore]

Import of services – Receipt of service for use in relation to business or commerce: CESTAT Mumbai has held that reference to 'business or commerce' in Rule 3(iii) in Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 is restricted to 'business and commerce' in India not to 'business and commerce' outside India. The demand pertained to expenditure incurred by the foreign branch of the assessee for marketing and promotion of their software package outside India, and in respect of commission paid to foreign service providers by the foreign branch. Distinguishing the earlier orders in the cases of *British Airways* and *Torrent Pharmaceuticals,* the Tribunal was of the view that inclusions owing to accounting standards were not sufficient to conclude that services were rendered by foreign service providers to the Indian headquarters. Allowing the appeal of the assessee, it was noted that no effort was made by the adjudicating authority to ascertain the nature of transactions for which payments were made. [*3i Infotech Ltd.* v. *Commissioner* - 2017-VIL-04-CESTAT-MUM-ST]

Freight margin recovered from customers by logistic service provider, when not taxable: Authority for Advance Rulings has held that freight margin recovered by the assessee-applicant from its customers, wherein the applicant negotiates with the airline/shipping line, while also contracting with its customers to provide transportation of cargo, would not be covered as 'intermediary' service under Rule 9(c) of the Place of Provision of Services Rules, 2012. The Authority noted that the applicant would enter into an agreement with the carrier on principal to principal basis and not as agent. It was held that the applicant would be covered under the exclusion clause in terms of Rule 2(f) of the Rules. Further, the Authority was of the view that in absence of specific exclusion, service provided by the applicant cannot be excluded from the scope of Rule 10 of the abovementioned Rules, which prescribes place of provision of transportation of goods service as place of destination of goods, in respect of outbound transportation. [In Re: *Global Transportation Services Pvt. Ltd.* – 2016 (45) STR 574 (A.A.R.)]

Real Estate Agent service – Coverage of 'administrative charges', 'restoration charges' and 'transfer charges': CESTAT Delhi has held that administration charge recovered by the appellant from all original allottees of flats to cover expenses in connection with registration, etc., would not be liable to service tax under Real Estate Agent service. The Tribunal was of the view that since the charges were collected by the appellant directly from the allottees, the transaction involved only two parties - the buyer and seller (appellant) of

the flat, and hence no service was rendered. Further, in respect of 'restoration charges' received by the appellant when the allottee, who had first defaulted in the payment leading to cancellation of his registration, asks his allotment to be restored, the Tribunal was of the view that such charges are in the nature of a penalty imposed on the allottee to cover damages caused by his default in payment, and hence would not be covered as service. Transfer charges collected in respect of transfer of allotment to new buyer was however held to be liable to service tax. [*Jaipuria Infrastructure Developers Pvt. Ltd.* v. *Commissioner* - 2016-VIL-970-CESTAT-DEL-ST]

BAS – Brand promotion in advertisement: CESTAT Mumbai has, by a majority order, allowed assessee's appeal in a case involving advertisement of computer, which was the final product of the assessee, carrying a foot note "Intel Inside" and "Microsoft Windows" logos, belonging to their respective owners, where reimbursement of the said advertisement expenses was received from Intel and Microsoft. The Tribunal noted that the reimbursements were drawn from a fund created out of contribution of the two entities that is directly linked to purchases made in the past by assessee, and there was no connection between the source of contribution for the publicity campaign and the outcome of the publicity campaign. Allowing the appeal, it was noted that in scale and reputation, assessee was incomparable with the two global giants and hence it was difficult to conceive that the products of these giants would find additional acceptability in the market owing to the inclusion of their respective logos. Period involved in the dispute was from 1-7-2003 to 28-2-2007. [*Datamini Technologies (India) Ltd.* v. *Commissioner* - 2016-TIOL-3334-CESTAT-MUM]

VALUE ADDED TAX (VAT)

Notifications

Rajasthan - Amnesty Scheme for Entry Tax notified: Exercising its powers under Section 45 of the Rajasthan Tax on Entry of Goods into Local Areas Act, 1999, the State Government has notified a new Amnesty Scheme for Entry Tax, for waiver of amount of interest and penalty subject to the conditions specified therein. Notification No. F.12(17)FD/Tax/2015-Pt.I-68 dated 30-12-2016 has been issued in this regard. This amnesty scheme is effective from 1-1-2017 and shall remain in force up to 28-2-2017.

Odisha – Rate of tax under Composition Scheme reduced: By Notification No. 34913-FIN-CT1-TAX-0035-2015 dated 26-12-2016, Composition Scheme for registered dealers who undertake construction of flats, dwellings or buildings or premises and transfer of property along with land or interest underlying the land, has been amended. By the above notification, rate of tax to be paid in lieu of VAT under the Odisha VAT Act has been reduced from 3.5% to 1.25% of the aggregate amount determined in the agreement or value

determined for the purpose of stamp duty in respect of said agreement under the Odisha Stamp Rules, 1952, whichever is higher.

Ratio decidendi

Entry tax on goods brought to Uttar Pradesh from outside through e-commerce, stayed: Allahabad High Court has granted interim stay on payment of entry tax on the entry of specified goods being brought from outside Uttar Pradesh through e-commerce or online purchase. On the issue of validity of the said levy, the Court held that *prima facie* the amendment inserted in the Uttar Pradesh Tax on Entry of Goods into Local Areas Act, 2007 to levy such tax was beyond the authority and competence of the State Legislature as it introduced the levy of tax which was not existing earlier under the old Act and therefore the same could not be introduced by way of an amendment. In order to secure the interest of the State, the Court has asked the assessee to furnish a bank guarantee to the satisfaction of the authorities concerned and has directed the matter to come up for admission on 20-1-2017. [*Instakart Services Pvt. Ltd.* v. *State of Uttar Pradesh* - 2016-VIL-702-ALH]

Sale from Customs bonded warehouse is not sale in course of import – VAT payable: The Authority for Advance Rulings has held that sale made from the Customs bonded warehouse, not being sale in the course of import under the CST Act, will be taxable under the Maharashtra VAT Act. The Authority was also of the view that since the warehouse is not declared as a customs station, ex-bond sale of imported goods stored therein to a duty-free shop will not qualify as a sale in the course of import. The applicant in the instant case had, after import, transferred the goods to a warehouse declared as a private warehouse under Section 9 of the Customs Act, 1962. Sale of such goods was effected by issuing delivery challans and the buyers cleared the same by filing bill of entry for home consumption and payment of duty.

While coming to the above conclusion, the ARA took note of the expression 'crossing of customs frontiers of India' as defined in Central Sales Tax Act, 1956 and held that the term 'customs station' used in the definition was relevant for the purpose of CST and the expression 'clearance of goods by custom authorities' in the CST Act should be construed to mean 'as soon as goods are cleared from area of custom station due to any reason'. It further held that 'customs station' as per Customs Act included customs port, customs airport or land customs station and in the instant case, the goods were stored in the warehouse (declared as a private warehouse under Section 9 of the Custom Act) which may form part of the customs area but is not declared as a customs station under Section 7 of the said Act, for the purposes of CST Act. The ARA held that 'crossing the customs frontier' was coterminous with the date of assessment of the bill of entry, whether for home consumption or for warehousing, irrespective of payment of duty and therefore, such sale made by the applicant, not being sale in the course of import under the CST Act, will be taxable under the MVAT Act. The Authority

also took note of the fact that the warehouse was not declared as a customs station to hold that sale of goods stored therein to a duty-free shop will not qualify as a sale in the course of import. [In Re: *Moet Hennessy India Pvt. Ltd.* - 2016-VIL-31-ARA]

SIM replacement and lease line charges not liable to VAT: High Court of Madhya Pradesh has set aside the demand of VAT on a cellular telephone company for the amount received towards SIM replacement and lease line charges received from the customers. The High Court held that the amount received from subscribers towards SIM card will form part of the taxable value for levy of service tax, as the SIM cards are never sold as goods independent from service provided. Observing that even in the case of replacement of SIM card, the value of replacement in respect of SIM cards forms part of the activation charges, as no activation is possible without a valid functioning of SIM card and the value of taxable service is calculated on the gross amount received by the operator from the subscriber, the Court stated that once it has been held by the Supreme Court that no sales tax can be charged for providing a SIM (*IDEA Mobile Communication Ltd.* v. *C.C.E. & C., Cochin,* 2011-VIL-17-SC-ST), question of charging it on replacement of a SIM, does not arise.

In the case of lease line charges, the High Court was of the view that a subscriber of a lease line does not become the owner of the line either by control or by possession and hence such charges are only for services rendered and there is no element of sale therein. [*Idea Cellular Limited* v. *Assistant Commissioner* - 2017-VIL-14-MP]

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