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ARTICLES

Invoicing under GST

By **Gagan Gugnani**

India's decade long wait for a national tax on supply of goods and services that will create one of the world's biggest single market could be almost over by July 1. Government is planning to introduce GST Law in Parliament in the second half of current Budget Session. In its 11th meeting, GST Council approved draft CGST Bill and draft IGST Bill. GST law, as it evolves, contains many new and crucial provisions on invoicing. Taxable persons are required to ensure utmost care while raising invoices as the same information will be uploaded on returns and will ensure hassle free flow of credit in hands of recipient.

Kinds of documents

There are different kinds of documents which are required to be issued in different circumstances viz., tax invoice, supplementary invoice, vouchers, credit notes, debit notes and bill of supply.

When invoice shall be raised

Tax invoice shall be issued by the registered taxable person within the time in the following manner:

In case of goods:

a. One Time Supply:

i. Where supply involves movement: Before or at the time of removal of goods.

ii. Other Cases: Earlier of delivery or making available of goods.

b. Continuous Supply:

When successive statements of accounts or successive payments are involved, earlier of issuance of each statement or receipt of each payment.

c. Reverse Charge Liability:

On date of receipt of goods from a person who is not required to register under the GST Act.

d. Other Cases:

For goods sent on sale on approval or such similar terms, invoice shall be issued earlier of before or at the time it is known that supply has taken place; or 6 months from date of removal.

In case of Services:

a. One Time Supply:

Before such supply. If issued after supply, then within time prescribed under rules.

b. Continuous Supply:

i. If due date of payment is ascertainable from contract - Before or after (within prescribed time) the payment is liable to be made by recipient, irrespective of receipt of payment.

ii. If due date of payment is not ascertainable from contract - Before or after (within prescribed time) receipt of each payment.

iii. Milestone payments - Before or after (within prescribed time) the time of completion of each milestone.

c. Reverse Charge Liability:

On date of receipt of services from a person who is not required to register under the GST Act.

d. Other Cases:

Cessation of supply of services before its completion - On cessation of supply and to the extent of supply effected before cessation.

Crucial details in Tax Invoice

Apart from the various details mentioned in rules about invoicing, some of the crucial details are discussed in the following paragraphs.

- Trade Discounts: Discount needs to be specifically shown in tax invoice. This requirement is mentioned in the draft Invoice Rules. Also, Section 15 (Valuation of taxable supply) of model law provides that discount should be duly recorded in the invoice. Otherwise it will not be available for deduction from the value of supply.
- Amount of GST Charged: As per draft Invoice Rules, amount of GST charged is required to be shown separately. Further, Section 30 of model GST law, provides that every taxable person shall prominently indicate in all documents relating to assessment, tax invoice and other like documents the amount of GST which is forming part of price.
- HSN Code of Goods /Accounting Code of Services: Tax Invoice shall contain HSN code of Goods or Accounting Code of Services. Issues may arise in cases where there is composite supply or mixed supply or work contracts where both goods and services are involved, then how invoicing will be done? Since classification of that particular supply will either be supply of goods or services. Work Contract is considered as services and Composite Supply is considered as supply of principal component. In such situations, it is not clear whether goods will be moved without any document. Movement of goods in such cases would be difficult in inter-State supplies.

Debit Notes and Credit Notes

All revision, rectification, modifications, settlement of taxable value or tax charged may have to be carried out through debit notes and credit notes. Further, credit note shall be issued not later than September month of succeeding year in which supply was made or date of filling of annual return, whichever is earlier.

No time limit for issuance of debit note is specified under Section 31. However, as per Section 16(4), recipient shall not be eligible to take credit in respect of any debit note,

- after furnishing of the return under Section 34 for the month of September following the end of financial year to which such invoice relating to such debit note pertains or
- furnishing of the relevant annual return, whichever is earlier

Even though no time limit is specified for debit note in Section 31, since credit is not eligible after specified time, debit note shall

be issued approximately within the same time frame as of credit note.

Bill of Supply

Bill of Supply is required to be issued by a registered supplier when exempted goods or services are supplied or when the supplier is paying tax under composition scheme. Definition of exempt supply covers non-taxable supplies as well. Thus, bill of supply will be required to be issued even in case of non-taxable supplies, if the supplier is registered for other supplies made by him.

Receipt Voucher

Section 28(3) provides that receipt voucher shall be issued in case of advance receipt for supply of goods or services. Further, while raising of tax invoice, tax paid at the time of issuance of receipt voucher shall be adjusted against it. Receipt voucher, not being a tax invoice, will not be considered as eligible document for availment of credit in the hands of recipient.

Supplementary Invoice

Section 178 covers issuance of supplementary invoice. Where price of any goods and/or services is revised upwards or downwards in pursuance of contract entered into prior to the appointed day, then supplementary invoice/ debit note/ credit note shall be issued by the supplier within 30 days of the price revision. Further, such document shall be deemed to be issued in respect of an outward supply and accordingly GST will be applicable. Also, as per explanation to Section 28, debit note shall include supplementary invoice.

Invoicing under Reverse Charge

In case of reverse charge, where supply is received from registered supplier, then there is no requirement to issue invoice by the recipient. However, supplier shall mention in the invoice that reverse charge is applicable. Also, under return (GSTR 1), invoices on which reverse charge is applicable are to be mentioned by the supplier separately.

Invoice Reference Number (IRN)

A new concept has been introduced in GST, wherein duplicate copy of tax invoice is not required to be carried on by the transporter while transporting goods. Supplier can obtain Invoice Reference Number from the common portal and provide the same to the transporter.

Checking of invoices and consequences of wrong invoicing

Section 79(12) provides that Commissioner or an officer authorized can cause purchase of any goods or services to check issue of tax invoices or bills of supply by the registered taxable person. Commissioner can visit business premises of any supplier and can check invoicing.

Further Section 85 provides that, if supplier supplies goods/services without issue of invoice or issues invoice without supply of goods or issues incorrect invoice or false invoice or issues invoice using GSTIN of another supplier, then penalty of Rs. 10,000 or the amount of tax evaded shall be payable. Also, prosecution provisions are attracted in case of false invoicing as per Section 92.

Conclusion

Invoicing in GST will be vital for both supplier and recipient. Proper invoicing can be done only if proper sales orders/ purchase orders are made. Correct GSTIN of buyer at the time of sales order, consequently in invoice and further in the return will ensure seamless flow of credit and appropriate payment of GST (CGST+SGST or IGST). Appropriate changes in invoicing software would be required for proper collection of data while issuance of invoices and thereafter, uploading of the same in the returns. Thus, business needs to prepare themselves and discuss with their vendors and customers for proper compliance of GST law and avoid any loss of credit.

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

GST - Credit entitlement on free samples?

By **Ekansh Agrawal**

In the past year our country has witnessed some bold decisions taken by the Government, one of which was passing of 101st Amendment Act to the Constitution paving the way for Goods and Services Tax Act (GST). At the time of writing this article, the revised Model GST law issued in November, 2016 remains in draft form and is still subject to further amendments and debate in Parliament. This article seeks to highlight some of the significant issues pertaining to the *'act of giving free samples'* under GST, as set out in the Revised Model GST Law ("RMGL") and Draft Rules (issued to date) which may be of interest to most businesses.

What happens presently?

It is pertinent to note that Excise duty is levied on removal of goods from the factory, meaning thereby, as and when free samples are removed from the factory, liability to pay excise duty arises. As far as State VAT laws are concerned, to tax a transaction there has to be monetary consideration and therefore free samples do not attract any VAT/CST liability. However, majority of the States have a provision for reversal of proportionate input tax credit in those cases where free samples are given.

How it will pan out under GST?

Provisions allowing a taxable person input tax credits under GST are carved out under Section 16 of RMGL. To put things in context, the specific provision in sub-section (1) of Section 16 is reproduced below:

> *"Every registered taxable person shall, subject to such conditions and restrictions as may be prescribed and within the time and manner specified in section 44, be entitled to take credit of input tax charged on any supply of goods or services to him which are used or intended to be used* ***in the course or furtherance of his business*** *and the said amount shall be credited to the electronic credit ledger of such person."*

Furthermore, Section 17(4)(g) of RMGL provides that "notwithstanding anything contained in sub-section (1) of Section 16 and

sub-sections (1), (2), (3) and (4) of Section 18, input tax credit shall not be available in respect of the following":

> *"goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples"*

On conjoint reading of the above provisions, giving free samples would require reversal of proportionate credit.

What is the intention of this provision under GST law?

- Is it to allow the department to use this opportunity to deny the credit and agitate?
- Is it really intended to simplify the tax laws or to provide better clarity and avoid litigation?
- Does the provision clarify the approach to be adopted by a taxable person in interpreting the terms, i.e. whether to reverse or not?

Well, the answer on a simple reading is really not clear. The Finance Minister has emphasized at various fora that GST strives for seamless flow of credits. Where on one hand GST is opening up new credits in the form of "Credit of goods/services used in laying the support structures of capital goods" and on the other hand it has a provision disallowing the valid and genuine credits to the taxpayer. This provision in law is defeating the very purpose of introducing GST.

Why does any businessman give free samples?

This is done to apprise the customer, with whom he is having a long standing relationship, of the characteristics and quality of the product and induce him to order in bulk. This particular act of giving free samples is similar to the promotional and advertising activities undertaken by every business which are the basic ingredients and inevitable to thrive in such cut throat competition. In pharmaceutical industry, manufacturers of medicines cannot effect the sale of their products so long as free samples of such products are not distributed amongst the doctors, who can test the potency and medical value of these articles. Free supply of samples of these articles is an essential part of sale of rest of the articles of the lot manufactured. Moreover, when a manufacturer supplies a portion of the goods as free samples, the cost which that manufacturer has incurred in manufacturing these samples is always taken into account by him in fixing the price of the rest of the articles of that lot manufactured by him. Thus, albeit indirectly, the exchequer will get GST even on the value of the samples, and there is no revenue loss as such to the government. Similar observation has been made by courts in the cases of *Ruby Laboratories* [(1971) 27 STC 326 Guj.] and *Mahavir Enterprises* [(2002) 34 APSTJ 72]. If business promotion and advertisement expenses are not specifically excluded and are considered as *'in the course or furtherance of business'*, then why not giving free samples?

What does the provision achieve?

Reversing the credit on account of free samples under GST might not be the intention of law, however such language used in law

gives rise to doubts. This is a potential area where a representation can be made to the appropriate authority and industry can list down the repercussions of the above provision and pray to the government to come up with suitable amendments in the final law to remove the distortions and enable them to keep the credit chain flowing.

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GOODS AND SERVICES TAX (GST)

GST Enrolment / Migration – States / CBEC issue instructions: Assam VAT Department has issued instructions to its officers to ensure migration of existing dealers by sincere persuasion and exhortation as the percentage of migration has been noted as very low in Assam. The officers have also been instructed to initiate and finalize proceedings for cancellation of registration of those dealers who are covered by relevant provisions [Sections 27(7) and 27(8)] in this regard like discontinuance of business, absence of liability, transfer of business, dissolution of firm, etc. Haryana VAT department has constituted help desk in various locations to assist dealers for enrolment under GST. Tamil Nadu VAT Department states that those dealers who have submitted the necessary details for enrolment may provide digital signature certificate / e-sign now as this facility is enabled now. States like Haryana, West Bengal and Uttarakhand have announced that the last date for enrolment is 15-3-2017 though there is no time-limit as statutory provisions are yet to be brought into force. CBEC has also issued instructions on speeding up the process of enrolment and to encourage migration of existing assessees by 31-3-2017. This outer date has been mentioned as 'end date' for enrolment in the government's GST portal also for assessees registered under Central Excise or Service Tax but not under VAT and those assessees who got registered under Service Tax / Central Excise / VAT after January 2016. [*Circular No. 4/2017 dated 4-3-2017, Commr. of Taxes, Assam & websites of respective States & CBEC and www.gst.gov.in*]

CENTRAL EXCISE

Circulars

Captive consumption – CAS-4 certificates to be issued by 31st of December: CAS-4 certificate for the financial year ending on 31st of March has to be issued by 31st of December of the next financial year. According to CBEC Instruction F. No. 206/01/2017-CX 6, dated 16-2-2017, the assessing officer shall thereafter finalize provisional assessment expeditiously. The instruction notes that some of the assessees are not preparing CAS-4 certificates even after lapse of substantial amount of time from end of financial year and filing of Tax Audit reports.

Paper articles and goods of printing industry – Classification clarified: Central Board of Excise & Customs has clarified issues relating to classification of railway/bus/other

tickets or passes or ticket rolls, mark sheets/ certificates, OMR sheets, answer books and passbooks, inland letter cards, application forms, paper outer-strip seals, railway receipts and practical notebooks. According to Circular No. 1052/01/2017-CX, dated 23-2-2017, railway or bus tickets, passes or ticket rolls and OMR sheets are to be classified under Heading 4911 of the Central Excise Tariff as printing gives them their essential character. Similarly, application forms, inland letter cards and paper outer strip seals used to seal EVMs are to be classified under Heading 4911, as printing is not merely incidental in respect of such items. Plain letter cards are however classifiable under Heading 4817. Further, while mark-sheets/certificates and railway receipts are covered under Heading 4907, answer book, passbooks and practical notebooks having merely certain questions followed by blank spaces for writing are to be classified under Heading 4820. Other practical notebooks are to be classified under Heading 4901.

Saree even if further processed, classifiable under Chapters 50, 52 or 54: CBEC has clarified that "Saree" which has undergone further processing such as embroidery, stitching of lace and tikka, etc., and stitched with two or more kinds of fabrics will be classifiable as "Saree" under Chapters 50, 52 or 54 of the Central Excise Tariff Act, 1985 depending upon the material of the fabrics, and would not be covered as "made-ups" under Chapter 63 of the said Act. Circular No. 1054/3/2017-CX, dated 15-3-2017 issued in this regard states that even after stitching, embroidery work and fixing of falls etc., a "saree" remains fabrics only as no new item emerges having distinct name, character and use.

Ratio decidendi

Cenvat credit admissible on steel items used for constructing blast furnace and coke oven plant for use in factory: CESTAT Bangalore has allowed Cenvat credit on certain items such as MS beams, channels, joists used within the factory for constructing a blast furnace and coke oven plant for use in the factory for manufacture of final products. The Tribunal in this regard observed that structural steel items were components and used in the fabrication and assembly at site of the manufacturing facilities, and hence even if the blast furnace and coke oven batteries were made immovable by attaching them to the foundation for trouble free function, Cenvat credit was available. The Tribunal was also of the view that both the manufacturing facilities, i.e., blast furnace and the coke oven plant, are capital goods. [*JSW Steel Ltd.* v. *Commissioner* - 2017-VIL-191-CESTAT-BLR-CE]

Valuation – Amortisation of tools developed for production on job work basis, not required: In a case where tools were developed for manufacture of parts produced on job work basis, CESTAT Mumbai has held that amortisation of cost of such tools (value for which was received from principal) is not required. The Tribunal in this regard took note of the fact that no excise duty was payable on parts produced on job work in terms of

Cenvat Rule 4(5)(a), and hence there was no question of inclusion of amortisation cost of the tools. [*Rivolta Auto Industries P. Ltd.* v. *Commissioner* – Order dated 25-1-2017 in Appeal No. E/806/07, CESTAT Mumbai]

Valuation - Transaction value not influenced by relationship if procurement price decided by open tender: The assessee Kochi Refineries Ltd. (KRL) affected the sale of Poly Iso Butane (PIB) to various Oil Marketing Companies (OMCs) pursuant to the competitive bidding procedure mandated by the Central Vigilance Commission. In the above background, transaction value for sale of goods to BPCL by KRL was fixed by tender procedure just like with respect to other OMCs. However, KRL being a subsidiary of BPCL, the Department disputed the transaction value on the ground that both are related parties as per Section 4 of the Central Excise Act. CESTAT Bangalore however held that since the price of procurement of goods for supply to BPCL has been decided by an open tender procedure, it cannot be said that the transaction value has been influenced by the relationship. The Tribunal in this regard also noted that the chart submitted by the appellants proved that the same product was supplied not only to BPCL but also to other OMCs at the same price. [*Kochi Refineries Ltd.* v. *Commissioner* - 2017 (2) TMI 835- CESTAT Bangalore]

Manufacture - Conversion of paddy to rice does not amount to manufacture: Chandigarh Bench of CESTAT has held that the definition of manufacture under the Central Excise Act, 1944 is *pari materia* to definition of manufacture as per Section 2(29BA) of the Income Tax Act, 1961. Further, placing reliance on a Supreme Court decision in the case of *Cynamid India Ltd.* (Civil Appeal Nos. 4403-4404 of 1996, decided on 13-4-1999), it was held that conversion of paddy to rice is not a distinct operation and does not amount to manufacture, because after dehusking, rice and husk remain in their natural form. Further observing that rice was not an excisable commodity, it was held that clearance of rice from EOU to DTA shall not be subject to Central Excise duty. [*Dunar Foods Ltd.* v. *Commissioner* - 2017 (346) ELT 612 (Tri-Chan.)]

Manufacture - Repacking of goods after marking for easy identification covered under 'manufacture': Delhi CESTAT has held that repacking of goods after marking with supply order number, number of objects inside the package and other necessary details for easy identification at consignee's end is covered under definition of 'manufacture' under Section 2(f)(iii) of the Central Excise Act, 1944. The Tribunal in this regard observed that without such markings the product could not have been sold to the customer (ordnance factory) as the agreement between the two parties required the respondent to do so. [*Commissioner* v. *Channel Auto Electric Pvt. Ltd.* - 2017 (347) ELT 141 (Tri. - Del.)]

Manufacture – Affixing pre-cut glasses to frames is not manufacture: CESTAT Delhi has held that affixing duty paid processed and

pre-cut glasses supplied by client to duty paid aluminium frames and panels with the help of sealant does not amount to manufacture. The Tribunal was of the view that aluminium frames cut to specific dimension and the glass cut to specific dimension are components and parts of glazed panels, and their assembly and erection in the civil structure does not create a new commercially marketable product. Further fact that the work order was an indivisible work contract for installation of curtain wall on the existing structure, there being no order for purchase of glazed panels, and that upon fabrication the curtain wall of glass became part of civil construction, was also noted by the Tribunal while it held that that no marketable new product was emerging in between. [*Commissioner* v. *Crystal Corporation* - Final Order No. 50295/2017, dated 11-1-2017, CESTAT Delhi]

Interest not payable on Cenvat credit availed on inputs used in finished goods on which remission claimed: CESTAT Ahmedabad has held that interest on Cenvat credit which was availed on inputs used in finished goods on which remission was claimed under Rule 21 of the Central Excise Rules, 2002, is not payable. The assessee had reversed the Cenvat credit availed on such inputs in accordance with Rule 3(5C) of Cenvat Credit Rules, 2004, before making an application for remission of duty applicable on the final product. The Tribunal in this regard observed that there was no stipulation in the said rule requiring the assessee to pay interest on the amount of such Cenvat credit. [*Nirma Ltd.* v. *Commissioner* - Order No. A/10069/2017, dated 13-1-2017, CESTAT Ahmedabad]

Use of machine for a small process would not disqualify product from being a 'handicraft': In the instant case, benefit under Notification No. 76/86-C.E. was denied on the ground that since for the manufacture of readymade garments, machines were used in the process, the same cannot be classified as 'handicrafts'. Relying on the case of *Louis Shoppe* [1995 (3) TMI 108 – SC] and the CBEC Circular No. 773/6/2004-CX, dated 28-1-2004 which clarified that for classifying the goods as handicraft, one or more of the process such as hand painting or hand printing or tie and dye or handicrafts batik, embroidered or crocheted ornamentation, etc., can be carried out, CESTAT held the impugned goods to be correctly classifiable as handicrafts. It was observed that in the present case, except the part of the embroidery process, which was carried through pedal operated machine, most of the processes such as painting/ ornamentation was done manually. [*Shagufta Garments* v. *Commissioner* - 2017 (2) TMI 1058 - CESTAT Mumbai]

Refund of Cenvat credit to EOU when credit initially used in payment of duty on exports and rebate claimed: In a case involving refund of Cenvat credit under Cenvat Rule 5 to an EOU, when assessee had utilized earlier the credit towards payment of duty on exports and claimed rebate, but subsequently when rebate was denied, took re-credit of the debited

credit, CESTAT Delhi has held that denial of such re-credit of improperly debited credit on export of goods and at the same time rejection of claim under Rule 5 on the ground that there was no balance in the credit account, was not correct. The Department had processed the ARE-1 applications and thereafter the rebate claims, before subsequently denying rebate. Before remanding the matter to the Original Authority for taking a holistic view, the Tribunal observed that if the credit on the inputs was rightly taken, the same cannot be taken out of the books simply on the ground that the amount was debited on exports under claim for rebate. [*Welspring Universal* v. *Commissioner* - 2017-VIL-200-CESTAT-DEL-CE]

SERVICE TAX

Notifications

Exemption to specified services provided to educational institutions restricted to specified institutions: Exemption under Notification No. 25/2012-S.T. to services provided to educational institutions by way of transportation of students, faculty and staff; catering; security; cleaning or house-keeping and services relating to admission or conduct of examination, has been restricted to institutions providing services by way of pre-school education and education up to higher secondary school or equivalent only. Notification No. 10/2017-S.T., dated 8-3-2017 issued in this regard amends Notification No. 25/2012-S.T. with effect from 1-4-2017.

Admission to a museum – Exemption from 1-7-2012 to 31-3-2015: Ministry of Finance has issued notification to grant exemption to the service by way of admission to a museum for the period from 1-7-2012 to 31-3-2015. Notification No. 9/2017-S.T., dated 28-2-2017 issued under Section 11C of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994, states that such service was liable to service tax during the said period and that the tax was not paid according to a practice which was generally prevalent during the relevant period.

Effluent treatment – Service by operators of common effluent treatment plant – Exemption from 1-7-2012 to 31-3-2015: Services by operators of common effluent treatment plant in respect of treatment of effluent has been exempted for the period from 1-7-2012 to 31-3-2015. Notification No. 8/2017-S.T., dated 20-2-2017 has been issued in this regard.

Ratio decidendi

Cenvat credit for setting-up second unit – Utilization by existing unit only a procedural error: Expressing the view that the error, if any, of taking Cenvat credit on services utilized for setting-up second unit, by the existing unit, was only a procedural lapse, CESTAT Hyderabad has held that the error could not be considered as suppression or misrepresentation of facts with intent to evade payment of duty. The assessee had availed credit on Engineering Consulting services for setting-up their second unit. The Tribunal in this regard also noted that

there were divergent views on the eligibility of the credit inasmuch as in the first round of litigation, the authorities had held that the credit was available. Fact that as per the definition of input service, manufacturer, and not factory, was eligible for the credit was also considered by the Tribunal while it allowed assessee's appeal. [*Nelcast Ltd.* v. *Commissioner* – 2017 (49) STR 92 (Tri. - Hyd.)]

Cenvat credit on Outdoor Catering service when token amount taken from employees: Recovery of token amount of Re. 1 per employee per day as an administrative cost, which is not intended to defray the cost of food served to the employees, cannot be made the reason for denial of Cenvat credit on Outdoor Catering service. The service was held as availed by the assessee in furtherance of the manufacturing activity as the entire expenditure was remitted to the service provider by the assessee while the employees did not engage commercially with the service provider. [*Finolex Cables Ltd.* v. *Commissioner* - 2017-VIL-167-CESTAT-MUM-CE]

Franchise service - Whether right conferred is a representational right, to be established: Delhi High Court has held that merely because by an agreement, a right is conferred on a party to sell or manufacture goods or provide services or undertake a process, it would not *ipso facto* bring the agreement within the ambit of a franchise. The Court in this regard was of the view that it has to be established whether the right conferred is a representational right. It held that upfront fees and annual fees paid to the Airport Authority of India by the assessee under a joint venture agreement to develop, operate and manage airports would not be covered under Franchise service. It was held that once the functions of Authority were completely divested by it and assigned to the petitioners, there is no question of the petitioner representing the Authority in performance of those functions. [*Delhi International Airport P. Ltd.* v. *Union of India* – Judgement dated 14-2-2017 in WP(C) 2516/2008 & CM No. 15832/2011, Delhi HC]

Import of services – No liability on Indian holding company of the foreign service provider: Finding it improper to take the view that the address of the assessee in India is to be considered as the local address of the subsidiary company in London, CESTAT Bangalore has held that there is no liability on the Indian holding company, in respect of services provided by the foreign entity to the recipient in India. The Tribunal was further of the view that the position does not change because of the fact that assessee-appellant was earlier discharging such service tax liability as per the authorisation given in their favour by the subsidiary company. CBEC Circular No. 59/8/2003-S.T. was noted in this regard by the Tribunal. [*Pricewaterhousecoopers Pvt. Ltd.* v. *Commissioner* - Final Order No. 20237/2017, dated 13-2-2017, CESTAT Bangalore]

Rent-a-cab service – Exemption for transportation of school children: CESTAT Allahabad has held that exemption under Notification No. 25/2012-S.T. for service

of transportation of children to school and back, would be available even if the charges are collected directly from parents. Revenue department's contention that educational body has to enter into contract with bus operators, for the purpose of exemption, was hence rejected. The Tribunal in this regard observed that the vehicles were covered by the phrase 'rented for use by an educational body', and that such motor vehicles were not covered under definition of 'cab' under Section 65(20) of the Finance Act, 1994. [*Sangam Travels* v. *Commissioner* - Final Order No. 70074/2017, dated 10-1-2017, CESTAT Allahabad]

Activity of spot billing of electricity for electricity distribution company, covered under BAS: CESTAT Mumbai has held that activity of taking photographs of the meter-reading at the doorsteps of customers of electricity distribution company by way of digital camera and with the help of handheld programmable machine, is covered under Business Auxiliary Service. The service described in the contract was spot-billing with the help of handheld programmable machine and the Tribunal was of the view that said service would be covered under in the definition of 'business auxiliary service', clause (vii) as billing. It was also held that use of electronic programmable devices, for provision of service, cannot change the nature of the services to Information Technology service. [*S.S. Electricals* v. *Commissioner* – Order dated 7-2-2017 in Appeal Nos. ST/589/11, 163/12, 86276/13-Mum, CESTAT Mumbai]

BAS – Receipt of 1% of FOB value for transfer of export benefits, not covered: In a case involving receipt of 1% of FOB value for transfer of export benefits under the Foreign Trade Policy, CESTAT Mumbai has held that such receipts would not be covered under Business Auxiliary services under the category of 'production or processing of goods for or on behalf of client'. The Tribunal in this regard observed that there was no evidence to indicate that payer of 1% of FOB value had availed the services of appellant for production or processing of goods and thereafter exports. Reliance in this regard was also placed on Apex Court's decision in the case of *Baby Marine Exports*, dealing with Income Tax benefits for Export House Premium. [*Gitanjali Exports Ltd.* v. *Commissioner* – Order dated 18-1-2017 in Appeal No. ST/89/12, CESTAT Mumbai]

Providing top of the bus on hire on fixed charges, not covered under Courier Service: CESTAT Delhi has held that activity of renting of space on top of buses to facilitate transportation of packages when the contract carriage moves from point to point, is not covered under the definition of "Courier Agency service". The Tribunal while holding so, also set aside demand under Business Auxiliary services on commission received for booking of tickets, as the activity was not classified under any of the sub-clauses as provided in the definition of BAS. [*Sharma Travels* v. *Commissioner* - 2017-VIL-208-CESTAT-DEL-ST]

Cenvat credit admissible when sale of product promoted and not mere sale involved: CESTAT Delhi has rejected the contention of the Revenue department that service tax paid on sales commission agent's service is not eligible for Cenvat credit since the expenses incurred are in connection with sales and did not conform to "sales promotion". The Tribunal in this regard took note of the certificate issued by the commission agent regarding its scope of work, and concluded that job performed by the commission agent was for promoting the sales of the appellant's products and was not related to mere selling of goods. [*Commissioner v. Plastiblends India Ltd.* - 2017-VIL-201-CESTAT-DEL-ST]

CUSTOMS

e-BRC acceptable as proof of realization of sale proceeds for specified period: For exports where the Let Export Orders (LEO) have been issued between 12-8-2012 and 31-3-2014, the Electronic Bank Realization Certificate (e-BRC) generated from the DGFT web site is to be accepted as proof of realization of sales proceeds, subject to appropriate declarations made in the prescribed form. Circular No. 6/2017-Cus., dated 28-2-2017 has been issued by the CBEC in this regard.

Selfie Sticks are classifiable under Customs Tariff Item 9620 00 00: In line with the recent amendments made in the Harmonised System of Nomenclature (HSN) by the WCO and consequent changes made in the Indian Customs Tariff by the Finance Act, 2016, as effective from 1-1-2017, CBEC has clarified that 'selfie sticks', with or without Bluetooth, are classifiable under Customs Tariff Item 9620 00 00. Instruction No. 2/2017-Cus., dated 6-3-2017 has been issued in this purpose.

Prosecution - Guidelines for launching of prosecution clarified: The CBEC has clarified and indicated the officers concerned who shall initiate action for prosecution when the case has been investigated/ SCN issued by the DRI and also the jurisdictional Commissionerates. CBEC Circular No. 7/2017-Cus., dated 6-3-2017 issued in this regard substitutes certain paras in Circular No. 27/2015-Cus., dated 23-10-2015.

Ratio Decidendi

Merely re-assessed Bill of Entry, in absence of a speaking order, not appealable under Customs Section 128: Noting that Section 17(5) of the Customs Act, 1962 contemplates re-assessment order in writing by the proper officer within a specified time, the Kerala High Court has held that unless an order is passed in terms of Section 17(5), reassessment made by the officer in the bill of entry does not become a decision or order which could be appealed against. The assessee in the case had paid additional duty subsequent to re-assessment by the department and then filed appeal to the Commissioner (Appeals) which was rejected on the ground that there was no demand or speaking order against the assessee. [*John Jacob v. Assistant Commissioner* - 2017-TIOL-414-HC-KERALA-CUS]

Prohibited goods - Violation of Section 18 of Legal Metrology Act, 2009 gives imported goods colour of prohibited goods: The dispute involved imposition of penalty and redemption fine on goods imported in violation of Section 18 of the Legal Metrology Act, 2009. Noting that Section 18 of the Legal Metrology Act, 2009 used the word 'shall', the CESTAT was of the view that said section must be interpreted to mean that the goods must be imported in the manner as required therein. It was held that failure to do so would, consequently, give such goods the colour of 'prohibited goods' even though word 'prohibition' was not incorporated in the said provisions. [*Sharma Brothers* v. *Commissioner* - Final Order No. 41960/2016, dated 21-10-2016, CESTAT Chennai]

Subsequent change in legal position is not 'change in circumstances' for modification of Order: The Karnataka High Court has held that change in the legal position by virtue of subsequent case law cannot be termed as 'change in circumstances' enabling the court to consider the application for modification of the interim order. The Court in this regard further clarified that 'change in circumstances' should be circumstances rather more on facts. The appellant had filed for modification of stay order after the Gujarat High Court had delivered its decision in the case of *Colourtex Industries*, holding that if matter is referred to the Larger Bench, unconditional stay deserves to be granted. [*Agarwal Coal Corporation Pvt. Ltd.* v. *Commissioner* - CSTA No. 09/2016 dated 1-2-2017, Karnataka High Court]

Project Imports - Benefit of Notification No. 6/2002-CE (Sl. No. 237) not available to Turbines: The assessee in this case was claiming benefit of Notification No. 21/2002-Cus. and Notification No. 6/2006-C.E. on import of turbines. The dispute pertained to applicability of Notification No. 6/2006-C.E. to turbines imported under project import. Observing that *prima facie* the turbine does not produce energy without being integrally connected to other energy producing devices, CESTAT Chennai has held that the benefit of Notification No. 6/2006-C.E. (Sl. No. 237, Item No.16 of List 9) is not available for turbines. Said Serial Number in the notification granted exemption to conversion devices producing energy using agricultural, forestry, agro-industrial, industrial, municipal and urban waste. [*Clarion Power Corporation Ltd.* v. *Commissioner* - Final Order No. 40236/2017, dated 6-2-2017, CESTAT Chennai]

Voice Tab is classifiable as telephone and not automatic data processing machine: The issue for consideration was whether a Voice Tab named by the assessee as 'HP Slate 6" Voice Tab' is classifiable under CTH 8471 as an automatic data processing machine or under CTH 8517 as telephone for cellular network. Observing that the goods were capable of use both as a cellular telephone and as an automatic data processing machine (in form of a 'Tab') but the principle function being that of a cellular telephone, CESTAT Delhi has held the goods to be classifiable under CTH 8517. Reliance in this regard was placed by

the assessee and approved by the Tribunal, on WCO guidelines for classification of tablet of certain dimensions which were not met by the impugned goods, for classification as automatic data processing machine under CTH 8471. Reliance was also placed on Chapter Note 5(D) to Chapter 84 of the Customs Tariff which excludes apparatus capable of use as a telephone from classification under CTH 8471. [*Hewlett Packard India* v. *Commissioner* - 2017-TIOL-779-CESTAT-DEL]

Valuation – Absence of manufacturer's invoice and comparability of contemporaneous imports: CESTAT Delhi has held that non-production of manufacturer's invoice by itself cannot lead to rejection of the declared transaction value. Allowing assessee's appeal by way of remand, in a case involving valuation of imported goods, the Tribunal in this regard also held that when the assessing officer is attributing reason that the brand goods will have additional value then the comparison should be with similar branded goods. It took note of the fact that NIBD data relied upon by the department was for unbranded goods and that too for imports many months back from the date of present import or after many months of the said import. [*Maya Overseas* v. *Commissioner* - 2017-VIL-204-CESTAT-DEL-CU]

Exports – Market enquiry when cannot be relied to reject export value: CESTAT Mumbai has allowed the appeal of the assessee in a case involving confiscation of export goods alleging mis-declaration of value in order to avail export benefits. The Tribunal in this regard noted that market enquiry was done without any involvement of the exporter or the CHA and that the description taken for exploring the price of the goods was also without any specifics. The Tribunal was of the view that value of garments depends on the kind of fabric, the nature/ count/ denierage of yarn, the print/colour and size, etc., and hence any comparison without all these factors is not a fair comparison. Further, the facts that difference in value was not so significant, and that there was absence of evidence to show that the entire sale proceeds was not brought back or that the export FOB of similar goods was different at the material time, were also noted by the Tribunal in this regard. [*Jayesh Bhavsar* v. *Commissioner* - 2017-VIL-186-CESTAT-MUM-CU]

VALUE ADDED TAX (VAT)

Notifications

Jammu & Kashmir – Amnesty scheme and tax on specified services: Notifications have been issued under Jammu and Kashmir Value Added Tax Act, 2005 and Jammu and Kashmir General Sales Tax Act, 1962, to provide for amnesty scheme under J&K VAT, and for charging tax on specified services. Further validity of notification providing exemption from tax payable on sale of goods in course of inter-State trade and commerce by small, medium and large units, has also been extended.

- ***Notification No. SRO 30, dated 1st February, 2017:*** An amnesty scheme has been introduced under the Jammu and Kashmir Value Added Tax Act, 2005 whereby there will be remission of 100% of the penalty and interest on arrears of tax for all registered dealers who pay arrears of VAT, assessed/ re-assessed up to the accounting year 2015-16, in six equal monthly installments with the first installments to be paid within one month of the publication of the said notification. Clause 3 of the notification provides that default in payment of the first installment shall entail outright disqualification from the scheme. Further, Clause 6 of the notification provides that the scheme is also applicable in respect of arrears of tax/ interest/ penalty under the Central Sales Tax Act, 1956 w.e.f. 2005-06. The scheme is effective from 3rd of February, 2017.
- ***Notification No. SRO 33, dated 1st February, 2017:*** Following amendments have been made to Schedule B of Notification No. SRO 117 of 2007, dated 30-3-2007, effective from 3-2-2017, under the Jammu and Kashmir General Sales Tax Act, 1962 (J&K GST), which prescribes tax rate of 12% on the provision of specified services:
  i. In Entry 21, which provides for "security and placement services including manpower recruitment and/ or supply agency services", the term "including manpower recruitment and/ or supply agency services" has been deleted.
  ii. Entry 30 providing for *"Services provided in the shape of Body Building on Trucks, Buses and other vehicles"* and Entry 31 providing for *"Services provided in shape of installation/ erection of pre-fabricated structures"*, have been inserted. As a result, the said services will attract J&K GST at the rate of 12%.
- ***Notification No. SRO 36, dated 1st February, 2017:*** Operation of Notification No. SRO 34, dated 31-1-2004 (relevant notification), has been extended till 31st March, 2018 or till the same is superseded by any other notification, whichever is earlier. It may be noted that the relevant notification provides for exemption from tax payable on sale of goods in course of inter-State trade and commerce by small, medium and large units, subject to the conditions specified therein. The notification is effective from 1st April, 2017.

Ratio decidendi

Goods used for the purposes of cleaning are goods integral to the execution of the service contract: The issue before the Division Bench of the Delhi High Court was whether chemicals/ solvents used in the process of cleaning amounts to transfer of property in goods between the contractor and the contractee and thus exigible to tax. The petitioner, i.e. the contractor, was

engaged in the business of providing services of maintenance, cleaning, washing, housekeeping, waste management, etc., and was awarded a contract by the Northern Railways (contractee). It was contended that in view of the definition of 'sale' under Section 2(1)(zc) of the Delhi Value Added Tax Act, 2004, which includes transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract, there is a sale of the chemicals/ solvents by the petitioner.

The Court distinguished the Kerala High Court's decision in *Enviro Chemical* v. *State of Kerala* [2011-VIL-130-KER-FB], and the Apex Court decision of *Xerox Modicorp Ltd.* v. *State of Karnataka,* (2005) 7 SCC 380, observing that the decisions did not deal with goods which were integral to the service contract and which were completely consumed during the execution of the service contract. The goods were consumed for the purpose of the final output, i.e., the chemical treatment of effluent water, in *Enviro Chemicals* were spare parts and toners and developers in *Xerox Modicorp*. Futher, explaining the distinction between consumables required for running an equipment and those required for servicing or maintaining an equipment, it was held that soaps, detergent, chemicals and solvents used purely for the purposes of cleaning, etc., are goods which are integral to the execution of the service contract and are consumables which are completely consumed in the process of the execution of the contract. It was held that since no property in said goods passes to the contractee, the said goods are not exigible to tax, and consequently, the contractee is not liable to deduct TDS. It was further held that mere fact that such goods were deposited in the stores of the contractee would not make any difference to the legal position. [*VPSSR Facilities* v. *Commissioner* - 2017-VIL-105-Del]

Toffee or sugar candy – Classification: The issue in the instant case was whether the products bubble gums, chewing gums, sugar candies etc. (Mentos, Alpenliebe Choco, Alpenliebe Choco), would be covered under Entry 163 of Schedule IV which covers "*Sugar candy made of sugar and glucose but excluding coco*" attracting tax at the rate of 5% or under Entry 16 of Schedule V attracting tax at the rate of 14.5%. The Assessing Officer, took into consideration the other products, also manufactured/produced by the assessee, and came to the conclusion that the products, which contain hydrogenated vegetable oil, cocoa solids, coffee extract, stabilizers, emuslifier, synthetic food colour, starch, condensed milk, sweetened hydrogenated vegetable oil, edible common salt, acidity regulator, butter fat, cream (low fat), antioxidant, etc., and thus, it is in the nature of branded confectionery/ coco, are primarily candies and would fall in Schedule-V.

The High Court held that a sugar candy contains purely lumps of sugar and nothing more, whereas in the instant case it is not merely sugar but many more ingredients are added to these products. These are essentially

toffees or other products and cannot fall purely as a sugar candy containing majority of sugar. The Court, applying the common parlance test, held that the products in which the assessees are dealing or manufacturing / producing would not fall within the Entry 163 of Schedule-IV and fall under residuary entry attracting tax at the rate of 14.5%. [*Perfetti Van Melle India Pvt. Ltd.* v. *Deputy Commissioner* - 2017-VIL-129-RAJ]

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