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Demand of interest due to price revision – An analysis

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Introduction

The present-day commercial landscape involves a variety of transactions which are structured in various manners. Assessees under Central Excise ordinarily discharge duty on the goods cleared by them on the basis of invoices raised indicating the value of these goods as on the date of the clearance of these goods. The price declared in the said invoices is the transaction value of the goods in terms of Section 4 of the Central Excise Act, 1944. However, difficulties arise when the price is subsequently revised due to various factors, leading to demand of interest by the Revenue Department on the differential duty paid due to such price revision. This article seeks to examine the position of law with regard to demand of interest on the assessee in such situations.

Nature of transactions

Transactions which involve price revision are of two kinds:-

- Where the price of the goods is 'fixed' at the time and place of removal, and as a result of subsequent negotiations, the price is retrospectively revised by the buyer;
- Where the price at the time and place of removal is 'not fixed' (price subject to escalation clause in the contract) and the final price is subsequently agreed between the seller and buyer.

In such cases, the occasion for differential duty arises at a later date due to invocation of the price variation clause in the contract for sale or due to culmination of the negotiations for revised price in favour of the seller. There can be no doubt that in such non-fixed price scenario, differential duty is liable to be paid on subsequent revision of price. The question, however, is as to whether interest thereon is payable at all and if so, is it payable from the date of clearance of goods when duty was paid on the basis of invoice, till the date when differential duty was paid.

Leviability of interest on such transactions

Interest under the relevant provisions of the Excise Act (Section 11AB/11AA) can be levied/ charged where any duty has not been levied or paid or has been short-levied or short-paid. For sustaining the demand of interest, the difference in price, arising due to the decision taken by the parties at a later date i.e. much after the date on which the goods were cleared, will have be treated as price as on the date when the goods were actually removed and, therefore, it has to be construed that the duty initially paid was 'short paid' to bring this event within the fold of Section 11AB/11AA of the Excise Act. The assessee has a compelling case to state that the provisions of Section 11AB/11AA of the Excise Act would not be attracted at all. This is on the ground that the

duty paid on the date of removal of the goods cannot be treated as 'short paid' only because of the occurrence of an event at a later date which could not be visualized or taken into consideration at the time of removal of these goods. It is impossible to determine the revised price on the date of removal, especially so as it is not even known at the time of removal as to whether there would be any price revision at all. Thus construing duty as short paid in this scenario would be in derogation of the principle of *Lex non cogit ad impossibilia,* i.e. the law does not compel the doing of impossibilities.

The Supreme Court interpreted the provisions of Section 11AB of the Excise Act in *SKF India Ltd.* - 2009 (239) E.L.T. 385 (S.C.) and *International Auto Limited* - 2010 (250) E.L.T. 3 (S.C.). In both these cases, the Apex Court sustained the demand of interest on differential duty payment by the assessee. However, after taking note of the aforesaid judgments, recently in the case of *Steel Authority of India* – 2015 (326) ELT 450 (SC), this issue has been referred to the Larger Bench of the Supreme Court.

In the above case of *SAIL,* the Apex Court observed that the Bench in *SKF India* and in *International Auto* (cited supra) did not consider the effect of the expression 'ought to have been paid' occurring in Section 11AB of the Excise Act. It was noted that as on the date when the goods were cleared, there was no certainty that there would be price escalation and it was beyond comprehension to ascertain the exactitude of such an escalation. The Apex Court held that it would be impossible to expect the assessee to pay the excise duty, at the time of clearance of the goods, on the basis of price escalation that took place at a later date in future. Therefore, as on the date of clearance when excise duty was paid, it could not be treated as 'short-paid' on the said date. As a consequence when the principal amount, namely, the excise duty itself was not payable (i.e. on the differential) on the date of clearance of the goods, there cannot be any question of payment of interest. Thus, it can be seen that the said judgment disapproves of the ratio laid down in *SKF India* and in *International Auto* (cited supra).

Conclusion

In the light of the above, it is seen that the jurisprudence pertaining to the issue of demand of interest on payment of differential duty due to revision of price has not been static but is still evolving. The assessees can feel vindicated at least by reference of this issue to Larger Bench of Supreme Court as commercial issues, as they arise in reality, need to be seen through the prism of business principles and practices but within the four corners of law. One would have wished the government to make retrospective amendments to undo *SKF* ruling to convey that it understands business and ease of doing the same, but rulings in favour of the Department can hardly have such treatment as the same bureaucracy has to draft the amendment also.

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CENTRAL EXCISE

Circulars

Cenvat credit – Clearance of process waste cannot be treated as removal of inputs 'as such': CBEC has clarified that clearance of segregated foreign materials namely iron, steel, rubber, plastic, dust, etc., from honey grade brass scrap before feeding the same in the furnace cannot be treated as removal of "inputs as such" for the purpose of Rule 3(5) of Cenvat Credit Rules, 2004. Circular No.1029/17/2016-CX, dated 10-5-2016 issued in this regard also states that segregated foreign material can be cleared on payment of Central Excise duty on transaction value as per its appropriate classification and rate of duty. As per the circular, foreign materials, emerging during the process of segregation have to be treated as process waste.

Bagasse & aluminium/zinc dross are not excisable but Cenvat Rule 6 applicable: CBEC has issued Circular No. 1027/15/2016-CX dated 25-4-2016 clarifying that bagasse, dross, skimmings or any such by-product or waste are non-excisable but when they are cleared from the factory, they should be treated as exempted goods for the purpose of reversal of credit of input and input services, in terms of Rule 6 of the Cenvat Credit Rules, 2004. By the present circular, the Board has withdrawn earlier Circulars dated 28-10-2009 & 14-2-2011 and instruction dated 12-11-2014 which were issued instructing officers to recover duty on such waste. The latest circular has been issued in light of the decision of the Supreme Court in *DSCL Sugar Ltd.* [2015 (322) ELT 769 (SC)], wherein it was held that bagasse is only an agricultural waste and residue, which itself is not the result of any process and therefore in the absence of manufacture, the same is non-excisable irrespective of the amendment in Section 2(d) of Central Excise Act made in 2008.

Ratio Decidendi

Demand of erroneous refund when not permissible: Madras High Court has held that once an application for refund is allowed under Section 11B of the Central Excise Act, 1944, the expression 'erroneous refund' appearing in sub-section (1) of Section 11A cannot be applied. It was held that if an order of refund is passed after adjudication, the amount refunded will not fall under the category of erroneous refund so as to revoke the refund order. The Court in this regard noted that since the appeal against finalisation of assessment which led to refund was closed on the basis of the refund order, the right of appeal was actually altered. Discussing the interplay between Section 11A and Section 35E (relating to review of orders leading to appeal by Dept.), the Court was of the view that one authority cannot be allowed to say in a collateral proceeding that what was done by another authority was an erroneous thing. [*Eveready Industries India Ltd. v. CESTAT* - Civil Miscellaneous Appeal No.973 of 2008 and MP.No.1 of 2008, decided on 3-3-2016, Madras High Court]

Cenvat credit on steel items when admissible: Classification of items under Chapter 73 of Central Excise Tariff by itself will not exclude them from Cenvat credit if it is established that these goods become part of machinery or equipments or their accessories, according to CESTAT, Delhi. Cenvat credit on galvanized steel, nuts and bolts used for making electrical instrument of mill plant, was hence allowed by the Tribunal observing that product system of electrical instrument in a mill is an accessory to such instrument and credit cannot be denied on such accessory. Cenvat credit on drive base frame, drive pulley frame, tale pulley frame, bend fully frame and technical structures used in manufacture of conveyor system, was also allowed by CESTAT rejecting department's contention that items were used in support structures or as part of protection equipment. [*Hindustan Zinc Ltd.* v. *Commissioner* - Final Order No. 53893/2015, dated 31-12-2015, CESTAT Delhi]

Similarly, Cenvat credit was allowed by the Tribunal on MS Rounds and other MS products used in manufacture or fabrication of moulds through job workers. The moulds were used by the assessee in their manufacturing process while availing SSI exemption. The Tribunal relied upon Supreme Court's decision in the case of *Rajasthan Spinning & Weaving Mills Ltd.* prescribing the 'user test'. [*Malwa Concrete Udyog Pvt. Ltd.* v. *Commissioner* – 2016 (335) ELT 109 (Tri.-Del.)].

CESTAT Mumbai has also allowed Cenvat credit on channels, angles, H.R. plates and welding electrodes, used in the manufacture of parts of furnace and other machinery. Supreme Court's judgement in the case of *Rajasthan Spinning and Weaving Mills Ltd.* was relied by the Mumbai CESTAT in this regard. [*Smita Steels Rolling Mills Pvt. Ltd.* v. *Commissioner* - 2016-TIOL-1054-CESTAT-MUM]

Cenvat credit - No reversal required for inputs used in finished goods which were written off: Cenvat credit is not required to be reversed in respect of inputs used in manufacture of goods which were later written off. The question before Chandigarh Bench of the Tribunal was, whether according to Rule 3(5B) of the Cenvat Credit Rules, 2004 the assessee is required to reverse Cenvat credit on finished goods which have been written-off, was hence answered in the negative. It was also held that no reversal is required in respect of inputs for which provision for writing-off was made in balance sheet but inputs were later on used in manufacture. [*BCH Electric Ltd.* v. *Commissioner* – Final Order No. 83/2016-CHD, dated 9-2-2016, CESTAT, Chandigarh]

Cenvat credit on inputs sold but not removed: In a case involving transfer of unutilized credit by lessor, on lease of capital goods and factory building and on sale of inputs as such, where the inputs were not removed physically, CESTAT Chennai has set aside the demand on the lessor. The Tribunal noted that though proper procedure was not followed, credit was available to lessee and that there was no loss of revenue. Reliance by the assessee on Rule 10 of the Cenvat Credit Rules, 2004 was held as not relevant as inputs were kept out of

the lease transaction. [*Jaishree Packaging* v. *Commissioner* - Final Order No. 40592/2016, dated 8-4-2016, CESTAT Chennai]

Cenvat credit – Option to reverse proportionate credit – Intimation under Cenvat Rule 6(3A) not mandatory: Hyderabad Bench of the CESTAT has rejected the contention of the department that when written intimation was not given as per Rule 6(3A) of the Cenvat Credit Rules, 2004, the assessee is bound to pay amount according to the first option under Rule 6(3)(i), i.e. certain percentage of the value of exempted goods/services. The Tribunal in this regard observed that Rule 6(3A) does not say that on failure to intimate the department about the option, the manufacturer/service provider would lose his choice to avail option of reversing the proportionate credit. It was held that the procedure and conditions laid in Rule 6(3A) are intended to make Rule 6(3) workable and not to take away the option available to the assessee. [*Aster Pvt. Ltd.* v. *Commissioner* - 2016-TIOL-1035-CESTAT-HYD]

Exemption under Notification No. 108/95-CE when supplies made through contractor: Madras High Court has allowed benefit of Notification No. 108/95-C.E. in a case where the supply to a project financed by the United Nations or an International Organization was made through a contractor. It was of the view that it would be illogical to think that supply should be made only directly, for the purpose of the notification. Noting that the department wanted to insert the word "directly" after the word "supply", in the exemption notification, the Court held that no addition or deletion of any expression either by the department or by the assessee is permissible, when it comes to interpretation of exemption notifications. [*Commissioner* v. *IBM India Limited* - Civil Miscellaneous Appeal No. 2614/2008, decided on 11-2-2016, Madras High Court]

No interest on differential duty when sufficient credit available in Cenvat credit account: Interest is not payable on payment of differential duty from Cenvat credit account, if sufficient credit was available in Cenvat account during the material period when the duty was paid. Madras High Court while holding so observed that when credit was available in the account of the assessee, the Department cannot act like Shylock demanding a pound of flesh. [*Commissioner* v. *Larsen & Toubro Ltd.* - Civil Miscellaneous Appeal Nos.3649 and 3650 of 2010, decided on 18-3-2016, Madras High Court]

Exemption for supply to R&D establishment: CESTAT Mumbai has allowed benefit of Notification No. 10/97-C.E. to air-conditioning and refrigeration equipment supplied to Research & Development Organisations namely, Vehicle Research & Development Establishment, and the Electronic & Radar Development Establishment, when the AC system were specially designed and modified, by the said customers, for use in specialized mobile operation theatres for use by the Indian Army in the field. The Tribunal in this regard noted that the customers were public sector institutions who had fulfilled all the conditions of the notification and therefore, exemption

was held as admissible. [*Auto Aircon (India) Ltd.* v. *Commissioner* – Order passed in Appeal No. E/1759/2005-MUM dated 8-3-2016, CESTAT Mumbai]

Similarly, CESTAT Bangalore in its recent decision rejected the contention of the department that if goods supplied are in common and commercial parlance known as parts of aircraft or parts of some other equipment, and have been supplied in commercial quantity, they cannot be used for research purposes. Argument of the lower authorities that research purposes goods should be supplied only in smaller quantities was rejected by the Tribunal noting that conditions of the notification were satisfied by the assessee. [*Spectrum Infotech Pvt Ltd.* v. *Commissioner* - Final Order No. 20280-20283/2016, dated 18-2-2016, CESTAT, Bangalore]

Refund of Cenvat credit in cases of clearance of intermediate goods to EOU when goods processed and exported by EOU: When the intermediate goods are cleared to the Export Oriented Unit and such goods underwent processing by the EOU and were then exported by the EOU, the assesse shall be entitled to refund for unutilized credit under Rule 5(1) of CENVAT Credit Rules, 2004. In a recent order, Chennai Bench of CESTAT notes that the appellant satisfied the condition of Rule 5(1) by effecting export of the goods in question through the EOU. [*Lakshmi Automatic Loom Works Ltd.* v. *Commissioner* – Final Order No. 40037-40038/2016, dated 6-1-2016, CESTAT, Chennai]

CUSTOMS

Notifications and Public Notices

Status holder recognition – Last three years of exports to be counted: Eligibility to be recognized as a 'status holder' under the Paragraph 3.20(b) of the Foreign Trade Policy (FTP) has been amended. Henceforth, as per DGFT Notification No. 4/2015-20, dated 29-4-2016, status recognition shall depend on the export performance for the current year and preceding 3 financial years (as opposed to current and preceding 2 financial years prior to the amendment). For gems and jewellery exports, export performance shall still be counted for the current year and preceding 2 financial years.

EPCG and SFIS – Rupee payment for specified services to be counted towards benefits: List of services, payments for which are received in Indian Rupees and which can be counted towards discharge of export obligation under the EPCG Scheme, has been notified. New Appendix 5D to the FTP Handbook of Procedures Vol. 1 has been notified by Public Notice No. 4/2015-20, dated 3-5-2016 in this regard. The services covered are maintenance & repair of vessels, pushing and towing services, and supporting services for maritime transport.

Similarly, Appendix 3E covering approximately

similar specified services rendered in Customs Notified Areas to a foreign liner, where payments are received in Indian Rupees and which would be counted for benefit under SFIS, has been notified. Public Notice No. 7/2015-20, dated 4-5-2016 has been issued in this regard.

Ratio Decidendi

DRI officers do not have jurisdiction to issue SCNs for imports made prior to 8-4-2011: The Delhi High Court has held that officers of Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence (DGCEI) and similarly placed officers, do not have jurisdiction to issue show cause notices under Section 28 of Customs Act, for imports made prior to 8-4-2011. The Court however upheld the validity of sub-section (11) of Section 28 conferring jurisdiction on the above officers, in respect of imports made on or after 8th April, 2011. The Court directed the Central Board of Excise and Customs (CBEC) to issue instructions to avoid duplication/overlap of jurisdiction. [*Daikin Airconditioning India Private Ltd.* v. *Union of India* - W.P.(C) 5877/2014 & CM 14409/2014 and Ors., decided on 3-5-2016, Delhi High Court]

DGCEI, Mumbai has jurisdiction to issue SCN for goods imported and transshipped from Mumbai port: The Tribunal has held that the officers of Director General of Central Excise Intelligence (DGCEI), Mumbai have jurisdiction to issue SCN for the goods imported at Mumbai port for transshipment to any other customs station. Reliance was placed on Section 54 of the Customs Act, 1962 which uses the words *"where any goods imported into a customs station....for transhipment"* to hold that the goods were initially imported at the Mumbai port before the transshipment. The appellant had raised preliminary objection on territorial jurisdiction of DGCEI, Mumbai, when goods were cleared for warehousing at Surat, which was rejected by the Tribunal. In this case SCN was issued on 19-10-2005 demanding duty on goods imported duty free but allegedly diverted in local market by EOU. [*Hasmukh Ganatra* v. *Commissioner* – Order No. A/11882-11885/2015, dated 7-12-2015, CESTAT, Ahmedabad]

Chemical examiner's report not to be relied upon in absence of cross-examination: The Madras High Court has held that the report of the Chemical Examiner is not to be relied upon in the appellate proceedings when the opportunity to cross examine him was denied by the lower authority. The petitioner was given liberty to file appeal against the impugned order, while appellate authority was directed to decide the appeal on merits and in accordance with law, without relying upon the Chemical Examiner's report. [*SDS Ramcides Crop Science Pvt. Ltd.* v. *Commissioner* – Order dated 15-3-2016 in W.P. No. 30771 of 2015, Madras High Court]

Disposable Sterilized Dialyzer and Microbarrier for filtering blood – CBEC Circular No. 19/2013-Cus., quashed: Calcutta High Court has quashed CBEC Circular No. 19/2013-Cus., dated 9-5-2013 according to which Disposable

Sterilized Dialyzer and Microbarrier for filtering blood are classifiable under Heading 8421 of the Customs Tariff Act, 1975 and not under Chapter 90. The Court in this regard noted that while Tariff Item 9018 90 31 pertained to renal dialysis equipment, TI 8421 29 00 talks of filtering or purifying machinery and apparatus for gases, and hence the TI 9018 90 31 was specific in this regard. The Court held that the department sought to amend the First Schedule to the Customs Tariff Act by issuing the said Circular which was not permissible. [*Sanwar Agarwal* v. *Commissioner* – W.P. No. 496 of 2015, decided on 7-4-2016, Calcutta High Court]

GPS trans-receiver capable of two way communication is restricted for import: CESTAT New Delhi has held that a GSM/ GPRS/GPS/Terminal with RFID interface/ 300 MAH Battery/ Audio, installed in taxis, which is capable of locating the position of taxis and for sending instructions to the driver and getting his feedback, is rightly classifiable under Tariff Item 8526 91 90 of the Customs Tariff. The Tribunal distinguished the device from a mere GPS receiver and held that the impugned goods were restricted for import requiring an import license. [*Commissioner* v. *Geo Vision Technologies Pvt. Ltd.* – Final Order No. 50890/2016-CU (DB), dated 10-2-2016, CESTAT, New Delhi]

"M2A Capsule Endoscopy Given Diagnostic System (Wireless Endoscopy)" covered under Notification No. 21/2002-Cus. as "Video Oesophago Gastroscope": Relying on the product catalogue, literature and extracts of journals of Gastrointestinal Endoscopy, CESTAT Chennai has held that "M2A Capsule Endoscopy Given Diagnostic System (Wireless Endoscopy)" falling under Tariff Item 9018 90 44 of Customs Tariff is covered under Item No.82 of List 37 at S.No.363A of the Table under Notification No.21/2002-Cus., under the description "Video Oesophago Gastroscope". The Tribunal observed that Video Capsule Endoscopy is advanced Endoscopic System which provides visualization of gastrointestinal track by transmitting images wirelessly from a disposable capsule with data recorder which is worn by the patient in the form of belt which is again connected to computer system. Revenue department's contention that the word "wireless" is not mentioned in the notification was found to be not justified by the Tribunal. [*Commissioner* v. *Vishal Surgical Equipment Co. Pvt. Ltd.* – Final Order No. 40142/2016, dated 28-1-2016, CESTAT, Chennai]

Central Excise portion of drawback admissible when goods procured from open market: Drawback of Central Excise portion of duty is admissible even when the goods meant for export have been procured from traders and not manufacturers. CESTAT Delhi has held that the fact that the certificates relating to supporting manufacturers were false did not change the position. Reliance was placed on CESTAT's earlier order in the case of *Kultar Export* which was upheld by the Delhi High Court and accepted by CBEC. [*Vikas Gumber* v. *Commissioner* – Final Order Nos. 50048-50049/2016 dated 13-1-2016, CESTAT, New Delhi]

SERVICE TAX

Notifications

Parity between government, local authority and governmental authority while performing certain functions, for the purpose of service tax: By way of Notification No. 22/2016-ST dated 13-4-2016, the words 'local authority' has been inserted after 'Government' in Notification No. 25/2012-ST (mega exemption). Thus, in case of certain specified services provided by local authority like issuance of passport and birth / death certificate or fines or damages imposed in cases of non-performance of contract are also exempt. Services provided by local authorities where gross amount charged does not exceed Rs. 5000/- are also exempt.

Services provided by government / local authority – Certain rules amended: As per Rule 6(2)(iv) of Service Tax (Determination of Value) Rules, 2006, interest on delayed payment of consideration for provision of services or sale of movable or immovable property is not includible in taxable value. By Notification No. 23/2016-ST, dated 13-4-2016, the said rule has been amended by inserting a proviso. As per the amendment, if the amount payable to government or local authority is allowed to be deferred, then such interest will be includible in taxable value of services provided by govt., or such authority to a business entity. As per Notification No. 24/2016-ST dated 13-4-2016, the point of taxation when services are received from government or local authority by a business entity will be the earlier of the dates on which payment becomes due or date of payment.

Ratio Decidendi

Deputation of employees to group companies for marketing support – Case of joint employment, not exigible to service tax: Whether services are rendered by an employee to one employer or to many, as in the case of joint employment, cannot make any difference to the tax treatment of the emoluments earned by the employee. Reasoning thus, the Tribunal held that deputation of employees to other entities in the group for marketing support is not taxable under Business Support Services. In the instant case, the group companies shared the expenses towards salary, bonus and incidental expenses in proportion to value of sales. Also, no separate consideration was paid for deputation. [*Franco Indian Pharmaceutical P Ltd* v. *CST,* Order dated 5-1-2016 in Appeal No.ST/368/12-Mum, CESTAT, Mumbai]

Cenvat credit not deniable for absence of registration number in invoice: Reiterating that Cenvat credit cannot be denied on account of minor procedural lapses the Tribunal held that even if registration number of service provider is not mentioned in document or written by hand, if credit was otherwise admissible, it cannot be denied. The assessee urged that credit had been denied only on account of the procedural shortcoming and eligibility had not been discussed by the authorities. [*WPIL*

Ltd v. *CCE*, Order No. FO/A/75258/16 dated 6-4-2016, CESTAT, Kolkata]

Refund – One to one co-relation between remittance and export invoice not required: Though the Commissioner upheld eligibility for refund in principle, the Department sought to deny refund stating that there was no one to one co-relation between the foreign inward remittance and export invoices and the input services availed did not have direct nexus with export. The assessee received remittances in lump sum and in a continuous account. There was no dispute as to export of service or receipt of foreign exchange. The Tribunal held that the Department could not deny refund under the guise of verification once all documents were submitted and eligibility to refund was not in question. [*Alliance Global Service IT (I) (P) Ltd* v. *Commissioner*, 2016 (42) S.T.R. 438 (Tri.-Hyd.)]

Cenvat credit on capital goods received earlier, availed subsequent to registration as service provider: The Department sought to deny Cenvat credit on capital goods received by the assessee when he was registered as a service provider reasoning that the hotel – from where output service was provided started functioning only after two years. The order of the lower appellate authority records that the appellant (assessee) cannot be faulted for taking 100% credit since credit had not been taken in the first or second year and registration was subsequent to the receipt of capital goods. Upholding the order of the lower authority, the Tribunal held that Cenvat credit was admissible as it was common knowledge that capital goods are received for installation during construction activity and tax liability commences only when hotel starts functioning. [*Commissioner* v. *Kamat Constructions & Resorts P. Ltd.*, 2016 (42) S.T.R. 450 (Tri.-Mumbai)]

Lease equalisation levy is not consideration and not liable to service tax: To qualify as 'gross amount charged' there must be a payment and it must be in the nature of a consideration for a service. The Tribunal held that amount for 'lease equalisation levy' which had been entered in the books of accounts of the assessee to show amortisation of the asset is not a payment and neither a consideration nor gross amount charged. Thus, the assessee was not liable to pay service tax on the same. As per the schedule of payment, the actual lease rent in the initial years was lesser than the later years. To comply with AS-19, the assessee had shown a notional amount under 'Lease rent advance/equalisation'. The department argued that even book adjustments could be a method of payment and service tax was payable on the amount of equalisation also. However, the Tribunal did not find force in this argument and agreed that 'lease equalisation levy' is not income and is also not a payment actually received or receivable. [*Reliance Infratel Ltd* v. *Commissioner*, 2016 (42) S.T.R. 452 (Tri.-Mumbai)]

Revised claim not delayed when original claim for refund within statutory time limit: At issue was the relevant date for filing of refund claim when the original claim had been duly filed in time. The assessee omitted certain claims

it decided were ineligible and filed a revised claim for a lesser amount. The Department argued that the revised claim was beyond the statutory time limit and hence it was barred by limitation. Observing that *suo motu* revision by the assessee only facilitated the Department and the (revised) claimed amount was part of the original claim, the Tribunal held that the revised refund claim was not barred by limitation. [*Banco Products India Ltd* v. *Commissioner*, 2016 (42) S.T.R. 535 (Tri.- Ahmd.)]

Rent paid by EOU for additional units where processing takes place – Cenvat credit admissible: The assessee, a 100% EOU rented two more facilities but away from the registered premises. The Department contended that the service of renting had not been received at the place from where manufacture or clearance of excisable goods was done and hence credit was inadmissible. Finding however, that the additional units were used for processing of intermediate goods and final goods manufactured at the first unit were exported, the Tribunal held that renting of immovable property was an input service for the assessee. The Tribunal noted that all units belonged to the same legal entity and the production processes were interlinked. Without processing undertaken by the additional units the first unit could not undertake manufacture. [*India Trimmings P Ltd* v. *Commissioner*, 2016 (42) S.T.R. 552 (Tri.- Chennai)]

Settlement Commission – Copy of Department's report to be given to applicant: The petitioner-assessee was aggrieved that the Settlement Commission had not shared the report of the Revenue Department and he had not been given an opportunity to defend himself. The assessee had incurred huge losses due to default from clients and hence had not paid service tax. It paid the admitted liability and sought an opportunity to explain its calculations. However, the Settlement Commission rejected the application based on the report from the Department that the application could not be accepted. The High Court held that the Settlement Commission should have given an opportunity to the applicant to present his case. It also said that the Settlement Commission has wide powers to take evidence and should fulfil the statutory mandate without an overly rigid approach. [*Cineyug Worldwide* v. *Union of India*, 2016 (42) S.T.R. 219 (Bom.)]

Cenvat credit on construction service availed after completion of construction, admissible: Cenvat credit of input services used for construction and renting of immovable property was denied by the Department on grounds that time gap was unreasonable and there was absence of centralised registration. On facts, the assessee had not availed credit on the materials and explained that they had waited till the building was completed as until then it was not certain how much portion would be sold and how much would be let out. The assessee availed credit only on the let out portion. Noting that there was no difference in the definition of input service for construction of building or civil structure for providing output service, the Tribunal held that credit of input services was admissible. Regarding time lag, the Tribunal was of the

view that a substantial benefit should not be denied when there was no violation of legal provisions and the delay could be ignored. [*Vamona Developers P Ltd* v. *CCE & ST*, 2016 (42) S.T.R. 277 (Tri.-Mumbai)]

Excess tax paid under wrong rate can be adjusted as advance tax: The Department contended that the assessee who had paid excess tax erroneously under higher rate (12.36%) though he was required to pay on 10.3% could not adjust the same under provision of Rule 6. It argued that the assessee should have sought refund of tax within prescribed time limit. However, the Tribunal held that tax at higher rate had been collected without the authority of law, and the Department could not retain the same. Though the assessee did not fall within the provisions in terms of service not being provided or tax being paid in advance and could not comply with various conditions stated therein, the Tribunal held that based on facts, liberal view should be taken and the assessee could adjust the excess service tax paid. [*Dell India P Ltd* v. *Commissioner*, 2016 (42) S.T.R. 273 (Tri. – Bang.)]

Cenvat credit on excess tax paid, reversed later is 'not wrongly taken or utilised': Where there has been no liability to pay service tax, the Department cannot impose liability to pay interest invoking provisions of Rule 14 of Cenvat Credit Rules. The assessee had paid service tax in excess due to erroneous calculation and later applied for refund which was sanctioned and the assessee reversed Cenvat credit. However, the Department sought to collect interest on the amount citing contravention of Cenvat Credit Rules. The Tribunal followed the decision of Karnataka High Court in *CCE* v. *Bill Forge* that interest liability can arise only when the duty legally due to the government is not paid and the credit taken on excess service tax paid was wrongly taken or utilised. [*TNT (India) P Ltd* v. *Commissioner*, 2016 (42) S.T.R. 285 (Tri.-Bang.)]

Cenvat credit – Option not deniable when intimation under Rule 6(3A) filed belatedly: Charging that the failure to comply with the procedural formalities of Rule 6(3A) of Cenvat Credit Rules by delayed intimation to the Department that the assessee would be availing the option of proportionately reversing credit attributable to exempted services, the Department contended that the assessee could not reverse credit and had to pay 8% of the value of exempted services. Finding force in the assessee's argument that the rule is not a charging section and that once the assessee is willing to forgo the credit (proportionate), credit should not be denied on account of minor procedural lapses, the Tribunal held that credit was admissible. Thus, filing of the declaration belatedly exercising the option under Rule 6(3A) will not make the assessee ineligible to avail the option of proportionate reversal. [*Tata Technologies Ltd* v. *Commissioner*, 2016 (42) S.T.R. 290 (Tri.-Mumbai)]

Cenvat credit on input service used to provide output service provided by the manufacturer is admissible: The assessee, manufacturer of DG sets availed the services of contractors for erection, installation and commissioning at the site of the client and claimed Cenvat

credit to be admissible since it was using an input service for provided output service. The Department contended that the assessee being a manufacturer could not avail Cenvat credit of services used beyond the place of removal. However, the Tribunal held that since the assessee has used input services as a provider of taxable service, Cenvat credit would be admissible. [*Veena Industries* v. *Commissioner*, 2016 (42) S.T.R. 299(Tri.-Ahmd.)]

Cenvat credit availment by successor-entity - Imperfect intimation to Department not fatal to eligibility: It was alleged by the Department that since the assessee which had been formed by merger with another, did not intimate the same and the service tax registration of the erstwhile merging entity was not cancelled, the merged entity could not use the credit available in the PLA at time of merger. The assessee had written to the Department about its intention to use the amount in PLA. Reasoning that on merger, the successor entity was legally entitled to utilise the balance in the PLA, the Tribunal upheld the action of the assessee. [*PSP Projects P Ltd.* v. *Commissioner,* 2016 (42) S.T.R. 301 (Tri.-Ahmd)]

Capital goods received by assessee not used by contractor for thermal power plant - Cenvat credit admissible: Two reasons were advanced for denial of credit of capital goods received by the assessee – the goods had been used for generation of electricity (exempted goods) and the goods had been in possession of the contractor who was not eligible for Cenvat credit. However, while ground of exempted goods was dropped, the original authority denied credit on grounds which were not raised in the show cause notice. The Tribunal agreed with the assessee that the order based on new grounds like reading together different contracts for supply of machinery, installation, etc., and looking into valuation of services by the contractor was liable to be set aside. Thus, it held that since there was no composite contract for construction of the thermal plant and the goods had been received and paid for by the assessee, Cenvat credit could not be denied. [*Ultra Tech Cement Ltd* v. *Commissioner*, 2016 (42) S.T.R.303 (Tri.-Del.)]

Service tax on admission/access to entertainment – Constitutional validity upheld: The issue for consideration was whether the levy of service tax on admission and access to entertainment events and amusement facilities would result in the Union Parliament encroaching the exclusive field assigned to the State, under Entry 62 List II of the Seventh Schedule of the Constitution of India. It was held by the High Court that the fact that admission to entertainment events and access to amusement facilities are included in the negative list itself is a pointer that the same partakes a service and the Parliament initially exempted it from the levy. The exclusion of such activity from the negative list empowers the Union Parliament to tax the said services. Further, even though the appellants are required to pay entertainment tax even in case there are no entrants to the amusement parks, service tax is required to be paid only when

there are tickets sold. Thus, there is no conflict between the entertainment tax and service tax levied. [*Kanjirappilly Amusement Park and Hotels Pvt Ltd.* v. *Union of India*, 2016-TIOL-856-HC-Ker]

Distributorship of books is selling activity and not service: The applicant had agreed to become a distributor of books for a foreign firm and claimed that being purely a selling activity, service tax was not attracted. The Department contended that the applicant would be rendering a service to the overseas firm. However, on reading the clauses of the agreement wherein the distributor was to be reimbursed for any additional expenses, errors in the book, etc., it was concluded that there was no element of service involved. [*In Re: Creative Problem Solving India*, Authority for Advance Rulings, 2016 (42) S.T.R. 591 (A.A.R.)]

VALUE ADDED TAX (VAT)

Notifications

UP VAT – Rate of additional tax on cement increased: By Notification No. KA.NI.-2-485/XI-9(13)/2010-U.P.Act.-5-2008-Order-(156)-2016, dated 4-4-2016, effective from 5-4-2016, the rate of additional tax on sale or purchase of cement has been increased from 3% to 4% in Uttar Pradesh. It may be noted that Section 3-A of the Uttar Pradesh Value Added Tax Act, 2008 gives the power to the State Government to levy an additional tax on the taxable turnover of sale or purchase of notified goods.

Delhi VAT – Rate of tax decreased in respect of specified products: By Notification No. F.3(3)/Fin/(Rev-I)/2016-17/dsvi/148 dated, 9-5-2016, effective from 10-5-2016, the Schedules of Delhi Value Added Tax Act, 2004 have been amended to revise the rate of VAT on different products. While VAT rate has been decreased from 12.5% to 5% in respect of Sweets and Namkeens, E-Rickshaw, Battery operated vehicles and Hybrid Automobiles, rate has been changed from 20% to 12.5% in respect of watches costing above Rs. 5000. Rate of tax on Uninterrupted Power Supply units (UPS) has however been increased from 5% to 12.5%.

MP VAT – Electric/battery run two wheelers, cars and rickshaws, exempted: Madhya Pradesh Value Added Tax Act, 2002 has been amended by Madhya Pradesh VAT (Amendment) Act, 2016 which has come into force from 5-4-2016. All kinds of electric/battery run two wheelers, cars and rickshaws, which were earlier liable to tax @ 5%, have now been fully exempted. Further, Section 26 of the MP VAT Act has been amended to increase the rate of WCT-TDS from 2% to 3% where the contractor is an unregistered dealer. Section 14 is also amended to restrict the availability of input tax credit in respect of goods resold in the course of inter-State trade or commerce.

Maharashtra VAT – Rate increased for Schedule C goods: The rate of tax on most goods (excluding declared goods) covered by

Schedule C to the Maharashtra Value Added Tax Act, 2002, has been increased from 5% to 5.5%. Notification No. VAT. 1516/C.R. 31/ Taxation-1, dated 30-3-2016, issued in this regard is effective from 1-4-2016.

Ratio Decidendi

Anti-dumping duty includible in value for VAT when goods cleared from SEZ: Madras High Court has held that anti-dumping duty levied on the components imported from China and paid by a company which purchased the finished products from the petitioner, who is located in Special Economic Zone, would form part of the sale price of the goods manufactured and sold by the petitioner to such buyer under the provisions of Tamil Nadu Value Added Tax Act, 2006. Observing that the anti-dumping duty became leviable from the time of export from China into India, but was not actually collected due to the protective cover given by the Special Economic Zones Act, the Court held that the moment the goods went out of this protective cover, the duty automatically got attached to the goods and hence, the same shall be included in the sale price for the purpose of levy of VAT. The Court further proceeded to examine this issue from different perspective and observing that the margin of dumping is the difference between the normal value, namely the price in the domestic market of the foreign exporter and the export price at which the goods are exported to India, held that once anti-dumping duty is levied, the same becomes part of the sale price, as otherwise the sale price of the product imported into India will be different from the sale price of the product domestically manufactured. [*Flextronics Technologies (India) Private Limited* v. *State of Tamil Nadu* - 2016-VIL-230-MAD]

Input Tax Credit of tax paid on purchase of DEPB scrips, not allowed: Madras High Court has denied Input Tax Credit of tax paid on the purchase of Duty Entitlement Passbook (DEPB) license. Observing that the DEPB license is not included in the First Schedule appended to the Tamil Nadu Value Added Tax Act, 2006, it was held that these "goods", despite falling within the purview of goods, do not constitute 'goods'. It further added that despite the fact that DEPB licenses, conferring a right upon the licensees to import goods at some concession, are goods, they are certainly different and distinct from the goods that can be imported on the strength of those licenses. It was held that it is only the goods that are imported on the strength of these DEPB licenses, that may fall within the ambit of Section 19(1) provided a tax is payable or paid under the TN VAT Act on those goods and those goods are also listed in the First Schedule to the Act. The High Court for this purpose observed that three conditions are required to be satisfied in order to claim input tax credit under Section 19 of the TN VAT, (i) that he is a registered dealer, (ii) that he actually paid or becomes liable to pay tax on the purchase of taxable goods and (iii) that the tax paid or payable was in respect of goods specified in the First Schedule. [*Sha Kantilal Jayantilal* v. *State of Tamil Nadu* - 2016-VIL-211-MAD]

Not every kind of milk powder is baby food: The issue before the Karnataka High Court was that whether the Entry "Baby foods including milk powder" covered all types of milk powder and thus exempted under Karnataka Sales Tax Act, 1957. The High Court held that when one reads and gives meaning to the subsequent words after 'baby food', one cannot forget nor ignore the earlier words 'Baby Food'. It was held though baby food includes milk powder, all milk powder necessarily does not come within the scope of the expression 'baby food'. Milk powder used or marketed as baby food can be considered for the purpose of exemption but not other kinds of milk powder. [*Gujarat Co-operative Milk Marketing Federation Ltd. v. Additional Commissioner of Commercial Taxes* - 2016-VIL-183-KAR]

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