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Articles

Swachh Bharat Cess – Certain issues

By **Sharanya Mishra and Yogendra Aldak**

Swachh Bharat Cess ("SBC") proposed at the "rate of 2% on all or any services" in Budget Speech on 28th February 2015, was notified vide Notification No. 21/2015-ST and Notification No. 22/2015-ST both dated 6th November 2015 for imposition from 15th November 2015 onwards "just like Service Tax" at the rate of 0.5% on the assessable value of taxable service.

While one is to be grateful for the 1.5% exemption, the short notice on the face of festivity and unpreparedness had stirred up a lot more chaos and confusion among the entire gamut of taxpayers and advisors. The basic issue, inter alia, at that time was the ambiguity in Notification No. 22/2015-ST dated 6-11-2015, for it notified the rate of charge for the taxable services and those fully exempted alone, overlooking the fact that there exist a plethora of services between the two. It also made a blunder of exempting the services in the negative list as a taxable service, implying that the non–taxable negative list was earlier taxable.

A lot of legal issues were put to rest on 12th November 2015 vide Notification No. 23/2015-ST dated 12-11-2015 which amended Notification No. 22/2015-ST, providing for SBC on abated value, vide Notification No. 24/2015-ST dated 12-11-2015 which made applicable the full and partial Reverse Charge Mechanism and vide Notification No. 25/2015-ST dated 12-11-2015 which amended the Service Tax Rules, 1994 by inserting sub-rule 7D in Rule 6, to provide for alternate rate in respect of SBC on money changing, life insurance, air travel and lottery services. However there was no notification or clarification regarding the Cenvat credit applicability and mode of payment of SBC. While the FAQs on SBC published by CBEC on its website posed as respite over inter alia the issue of Cenvatability, as it clarified that the Cenvat Credit Rules, 2004 ("Credit Rules") would not extend to SBC, the mode of clarification was condemned since FAQs do not hold legal binding of any sort, which gives way to frivolous litigation and otherwise an obvious cascading effect.

On observing SBC, it is not impetuous to remark that the burden of Service Tax exclusive of the benefits extends to SBC, making the tax system way more complex and regressive. SBC though in the nomenclature of cess, since it is earmarked for the purpose of 'Swachh Bharat Abhiyan', is disparate with the earlier cesses levied on Service Tax like Education Cess and Secondary and Higher Education Cess. Unlike the earlier ones it is not tax on tax but tax on the taxable value and Credit Rules do not extend to it. The subject matter of SBC is public health and sanitation which falls under the State List, but the Centre has under the garb of residuary power and power to legislate over service tax, introduced additional tax in the name of SBC, which the Centre is not bound to share with the respective States.

The discrepancies of SBC on the basis of which it can be constitutionally / legally challenged are briefly touched upon in the following paragraphs.

The wordings of the charging Section 119(2) "on all or any services" creates certain ambiguity, vagueness and uncertainty as to the subject of tax, which lays open the imposition of SBC to the whims and fancies of the executive. "A taxing statute must be couched in express and unambiguous language" since by well-settled principles of law, it has to be read and construed strictly.

The Centre has achieved the devolution of revenue to States at rate of 42% as recommended by the 14th Finance Commission, to uphold the essence of federalism in the nation, however it is an eyewash, since devolution is only of tax and not of cess and surcharge, thus the revenue benefit by imposition of any sort of cess or surcharge shall remain with the Centre and keep the pocket of Centre alone jingling, completely inimical to the quasi-federal structure of India.

SBC does not hold strong ground in the face of challenge on taxation principles of equality, convenience, certainty and economy. These are the basic canons of a good tax system, inspired by the economic theory and policy of Adam Smith. Equality refers to vertical equity of taxation, Convenience refers to the manner and time of tax payment, Certainty refers to the certain nature of the tax which is not arbitrary and is simple and provides stability, and lastly Economy propagates that taxes should be minimized. However SBC does not seem to be based on these cornerstones of good taxation regime.

To sum up, while expenditure of the government for improving the sanitation level in the country having a direct effect on health is appreciated, the collection of cess is condemned since the usage of nomenclature of cess deprives State of funds and increases tax burden on taxpayers and why should there be an additional tax when tax collected can be internally earmarked for this purpose and spent accordingly. Looking towards tax overhaul with GST, the question that is to be vetted is about the treatment of SBC then since GST conventionally and by practice is one consolidated tax with no additional taxes.

[The first author was an intern and the second author is a Principal Associate in Lakshmikumaran & Sridharan, New Delhi]

Duty paid before finalisation of provisional assessment – Interest liability does not arise

By **Rajesh Ostwal**

Where the provisional assessment is finalized and assessee pays the differential duty before finalization order is passed by the Assessing Officer, is the interest payable from the due date till the date of payment or is interest not payable as there is no determination of duty by Assessing Officer? This doubt arises due to peculiar language employed by Rule 7(4) of the Central Excise Rules, 2002:

"7(4) The assessee shall be liable to

pay interest on any amount payable to Central Government, consequent to order for final assessment under sub-rule (3), at the rate specified by the Central Government by notification issued under Section 11AA or Section 11AB of the Act from the first day of the month succeeding the month for which such amount is determined, till the date of payment thereof."

A plain reading of Rule 7(4) would show that if there is no amount payable consequent to the finalization order, no interest would be payable in terms of the aforesaid Rule 7(4). There is no liability to pay interest since there is no amount payable at the time of finalization order. However Revenue authorities would contend that interest is payable on the amount from the date from the first day of the month succeeding the month for which such amount is determined, till the date of payment, in case of finalization of provisional assessment. Rule 7(4) creates liability to be assessed and not liability to pay.

The conceptual difference between liability to pay and liability to be assessed was explained by Constitution Bench of Supreme Court in *State of Rajasthan* v. *Ghasilal*[1]. The Act had come into force on 1-4-1955 while the rules framed thereunder were published on 28-3-1955. Ghasilal challenged the making of assessments on his turnover for the year 1955-56 on the ground that the rules were invalid. The High Court in the writ petition filed by Ghasilal made an interim order on 9-1-1958 that Ghasilal will maintain proper accounts and file the prescribed returns and the Revenue will not assess him till further orders. During the pendency of the writ petition, the rules were validated by Ordinance. Thereupon Ghasilal withdrew his writ petition. Thereafter, on receipt of notices for various periods, Ghasilal filed returns & deposited tax. The STO imposed a penalty under Section 16(1)(b) of the Act on the ground that Ghasilal had not deposited tax on the due dates. Ghasilal contended that there was no violation of Section 7(2) and so long as the tax was not assessed and determined as required under Section 10, the liability for payment of penalty did not arise. On the other hand, the Revenue contended that the liability to pay tax had arisen under Sections 3 and 5 of the Act and the delay in complying with the demand notice entailed imposition of penalty. The Supreme Court held:

"10. In our opinion, there has been no breach of s. 16(1)(b) of the Act, and consequently, the orders imposing the penalties cannot be sustained. According to the terms of s. 16(1)(b), there must be a tax due and there must be a failure to pay the tax due within the time allowed. .... Section 3, the charging section, read with s. 5, makes tax payable, i.e., creates a liability to pay the tax. That is the normal function of a charging section in a taxing statute.

[1] AIR 1965 SC 1454 = 1965 (16) STC 318 (SC)

But till the tax payable is ascertained by the assessing authority under S. 10, or by the assessee under s. 7(2), no tax can be said to be due within s. 16(1) (b) of the Act, for till then there is only a liability to be assessed to tax."

The judgement in *Ghasilal's* case was affirmed by Constitution Bench of the Supreme Court in *J.K. Synthetics Ltd.* v. *CTO*[2]. The dispute was whether the dealer was required to pay interest on the additional sales tax which had to be paid on the inclusion of the freight amount in the sale price. According to the dealer, interest could be charged for the period subsequent to the determination of sales tax under the final assessment and that too after the expiry of the period allowed under the Notice of Demand issued on finalisation of the assessment. As per Revenue, interest becomes payable from the date on which the original return was filed. The Constitution Bench held as under:

"7. … It will thus be seen that under Section 11-B before the 1979 Amendment the liability to pay interest on unpaid tax amount accrued on the dealer in two situations only, viz., (i) failure to pay the tax due under sub- sections (2) And (2-A) of Section 7 and (ii) failure to pay the tax within the time allowed by the notice of demand or 30 days from the receipt of the notice by the dealer. Section 11-B before its amendment nowhere provided for payment of interest on the unpaid tax amount as found on final assessment from the date of the filing of the return under Section 7 of the Act. If the amount of tax payable under sub-section (2) is paid on the basis of return, not on the basis of final assessment, there can be no question of payment of interest under clause (a) of Section 11-B. Similarly, if the tax is paid according to the return as required by sub-section (2-A), in other words, if the full amount of tax due 'shown' in the return is paid, there can be no question of charging interest under clause (a) of Section 11-B. …."

The Karnataka High Court in *J.K. Industries*[3] held that interest is payable even on the differential amount paid prior to finalization of provisional assessment. However the Bombay High court affirmed the decision of the CESTAT in *Ispat Industries*[4] & *Tata Motors*[5] and held that interest is not payable when the differential duty (excise) is paid before the finalization order. The High Court held the same view in *ICICI Bank Ltd*[6] as regards service tax.

2 1994 (4) SCC 276
3 2011 (268) ELT 168 (Kar)
4 2007(209) ELT 280
5 2011 (269) ELT 415 (T)
6 2015 (38) STR 907 (Bom.)

The Supreme Court dismissed, on merits, the SLP filed by the department against the judgement of the Bombay High Court in *Ceat*[2015 (317) ELT 192 (Bom.)] reversing CESTAT's order by holding that interest is not payable.With this, the controversy is settled in favour of assessee as of now.

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CENTRAL EXCISE

Circular

Revision of monetary limits for filing of appeal: Central Board of Excise & Customs has revised monetary limits below which appeal shall not be filed by the Revenue Department in the CESTAT, High Courts and the Supreme Court. According to Instruction F. No. 390/ Misc./163/2010-JC, dated 17-12-2015 such monetary limit for filing appeal to CESTAT would be Rs. 10 Lakh, while to High Court it would be Rs. 15 Lakh. Further, henceforth minimum amount involved in the dispute should be Rs. 25 Lakh for filing appeal to the Supreme Court of India.

Ratio Decidendi

No interest if differential duty paid before finalization of provisional assessment: Finding no merit in the Special Leave Petition filed against the order of the Bombay High Court in a case involving liability to pay interest when the duty was paid before finalization of provisional assessment by the Revenue Department, the Supreme Court dismissed the same. The Bombay High Court had held that the liability to pay interest does not arise unless finalisation of the assessment results in any additional or differential liability, but where differential duty was paid prior to the finalisation of the assessment, then no interest is payable. [*Commissioner* v. *CEAT Limited* - Order dated 14-12-2015 in CCNo.20219/2015, Supreme Court]

PDI and free after sales services charges when not includible in transaction value of vehicles: Pre-delivery inspection charges (PDI) and freeafter sales service charges, which are not charged by the manufacturers of vehicles from the dealers, are not to be included in the transaction value of the vehicles, on which the manufacturer has to pay excise duty. The Supreme Court hence overruled the CESTAT Larger Bench decision in the case of *Maruti Suzuki India Ltd.* while agreeing with Bombay High Court decision in the case of *Tata Motors Ltd.* It was observed that the activity was a post sale activity undertaken by the dealer and hence the same is not relevant for the purpose of excise since the goods have already been marketed. It was noted that services which are provided by the dealers were on their behalf and not on behalf of the assessees. [*Commissioner* v. *TVS Motors Company Ltd.* - Civil Appeal Nos. 5155-5156/2007, 1763-1764/2009, 7007/2011, 7550/2011, 2204/2013, 2205/2013, 957-959/2014, 7854-

7865/2014, 7444/2008 and 3768-3769/2011, decided on 15-12-2015, Supreme Court]

Manufacture – Filling of gas in cylinders, does not amount to manufacture: Filling of gas, received through pipelines, in cylinders after compressing, oil filtration and removal of moisture, would not amount to manufacture, according to CESTAT Delhi. Relying on decision in the case of *Ammonia Supply Company*, the Tribunal was of the view that filling of gas in smaller containers was not manufacture. Reliance in this regard was also placed on the decision in the case of *Shivam Industries* wherein the Tribunal was of the view the that word 'consumer' in the phrase 'adoption of any other treatment to render the product marketable to consumer' would not cover industrial user. It was noted that the gas in the instant case was supplied to vanaspati manufacturers who were industrial users. Further, noting that the gas was already marketable, the Tribunal held that the activity undertaken does not amount to manufacture. [*Goyal M.G. Gases Pvt. Ltd.* v. *Commissioner* – 2015 (325) ELT 768 (Tri. – Del.)]

Cenvat credit – Applicability of Cenvat Rule 11(3) when more than one final product manufactured: CESTAT Mumbai has held that Rule 11(3) of the Cenvat Credit Rules, 2004 is not applicable when the balance credit is utilized in clearance of other than exempted goods also manufactured by the assessee. The assessee had converted its unit from EOU to DTA, reversed the amount of appropriate duty on inputs, carried forward the credit lying in balance in books of DTA and utilized the same in clearance of parts of agricultural tractors. Revenue department's view that since the tractors were exempted, the credit would lapse, was hence rejected by the Tribunal. [*John Deere India Pvt. Ltd.* v. *Commissioner* – 2015 (326) ELT 205 (Tri. – Mumbai)]

Violation of Cenvat Rule 11(3) does not disentitle benefit of exemption notification: CESTAT Ahmedabad has held that any violation of sub-rule (3) of Rule 11 of the Cenvat Credit Rules, 2004 should invite necessary action under Rules 14 & 15 of such rules only and that the same cannot be extended to deny the benefit of Notification No. 30/2004-C.E. for that mere reason. The Tribunal in this regard held that though the assessee was supposed to expunge the balance credit on 1-3-2007 when the provisions for the same [Rule 11(3)] was introduced, but not doing so would not amount to taking of fresh credit. [*Sunflag Filaments Industries* v. *Commissioner* - Order No.A/11671-11676/2015, dated 17-11-2015, CESTAT Ahmd.]

EOU – DTA clearance to sister concern – Valuation under Rule 8: The Supreme Court has held that where the goods were cleared to sister concern in the DTA, and not sold, Rule 8 of the Central Excise Valuation Rules, 2000 would apply. The Court in this regard rejected the contention of the Revenue Department that basis of valuation had to be FOB value of export of similar goods. It was noted that duty arrived at under Section 3(1) Proviso (ii) of the Central Excise Act, 1944 was more than the duty determinable for like goods produced or manufactured in India in other

than EOUs, and that the said notification used the phrase 'allowed to be sold' and hence would be applicable in the present case also. [*Commissioner* v. *Nestle India Ltd.* – 2015 (326) ELT 226 (SC)]

Rebate claim – Limitation under Excise Section 11B not applicable: Punjab & Haryana High Court has held that provisions of limitation as prescribed under Section 11B of the Central Excise Act, 1944 would not be applicable in case of rebate claims. Noting that Notification No. 19/2004-C.E. does not prescribe any limitation as to the period within which a claim for rebate has to be made, the High Court allowed the assessee's appeal. Further, reliance in this regard was placed on Supreme Court judgment in the case of *Raghuvar (India) Ltd*. while Bombay High Court judgment in the case of *Everest Flavours Ltd.* was not agreed with by the Court. [*JSL Lifestyle Ltd*. v. *Union of India* – 2015 (326) ELT 265 (P&H)]

CUSTOMS

Ratio Decidendi

Drawback on All Industry rates can be granted even without conversion of Shipping Bill: The Supreme Court has held that the conversion of free shipping bill into drawback shipping bill may be permitted by the Commissioner under Rule 12(1)(a) of the Drawback Rules only when the exporter is able to establish that failure to claim drawback at the initial stage was on account of reasons beyond his control. However, the Court also held that by virtue of Circular No. 4/2004-Cus., dated 16-1-2004, a claim for drawback may be made without seeking conversion of the shipping bills in cases where the All Industry Rate of drawback is claimed. [*Cargill India Pvt. Ltd.* v. *Commissioner* - 2015 TIOL 263 SC]

Registration as per Customs (IGCRDMEG) Rules, 1996 procedural and can be fulfilled post-importation: CESTAT Chennai has held that the claim for exemption on imported goods under Notification No. 21/2003-Cus. (Sl. No. 3) should not be rejected on grounds that the registration was not taken prior to import, under the Customs (Import of Goods at Concession Rate of Duty for Manufacture of Excisable Goods) Rules, 1996. The Tribunal in this regard observed that such conditions are capable of being fulfilled post importation but before use of goods. [*Commissioner* v. *MedreichSterilab Ltd.* - 2015-TIOL-2228-CESTAT-MAD]

Interest on delayed refund of SAD under Notification No. 102/2007-Cus. – Customs Section 27A applicable: The Delhi High Court has held that the importer is entitled to interest on delayed refund of SAD paid under Notification No. 102/2007-Cus. The Court held that on collective reading of Section 3(8) of the Customs Tariff Act, 1975 and Sections 27 & 27A of the Customs Act, 1962, provisions of the Customs Act on refund and interest on delayed refunds would equally apply to refund of SAD levied under Customs Tariff Act. Para 4.3 of Circular No. 6/2008-Cus. stipulating

that such interest is not payable, was hence held to be *ultra vires* to Section 27A. [*Principal Commissioner of Customs* v. *Riso India Pvt. Ltd* - 2015-TIOL-2384-HC-DEL-CUS]

Limitation for issuance of show cause notice under Customs Section 110(2) - Date of seizure to be excluded: Delhi High Court has held that for computing the period of limitation under Section 110(2) of the Customs Act, to issue a show cause notice for confiscation, the date of seizure has to be excluded. The High Court relied on the case of *M/s Econ Antri Ltd.* v. *Rom Industries Ltd.* [2014 (11) SCC 769]. The Court also recorded that the extension of the period for issuance of SCN would start automatically from the expiry of the initial period unlike in case of any renewal. [*SK Trading* v. *Union of India* - 2015-TIOL-2386-HC-DEL-CUS]

Service of show cause notice effected on Customs House Clearing Agent (CHA), is no service: Delhi High Court has held that merely because a CHA has a licence, it does not empower him to act as an authorized representative for those persons who are entitled to or required to appear before an officer of customs in connection with any proceedings. It was held that in case the importer or exporter has to enlarge its authority, a specific authorization in this regard has to be issued by him in favour of the CHA. The Court noted that after the amendment in 2012 the legislature has done away with the service on agent. [*Santosh Handlooms* v. *Commissioner* – W.P.(C) 3598/2015, decided on 23-11-2015, Delhi High Court]

Oxygen Sensors classifiable as measuring or checking instruments, appliances and machines: Placing reliance on technical sources and noting that oxygen sensors are electronic devices that measure the proportion of oxygen in the gas/liquid, CESTAT Delhi has held that the goods should be classified under Heading 9031 of the Customs Tariff Act, 1975 as measuring or checking instruments, appliances and machines, not specified or included elsewhere in Chapter 90. It was held that these sensors could not be classified under Heading 9027 as the sensors are not instruments or apparatus for physical or chemical analysis, not doing any analysis and also not capable of doing so. It was observed that the goods also could not be said to be instruments and apparatus for measuring or checking viscosity, porosity, expansion surface tension, which are covered under Heading 9027. [*Denso Haryana Pvt. Ltd.* v. *Commissioner* - 2015-TIOL-2316-CESTAT-DEL]

Rice exports - Samples of Basmati rice when need not be tested: CESTAT Ahmedabad has held that under DGFT Notification No. 93(RE-2007)/2004-2009, dated 1-4-2008, all the rice categories sold as basmati rice in the commercial parlance and having the dimensions mentioned in the notification will not be covered as restricted category. It was held that consequently, an opinion of the Agmark Testing Centers is not binding on the authorities to decide the export eligibility of Basmati Rice under the said notification as long as it satisfies the description under Sl.

No. 45AA of the said notification. The Tribunal in this regard noted that no requirement of getting the samples of Basmati Rice tested from Agmark Testing Centres is prescribed under the notification, which does not define 'Basmati Rice' or stipulates that inspite of satisfying the size still the rice can be Non-Basmati Rice. [*United Exports* v. *Commissioner* - 2015-TIOL-2336-CESTAT-AHM]

EOU manufacturing cotton yarn using imported wax cannot avail benefit of Notification No.8/97-C.E.: The Supreme Court has held that an Export Oriented Undertaking manufacturing cotton yarn using imported wax cannot take benefit of Notification No.8/97-C.E.as one of the conditions for availing the benefit under the said notification is that the products that are manufactured by such EOU should have been manufactured using indigenous raw material only. The Court in this regard observed that wax is a raw material (and not a consumable) in the manufacture of cotton yarn as the wax coating which is essential for lubrication of the yarn; and is allowed to remain on the end product i.e. yarn in order to facilitate its winding on cones and its use in knitting hosiery. [*Meridian Industries Ltd.* v. *Commissioner* - 2015-TIOL-262-SC]

Titanium sheets for lining of reactor importable as capital goods under SHIS: CESTAT Chennai has held that once the licensing authorities hold certain goodsas capital goods under the EPCG license, a different stand cannot be taken by the Customs for clearance through SHIS scrip. Based on the above principle, it has been held that the titanium sheets imported under SHIS are 'capital goods' covered under the definition of 'capital goods' in Notification No. 104/2009-Cus.as well as FTP. [*SreeRayalaseema Hi-Strength Hypo Ltd* v. *Commissioner* - 2015-TIOL-2239-CESTAT-MAD]

Liquid Crystal Devices (LCDs) for use principally for LCD TV are classifiable under CTH 9013: Following the Supreme Court judgment in *Secure Meters Ltd.* [2015 (319) ELT 565 (SC)], CESTAT Delhi has held that between Heading 9013 of the Customs Tariff Act and Heading 8529, Liquid Crystal Devices (LCDs) are specifically classifiable under heading 9013 of Customs Tariff. It was noted that the description of the said heading covers LCDs by name and devotes a tariff item (90138010) exclusively therefor. [*Samsung India Electronics Pvt. Ltd.* v. *Commissioner* - 2015-TIOL-2277-CESTAT-DEL]

'Electrode Grade Calcined Petroleum Coke' eligible for exemption under Notification No.20/2006-Cus.: Petroleum crude, kerosene, LPG, petrol, diesel coal and coke are covered under Notification No.20/2006-Cus. providing for exemption from additional duty of customs leviable under Section 3(5) of the Customs Tariff Act, 1975 and hence Electrode Grade Calcined Petroleum Coke is also entitled to such exemption. CESTAT Kolkata rejected the department's contention that the exemption was applicable only to coke derived from coal. [*Graphite India Ltd* v. *Commissioner* - 2015-TIOL-2258-CESTAT-KOL]

SERVICE TAX

Ratio decidendi

Limitation for refund - Date of electronic filing of refund claim to be reckoned: The relevant date to decide on bar of limitation in respect of refundclaim was at issue before the Tribunal. The assessee filed the refund claim and later submitted the hard copy of documents. The Tribunal held, based on trade notices issued by the Department that claim could be filed online and where the application contained all requisite particulars, there was no reason to hold that the refund application had been filed only when physical copies of the documents are received by the Department. Hence, the refund claim was held as not barred by limitation. [*The Design Consortium* v. *Commissioner* - 2015 (40) S.T.R. 734 (Tri.-Del.)]

Attachment (recovery proceedings) before issue of SCN, not valid: After search operations, the Department issued notices to the debtors of the assesse directing them to deposit monies payable to the treasury of the Central Government. The petitioner-assessee urged that an amount arrived at unilaterally by the Department cannot be recovered without any issuance of show cause notice or adjudication by the department. Granting relief to the assessee, the High Court of Gujarat held that garnishee order cannot be issued even prior to demand notice and set aside the notices issued by the Department in this regard. [*Gopala Builders* v. *DGCEI*-2015 (40) S.T.R. 888 (Guj.)]

Attachment without notice and opportunity of hearing is abuse of power: Seeking explanation from the department for abuse of powers, the High Court directed the attachment to bank accounts of the petitioner to be lifted. It stated that without giving any notice or opportunity of hearing, and attaching the bank accounts before issue of notice is a gross violation of the Service Tax (Provisional Attachment of Property) Rules. [*Kunj Power Project* v. *UOI* - 2015 (40) S.T.R. 1061(All.)]

Taxi provided by radio taxi operators to customers not taxable under STGU: The Department demanded service tax from the appellant who was a radio taxi operator, under 'Supply of Tangible Goods for Use' service. The appellant had entered into agreements with various drivers for plying of taxis and the charges deposited by the drivers. It was observed that it is the drivers employed by the appellant who provide their services under the agreements to the appellant, for which they retain their charges from the money collected from the customers and pass on the remaining charges to the appellant. Thus, it was the appellant who provides the radio taxi services to the customers and uses the services of the drivers. As no services were being provided by the appellant to the drivers, the demand under supply of tangible goods for use was set aside. [*Meru Cab Company* v. *Commissioner* - 2015-TIOL-2408-CESTAT-MUM]

Activity of lottery distributors does not constitute service: Service tax cannot be levied

on activity pertaining to sale and purchase of lottery tickets. The petitioner-companies who purchased tickets from the Government of Sikkim and resold them to the public through various agents, challenged the *vires* of the levy seeking to collect service tax post 1-6-2015. The High Court of Sikkim held that the activity relating to promotion of marketing or organizing of lottery would not fall within the meaning of service as no service is being rendered to the State, there is no principal-agent relationship and no consideration was paid for the activity. Also since taxes on betting & gambling was a State subject, service tax could not be levied on the same. The Court struck down the Explanation to Section 66D of the Finance Act, 1994 which sought to expand the scope of the section by excluding the activity carried out by a lottery distributor from the Negative List. [*Future Gaming & Hotel Services P. Ltd.* v. *UOI* - 2015 (40) S.T.R. 833 (Sikkim)]

Registration under same head not a pre-requisite for claiming refund: Opining that an exporter should not be unduly burdened to prove that he is registered under Port Service, the Tribunal held that where the facts of export and services rendered are not in dispute, the debit notes produced by the exporter were adequate documents for the purpose of claiming refund. The Department contended that during the relevant period, only services provided by a port or person authorized by the port fell into the category of Port Service and the assessee had paid tax under the head BAS. However, the Tribunal took a view that since considering the practical difficulties faced by exported as evidenced by various clarification issued by the CBEC itself, the department cannot insist on the assesse being registered under Port services. [*SRF Ltd.* v. *CCE* - 2015 (40) S.T.R. 980 (Tri.-Del)]

Cenvat credit on outward freight when buyer's place is place of removal: Observing that Circular dated 20-10-2014 issued by CBEC which states that payment for transport, insurance, etc., are not relevant to decide place of removal, should be read in favour of the assessee, the Karnataka High Court has held that the assessee could take Cenvat credit of service tax paid on outward transportation of goods. The assessee argued that sale was complete only when goods were delivered to the buyer and till such time buyer had no control over the goods. The Department sought to deny credit arguing that the sale had been completed at factory gate, the assessee had not proved that it bore insurance and such considerations as to who bore transport charges were not material to decide place of removal. However, the High Court decided in favour of the assessee. [*Madras Cements Ltd* v. *Addl. CCE* - 2015 (40) S.T.R.645 (Kar.)]

Refund of Cenvat credit - Restriction of claim based on date of service when not correct: The assessee had sought refund of unutilised credit on 27-11-2007. The Department restricted the claim to 10% reasoning that the last invoice was dated 30-11-2007 and the refund should be limited to 3-day period. However, the Tribunal held that there was no such formula as per the statute which stipulated that unutilised

credit would be restricted to the ratio of export turnover to total turnover. Hence, the amount of eligible credit for the entire period should be allowed. [*Commissioner* v. *Hyundai Motor India Engineering* - 2015 (40) S.T.R. 692 (Tri.-Bang)]

VALUE ADDED TAX (VAT)

Notifications

Input Tax Credit under Haryana VAT Act – Amendments: Schedule E appended to the Haryana Value Added Tax Act, 2003, which restricts input tax credit availability, has been amended by Notification No. 27/ST-1/H.A. 6/2003/S.59/2015, dated 24-11-2015,effective from 7-9-2015. It may be noted that Schedule E was substituted by Notification dated 7-9-2015.

- As per S. No. 3(b) of Schedule E, the input tax credit for all goods except those falling under Schedule C of HVAT Act and declared goods under CST Act, shall be admissible only to the extent of the amount of VAT actually paid on the purchase of such goods in Haryana or the CST payable, whichever is lower, in case the goods purchased are sold *as such* in the course of inter-State trade or commerce.This restriction will not apply to inter-state sale of Schedule C goods and declared goods. Hence, the position with respect to such goods as it existed prior to 7th September, 2015 has been restored.
- S. No. 3(c) provides that in case any goods are sold at a price lower than the purchase price of the goods, ITC shall be admissible only to the extent of output tax liability, if any, on the sale of such goods.As regards S. No. 3(c), the entry has only been renumbered and the position remains unaltered.
- Also, the restriction on availment of ITC under S. No. 3(b) will not apply to goods used in the manufacture of goods which are sold in the course of inter-State trade or commerce, restoring the position as it existed prior to 7th September, 2015.

Mobile phones sold with accessories – Rate of VAT under UP VAT Act revised: Notification No. KA.NI.-2-1821/XI-9(104)/15-U.P.Act-5-2008-Order-(148)-2015 dated 14-12-2015, effective from 15-12-2015, has amended entry at Serial number 28 in Part-B of the Schedule-II appended to the UPVAT Act.In addition to the description "*cell phones and its parts but excluding cell phones with M.R.P. exceeding rupees ten thousands*" already mentioned in the entry, words "*accessories packed with cell phones with M.R.P. not exceeding rupees ten thousands*" have been added to the entry. After this amendment, the cell phone and its accessories (composite package) with M.R.P. uptoRs. 10,000 would become taxable at the concessional rate of tax i.e. 4% + 1% additional tax.

Ratio Decidendi

Battery and battery parts, primarily meant for motor cars eligible for rate of tax as parts of motor vehicles: Rajasthan High Court has

upheld the Order of the Tax Board finding that Sales Tax payable under the Rajasthan Sales Tax Act, 1994 on sale of battery parts would be the rate as applicable on parts of motor vehicles. The department had contended that battery and battery-plates (parts) could not be considered as parts of motor car, as they were being used for diverse purposes and not exclusively to be installed/fitted in a motor vehicle. The High Court however concurred with the decision of the Tax Board, which held that even if the battery or battery-parts could be sold for other purposes but primarily the same were meant for motorcars, the rate of sales-tax applicable would be the rate of sales-tax applicable on parts of motor vehicles. [*Assistant Commercial Tax Officer* v. *Swastik Agencies* - 2015-VIL-490-RAJ]

Rate of tax on mobile phone charger sold along with mobile phones: In this case, the petitioner, a manufacturer and seller of consumer electronics and information technology products, also packages and sells mobile phone chargers, batteries, earphones, data cables etc. alongwith mobile phones in a single package so as to make one composite box for retail sale. VAT was discharged at the rate of 5.5% as per Entry No. 60(6)(g) of Schedule B of the Punjab VAT Act. The issue before the Court was whether the battery charger was a separate item and liable to be taxed at the residuary rate of tax under the PVAT Act? The Court relied on the Apex Court judgment in the case of *Nokia India Private Limited* [2014-VIL-23-SC] and dismissed the petition of the assessee. It was held that the rate of tax on mobile battery charger would be the residuary rate of tax under the Punjab VAT Act. [*Samsung India Electronics Private Limited* v. *State of Punjab* - 2015-VIL-515-P&H]

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