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Valuation of composite goods under VAT laws

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In the case of *State of Punjab* v. *Nokia India Pvt Ltd* (2014-VIL-23-SC), the Supreme Court held that battery charger of a cell phone is not a composite part of the cell phone but only an accessory and is an independent product. Hence, battery chargers sold along with cell phones were held to be assessable at the rate of 12.5% (Schedule 'F' of Punjab Value Added Tax Act, 2005) and not at concessional rate of 4% (Entry No.60 of Schedule 'B' of Punjab Value Added Tax Act, 2005) as paid by the appellant-manufacturer on the composite package of cell phone consisting of a cell phone and a battery charger.

The assessing authority had held that the battery charger being a separate item was liable to be taxed at general rate i.e. 12.5% and not at concessional rate applicable to the cell phones irrespective of the fact whether charger is sold in a composite package along with a cellphone or it is sold separately.

Taxpayer's contention

The product was being sold as mobile/cellular phone under a single solo pack unit and was covered under Entry No.60 of Schedule 'B' of Punjab Value Added Tax Act, 2005 and no separate amount for battery charger was being claimed from the customers, and that the only amount charged was for handsets. Charger is an integral part of the cell phone and the cell phone cannot be operated without the charger.

Contention of the department

The battery chargers are not covered under Entry 60(6)(g) in Schedule 'B' of the Punjab VAT Act, 2005 and was thus liable to be taxed at the rate of 12.5% on its value under Schedule 'F' of the Act which covers all residuary items not falling in any of the classifications of other Schedules of the Act. According to the department battery charger is not a part of the mobile/cell phone since cell phone can be operated without using the battery charger and battery in the cell phone can be charged directly from the other means also, like laptop, without employing the battery charger. The department was of the view that merely, making a composite package of cell phone and a charger does not make it composite goods for the purpose of interpretation of the provisions.

Tribunal's order

The VAT Tribunal by its order dated 11th February, 2010 dismissed the appeals of taxpayer, *inter alia*, observing that the battery charger is not a part of the cell phone and that the charger shall be liable to tax at the rate of 12.5% always and shall not be classified with cell phone.

High Court's order

The Punjab & Haryana High Court by its order dated 17-11-2010 allowed the appeals holding that the battery charger is a part of the composite package of cell phone and hence

concessional rate of tax shall be applicable when sold along with cell phone. The High Court, held that *".....on the other hand, in the present case, the battery charger is sold as composite package along with cell phone. Compared to the value of the cell phone, value of the charger is insignificant. Cell phone cannot be used without the charger. On these undisputed facts, the charger cannot be excluded from the Entry for concessional rate of tax which applies to cell phones and parts thereof."*

Supreme Court's judgement

The Supreme Court set aside the order of the High Court and affirmed the order passed by VAT Tribunal. The Supreme Court, in para 19 of the order dated 17 December 2014, concluded that:

".....we find that the Assessing Authority, Appellate Authority and the Tribunal rightly held that the mobile/cell phone charger is an accessory to cell phone and is not a part of the cell phone. We further hold that the battery charger cannot be held to be a composite part of the cell phone but is an independent product which can be sold separately, without selling the cell phone. The High Court failed to appreciate the aforesaid fact and wrongly held that the battery charger is a part of the cell phone."

Issues arising out of the judgement

Stock in hand cannot be sold over and above MRP already printed on the cell phone package. Current MRP does not include VAT as governed by the principles emerging out of this judgement. Therefore the burden of differential rate of tax (in this case 12.5% less 4% = 8.5%) on value of charger on stock in hand is on the manufacturer/seller. Hence manufacturer is bearing the burden of indirect tax which should have been borne by the customer.

If manufacturer/dealer have to charge separate rate of VAT on value of charger then they have to issue a bill containing 2 items (cell phone and a charger) with different rates of VAT. But there will be issues related to bifurcation of total amount charged for composite sale into value of charger and cell phone. For example: If the cost of manufacturing a charger is Rs.100 and it is being sold to end customer separately as an accessory for Rs.500 (since accessories have higher profit margins when sold separately). Now, when this charger is packed along with cell phone and entire package is being sold for Rs.10,000 then there will be dispute whether rate of VAT on chargers is to be charged on Rs.100+Notional profit or Rs.500. State governments might start raising demands on past sales made by the manufacturers/ dealers..

An example has been set by Karnataka State government where the state government has changed the rate of VAT on "mobile phone chargers when sold along with mobile phones in sealed pack of otherwise" and has made it equal to the VAT rate on mobile phones thereby resolving the entire issue which has been welcomed by the industry. Same can be followed by other states also.

Other industries which provide composite goods or provide complimentary/add-on

products like cameras, laptops being sold with carry case and charger might also face issue in valuation consequent to this judgement. Change in packaging of goods and change in billing system (separate rates on each item of accessory sold) may have to be adopted by the industry which can cause operational difficulties for the manufacturer/dealer. It may not be possible to charge different rates on all the accessories or change the packaging in the case of products for which composite sales are made.

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CENTRAL EXCISE

Notification and Circular

Bulk export cargo exempted from sealing in packages/containers: Central Board of Excise and Customs (CBEC) has empowered Principal Chief Commissioner/ Chief Commissioner of Central Excise to grant exemption from self-sealing of bulk cargo for export on case to case basis. Notification No. 42/2001-C.E. (N.T.) has been amended by Notification No. 23/2015-C.E.(N.T.), dated 30-10-2015 in this regard. Circular No. 1011/18/2015-CX, dated 30-10-2015 issued for this purpose also prescribes various time-lines for processing of application and for grant of such permission.

Ratio Decidendi

Exemption for captive consumption when one of the final products also exempted: The Supreme Court has held that the benefit of Notification No. 67/95-C.E. is available for clinker produced and used in manufacture of cement, by an assessee operating in Himachal Pradesh and clearing cement without payment of excise duty by availing the benefit of Notification No. 50/2003-C.E. The Apex Court in this regard observed that Notification No. 67/95-C.E. states that the duty on intermediary inputs is not to be paid when the goods are cleared by a manufacturer of both dutiable and exempted final products after discharging obligation under Rule 6 of the Cenvat Credit Rules, 2004 and that the clinker qualified as input under the said notification. It was held that neither clause (vi) of the notification nor Rule 6 contain any restriction that the same final product should be partly exempt and partly dutiable. [*Ambuja Cement Ltd. v. Commissioner* - CA No. 2793/2006, decided on 21-8-2015, Supreme Court]

Refund of Cenvat credit in case of supplies to EOU: Division Bench of the Gujarat High Court has held that clearance of goods from DTA unit to a 100% EOU would qualify as exports and refund of accumulated credit is available to the DTA unit under Rule 5 of the Cenvat Credit Rules, 2004. The Department was of the view that since there is no physical export of the goods, provisions of Rule 5 will not apply. The High Court however followed its earlier decision in case of *NBM Industries Pvt. Ltd.* [2012 (276) ELT 9 (Guj.)] and held that clearance to 100% EOU should be treated as physical export for the purpose of entitlement to refund of unutilised Cenvat Credit. The period

involved in the dispute was from April 2010 to March 2011. [*Commissioner* v. *Metflow Cast Ltd.*2015-TIOL-2530-HC-AHM-CX]

SSI exemption when Cenvat credit taken on inputs utilized in branded goods manufactured on job work: The Supreme Court has held that benefit of SSI exemption notification would be available to an assessee even if it has taken Cenvat credit on inputs which were utilized in the manufacture of branded goods on job work basis. The Court in this regard distinguished the earlier order in the case of *Ramesh Foods*, observing that the fact that Cenvat credit was availed of only in respect of goods manufactured for third parties and not with respect to home brand was not brought to the notice of the Court in that case. It was held that branded goods manufactured by the SSI Units meant for third parties are regulated by the normal provisions of Excise law and will have no bearing or relevance insofar as availing the benefit of SSI exemption notifications in respect of own products manufactured by the SSI units are concerned. Benefit under Notification Nos. 8/1999-C.E., 8/2000-C.E., 8/2001-C.E., 8/2002-C.E. and 8/2003-C.E. was hence allowed by the Apex Court dismissing the appeals filed by the department. [*Commissioner* v. *Nebulae Health Care Ltd.* - 2015-TIOL-261-SC-CX]

Valuation – Differential between deferred Sales Tax payable and Net Present Value of deferred tax paid not includible in assessable value: Distinguishing Supreme Court judgements in the cases of *Super Synotex* and *Maruti Suzuki* and holding that the issue of deferred payment of sales tax was not discussed before the SC, the Mumbai Bench of CESTAT Mumbai has held that difference between amounts collected by the assessee from its customers as sales tax and the amount of Net Present Value (NPV) paid as sales tax to the Sales Tax Department, is not includible in transaction value for the purpose of Central Excise valuation. Under the deferment scheme, the assessee was allowed to collect sales tax from its customers and then pay the same to the State Govt. after some time, however the provisions were amended to provide an optional scheme for payment of sales tax so deferred, in advance on its 'NPV'. Observing that that the retention period is very long and the "value of the money changes with time", it was held that the concept of Net Present Value has to mean the value of deferred sales tax at the time of clearance. [*Commissioner* v. *Uttam Galva Steels Ltd.* – Order Nos. A/3339-3344/15-SB, dated 6-10-2015, CESTAT Mumbai]

Cenvat credit on capital goods in cases of book transfer of ownership: CESTAT Chennai has upheld the order of Commissioner allowing Cenvat credit on capital goods used in provision of telecommunication service when there was book transfer of ownership of such goods from one unit to another. The capital goods were however physically not transferred. Dismissing Revenue department's appeal, the Tribunal observed that Commissioner's decision to allow credit did not suffer from legal infirmity. [*Commissioner* v. *Bharat Sanchar Nigam Ltd.* – Final Order No. 41377/2015, dated 9-10-2015, CESTAT Chennai]

Debit in Cenvat credit a/c during period of default is not pre-deposit: CESTAT Mumbai has held that Cenvat credit debits made by the assessee during the period of default are not sufficient for the purpose of Section 35F of the Central Excise Act, 1944. The Tribunal held that Circular of CESTAT dated 28-8-2014 which equated cash payment of duty with the debits made in the Cenvat Registers, would be applicable only in normal situations where the debit through Cenvat itself is not under challenge. In the instant case the department was of the view that utilisation of Cenvat account itself was incorrect. The Tribunal distinguished its earlier order in the case of *PMT Machines* and the Gujarat High Court decision in the case of *Indian Castings*. [*Supermax Personal Care Pvt. Ltd.* v. *Commissioner* – Appeal No. E/40076/2014, CESTAT Mumbai]

Refund of Cenvat credit – Failure to debit Cenvat a/c on date of filing refund claim does not debar refund: CESTAT Mumbai has held that failure to debit Cenvat A/c on the date of filing the refund claim is not such a lapse that it would debar the assessee from claiming refund of Cenvat credit under Rule 5 of the Cenvat Credit Rules, 2004. Observing that the assessee became entitled to refund on the date the debit was eventually made, though later, the Tribunal allowed the assessee's appeal. The fact that the amount was debited prior to issuance of SCN was also considered by the Tribunal in this regard. [*Sandoz Pvt. Ltd.* v. *Commissioner* - Appeal Nos.E/85304 & 85305/15, decided on 13-8-2015, CESTAT Mumbai.]

Cenvat credit available on inputs used in maintenance/running of Sewage Treatment Plant: Cenvat credit on inputs used in maintenance or running of sewage treatment plant (STP) would be admissible. CESTAT Chennai in this regard noted that there was a requirement of the Pollution Control Board to set up the plant for effluent treatment. It was held that removal of effluent being one of the requirements for effective utilization of water for the factory through recycling process, denial of Cenvat credit for the maintenance of STP was unreasonable. It was also held that that the STP was the integral part of the factory as well as the manufacturing activity. [*DCW Ltd.* v. *Commissioner* - Final Order Nos. 41382-41384/2015, dated 7-10-2015, CESTAT Chennai]

Processing operations like punching, welding, trimming, drilling of holes, level cutting of edges, and galvanisation do not amount to manufacture: Punching, welding, trimming, drilling of holes, level cutting of edges and galvanizing, carried out on duty paid angles, beams and channels during the process of assembly of transmission towers, do not amount to manufacture. Holding so, CESTAT Mumbai in a recent order has noted that the process did not transform the subject goods into a new and different product with a distinct name, character and use. Further, though the case related to the period prior to 1-3-1988, the Tribunal was of the view that merely because specific entry was included viz. Heading 73.08, from 1-3-1988, that ipso facto does not mean that the process amounts to manufacture. [*Jyoti Structures Ltd.* v. *Commissioner* –

Appeal No. E/511/05-Mum, decided on 9-10-2015, CESTAT Mumbai]

No mala fide even when availment of excess Cenvat credit, by clerical mistake, pointed out by audit: CESTAT Bangalore has set aside penalty in case of excess availment of Cenvat credit by the assessee. Taking note of the fact that excess availment was because of clerical error on account of change of place of decimal in the credit figures, the Tribunal was of the view that mala fide cannot be attributed based on the observations of the authorities below that if not pointed out by the audit the mistake would have gone unnoticed. The Tribunal in this regard also noted that the assessee was dealing with about 4000 documents in a month and hence the mistake in respect of 2 documents throughout the year cannot be called a wilful, malafide mistake. [*Bill Forge Pvt. Ltd.* v. *Commissioner* – Final Order No. 21871/2015, dated 3-8-2015, CESTAT Bangalore]

CUSTOMS

Circulars and Public Notices

Mandatory use of digital signatures in filing Customs documents: All importers & exporters using services of Customs Brokers for formalities under Customs Act, 1962, shipping lines and airlines shall have to file customs documents mandatorily under digital signature certificates with effect from 1-1-2016. CBEC Circular No. 26/2015-Cus., dated 23-10-2015 issued in this regard also states that importers/ exporters desirous of filing Bill of Entry or Shipping Bill individually may have the option of filing declarations/ documents without using digital signature.

MEIS - Manual claims in case of inadvertent error in Shipping Bill: Exporters have to mandatorily declare their intention to claim benefit under MEIS while filing shipping bills, with effect from 1-6-2015. However, various CHAs have been inadvertently ticking on 'N' in the reward box portion while filing the shipping bills. To regularize such cases, in respect of shipping bills filed for exports made between 1-4-2015 and 31-5-2015, where declaration of intent 'Y' has not been marked and 'N' has been inadvertently ticked in the 'reward item box', the exporters shall be allowed to submit physical copies of free shipping bills after filing an electronic application to RA for MEIS rewards. According to DGFT Public Notice 40/2015-20, dated 9-10-2015, RA shall grant MEIS rewards after examination of such shipping bills in accordance with other provisions of FTP/HBP.

SEIS - Notified Period under Appendix 3D extended: The notified period for benefit of Service Export from India Scheme (SEIS) has been extended upto 31-3-2016. Earlier, the services and rates of rewards notified against them were applicable for services export made between 1-4-2015 and 30-9-2015 only. DGFT Public Notice No. 42/2015-20, dated 26-10-2015 issued in this regard amends Note 1 of Appendix 3D of the Handbook of Procedures Vol. 1 which lists notified

services and corresponding rewards under the scheme.

Valuation of second hand machinery – Guidelines issued: CBEC has issued Circular No. 25/2015-Cus., dated 15-10-2015 in supersession of its earlier Circular No. 4/2008-Cus., dated 12-2-2008 to revise its guidelines for valuation of second-hand machinery in case of imports. According to the revised guidelines, where second hand machinery is sold for export to India and the sale meets the requirement of the Customs Valuation Rules, 2007, the price paid or payable shall be the assessable value and if such machinery has been refurbished, reconditioned, etc., prior to import into India or the buyer has incurred costs on pre-shipment dismantling, inspection etc., the same must be adjusted while arriving at the transaction value. These guidelines further provide that in order to ensure fair valuation, inspection / appraisement reports must be obtained from neutral third parties and therefore it has been decided to accept such reports from Chartered Engineers in the country of sale in the format annexed (Form A) to the Circular. In other cases, an importer may engage services of inspection agencies notified by the DGFT under the HBP (Appendix 2G). Where the port of import does not have such notified inspection agencies, the importer may engage a Chartered Engineers empanelled by the custom house at the port of import.

Ratio Decidendi

Valuation – Enhancement of value when cannot be challenged: Bills of entry filed by the importer were assessed at enhanced values based on alert issued by Department of Valuation. CHA of the importer consented to such enhancement and cleared the goods after paying higher duty. Taking note of the fact that CHA is an agent of the importer and the consent given by the former will bind the latter, CESTAT Mumbai has dismissed the assessee's appeal challenging the loading of value. It was held that by consenting, the importer made it unnecessary for the Department to establish valuation any further as the consented value becomes the declared transaction value. The Tribunal in this regard also observed that valuation of goods requires physical inspection and reassessment of value was not possible in the absence of goods. [*Grand Metal Industries Pvt. Ltd.* v. *Commissioner* - 2015-TIOL-2114-CESTAT-DEL]

Importer and not financier liable to pay customs duty when notification conditions violated: Capital goods were imported by EOU under exemption Notification No. 53/97-Cus. by availing loan from a finance company, under hire purchase agreement. The importer-EOU defaulted in paying instalments to finance company and the capital goods were sold under court directions, resulting in removal of the goods from EOU. The EOU argued that the duty liability was that of the finance company on that ground that latter was the owner of the goods, bill of entry being filed on joint basis. CESTAT Mumbai however confirmed the duty liability of the EOU on the ground that it was the EOU which had executed bond with the department undertaking to abide by the conditions of the notification. The Tribunal

however upheld allowance of depreciation for the period of usage of capital goods by the EOU. [*Commissioner* v. *C T Cotton Yarn Ltd.* - 2015-TIOL-2113-CESTAT-DEL]

Valuation of exports–Allegation of overvaluation when not sustainable: CESTAT Mumbai has held that allegation of overvaluation of export goods based on market enquiry is not sustainable in view of value indicated in tax invoices issued to the exporter by local suppliers. Noting that the lower authorities had erred in ignoring the tax invoices issued by local suppliers of the exporter registered with VAT authorities, it was held that such evidence in the form of supplier's invoices cannot be summarily discarded unless there is contrary evidence to show that declared values were incorrect. It was held that market enquiry may lead to suspicion as to the incorrectness of the declared value but cannot *per se* result in rejection of declared value. It was also observed that the lower authorities were incorrect in applying Rule 6 (residual method) of Export Valuation Rules, without exhausting Rules 4 and 5. [*R Kishan and Co.* v. *Commissioner* - 2015-TIOL-2103-CESTAT-MUM]

Refund of SAD when sales tax/VAT paid at 'appropriate' NIL rate: CESTAT Delhi has allowed the appeal of the assessee seeking refund of SAD under Notification No. 102/2007-Cus. in a case where sales tax/VAT was 'nil' rated. The Tribunal in this regard relied upon CBEC Circular No. 6/2008-Cus., stating that SAD refund was available even in case the appropriate sales tax was less than SAD. The contention of the department that no sales tax/ VAT was paid on the goods was hence rejected by the Tribunal. Since appropriate sales tax/VAT being nil in the present case, the Bench did not accept that the assessee had not paid appropriate sales tax/VAT. [*Gazal Overseas* v. *Commissioner* – Final Order Nos. 53092-53096/2015, dated 2-9-2015. CESTAT Delhi]

Exemption under Notification No. 146/94-Cus. when goods imported on behalf of sports association: CESTAT Mumbai has allowed the benefit of exemption Notification No. 146/94-Cus. on goods imported on behalf of All India Tennis Association. The Tribunal in this regard noted that the invoices and the B/E stated that the goods were imported on account of the Association and that LC also indicated the Association as importer. Definition of 'importer' as provided in Customs Act, 1962 that 'importer' includes any person holding out to be the importer, was also considered by the Tribunal in this regard. [*Syncotts International* v. *Commissioner* – Appeal No. C/972/05-NZB, decided on 5-8-2015, CESTAT Mumbai]

SHIS benefit available to items imported as parts of bigger machinery: CESTAT Chennai has allowed benefit of Notification No. 104/2009-Cus. to goods (Parts), as capital goods. The contract was for supply of capital goods (Continuous Annealing Line and Continuous Galvanising Line for Cold Rolling Mill Complex) and majority of the goods were cleared under EPCG. The department's contention that goods in the present case were only individual parts consisting of nuts and bolts and hence cannot be considered as

capital goods for the purpose of SHIS, was hence rejected by the CESTAT. It was held that definition of 'capital goods' was same for EPCG and SHIS and that department cannot take a different stand in respect of SHIS. [*Commissioner* v. *JSW Steel Ltd.* – Final Order No. 41362/2015, dated 8-10-2015, CESTAT Chennai]

Blood glucose meters for use by individuals at home/ workplace – Classification and exemption: Blood glucose meters for use by individuals at home or work place are classifiable under Heading 90.27 and not under Heading 90.18 of Customs Tariff. CESTAT, Mumbai has held that the said goods would be eligible for exemption under Notification No. 24/2005-Cus. It was held that Heading 90.27 covering instruments and apparatus for chemical analysis is more specific than Heading 90.18 covering instruments used in medical, surgical, dental or veterinary sciences. It was noted that as per HSN Explanatory Notes, instruments or apparatus of Heading 90.18 are in vast majority cases used in professional practice (by doctors, surgeons, dentists, etc.), whereas the item in question is used by common people. The Tribunal in this regard also held that since essential character to the kit is given by the glucose meter, presence of test strips will not change the classification. [*Bayer Pharmaceuticals Pvt. Ltd.* v. *Commissioner* - 2015-TIOL-2159-CESTAT-MUM]

Chocolate powder – Classification of: Mama's Best Premium Chocolate Nutritional Powder is classifiable under Heading 1901 of the Customs Tariff Act, 1975, eligible for exemption under AIFTA, and not under heading 2106 as claimed by the Revenue department. CESTAT Mumbai while holding so noted that the product predominantly consisted milk and milk derivative with other minerals and cocoa powder to the extent of 2.5% by weight. Relying upon HSN explanatory notes, the Tribunal held that food preparations of goods of Heading 0401 to 0404 containing less than 5% by weight of cocoa are classifiable under Heading 1901. Heading 2106 was also ruled out on the ground that the same covered only residual products which are not classified elsewhere. [*Abbott Healthcare Pvt. Ltd.* v. *Commissioner* - 2015-TIOL-2126-CESTAT-MUM]

SERVICE TAX

Notification & Circular

Swachh Bharat Cess in force from 15-11-2015: The Central Government issued Notification No. 21/2015-ST and Notification No. 22/2015-ST notifying the effective date as 15-11-2015 for levy of Swachh Bharat Cess at the rate of 0.5% on the value of taxable services. However, by Notification Nos. 23/2015-ST, 24/2015-ST, and 25/2015-ST, all dated 12-11-2015 certain amendments have been made to provisions regarding valuation, abatement and composition schemes. Accordingly, the SB Cess shall be leviable on abated value as specified under Notification No. 26/2012-ST and Reverse Charge Mechanism shall be

applicable for the purposes of the cess *mutatis mutandis*. Also value for the the purpose of SBC shall be determined as per Section 67 of the Finance Act, 1994 read with the Service Tax (Determination of Value) Rules, 2006 and composition Schemes for Air Travel Agents, Life Insurance Services, Purchase or Sale of Foreign Currency (including Money Changing), Lottery Distributors/Selling Agents shall be available for payment of SB Cess also. The CBEC has issued FAQs clarifying certain issues relating to SB cess like indicating such cess separately in the invoice as a different line item and that Cenvat credit of SB Cess cannot be availed.

Refund claims of exporters of services – Special scheme for speedy disbursal: The CBEC has announced a scheme for fast track sanction of refund. Circular No. 187/6/2015 –ST dated 10-11-2015 issued in this regard states that the scheme is applicable to refund claims filed on or before 31-3-2015, by registrants who are exporters of services. Refunds which have been finalized by issuance of adjudication order but remanded back to the original authority will not be covered by the scheme. A provisional payment of 80% of the amount claimed as refund will be made within 5 working days, on receipt of prescribed additional documents along with the claim. If any amount is found to be inadmissible subsequently during verification or review of refund order, the authorities can issue show cause notice for the same.

Ratio decidendi

Carts not registered as motor vehicle used in cargo handling – Cenvat credit admissible: Examining whether toilet carts and water carts can be capital goods used to provide cargo handling services, the Tribunal found force in the assessee's reasoning that the carts were not registered with the motor vehicles authority and could not have been used on roads as motor vehicles. It thus held the assessee could avail Cenvat credit of duty paid on the chassis which were converted into carts. [*CST* v. *Globe Ground India P Ltd,* 2015 (40) S.T.R. 417 (Del.)]

Recovery cannot be made without adjudication of amount due as per procedure : The petitioner sought quashing of the notice for recovery issued by the department urging that the amount was disputed and it had not been determined by way of proper adjudication. The department had issued a demand cum show cause notice for an amount which included the amount sought to be recovered. The High Court held that notice for recovery cannot be issued without determination of amount after issuance of notice under Section 73 (1) or 73-A(1). It observed that a letter written by the assessee - later corrected cannot be the basis for the department to claim that liability has been accepted and recovery is to be undertaken. [*Exman Security Services P Ltd* v. *UOI*, 2015 (40) S.T.R. 463 (Jhar.)]

Service tax cannot be demanded again from recipient when service provider has paid the same by mistake: In the instant case, the appellant (service recipient) erred in not taking

notice of change in provisions during the initial period of introduction of negative list. The service provider continued to pay service tax which was later reimbursed. The department demanded service tax due from the service recipient. However, the Tribunal held that when the taxable event has happened once and service tax has been discharged, it cannot be demanded again from the recipient under reverse charge mechanism. [*Kakinada Seaports Ltd* v. *CCE, ST & Cus.*, 2015 (40) S.T.R. 509 (Tri.-Bang.)]

Cenvat credit on distribution of calendars, awards etc. admissible: Disagreeing with the department's contention that printing calendars and diaries for distribution and organising functions to give rewards for innovative marketing ideas are facilities provided to employees, the Tribunal held them to be sales promotion activity and the assessee could avail Cenvat credit on the same. [*Ultratech Cement Ltd* v. *CCE*, 2015 (40) S.T.R. 523 (Tri.- Del.)]

'Input service' need not be rendered in the factory premises: The Tribunal held that the definition of input service does not require the said service should be rendered in the factory premises of the manufacturer. In the case of the assessee, a manufacturer of CNG, the department denied credit of service tax on inspection services which were carried out outside the factory. The assessee argued that the cylinders fitted to the vehicles carrying the gas had to be certified safe and the cost of such service had been included in the final price. The department argued, without success, that the inspection services were not provided to the assessee but to the vehicle owners and the inspection took place at the Regional Transport Office and not in the factory premises. Thus, the assessee was entitled to credit of the 'input service' of inspection. [*Mahanagar Gas Ltd* v. *CCE*, 2015 (40) S.T.R. 586 (Tri.-Mumbai)]

VCES - Appealability of orders: The assessee had applied under the VCES and incorrectly declared an amount of tax due. On this fact, the department contended that there was wrongful declaration and rejected the same. Accordingly, the assessee was required to pay the tax amount due along with interest and penalty. The assessee appealed to the Commissioner (Appeals) who directed the department to accept the declaration of the assessee. It was contended by the department that the VCES does not provide any mechanism for appeal against the order rejecting the declaration and no order had been issued by the Commissioner (Appeals) and was only a communication. However, the Tribunal held that remedy by way of filing of an appeal could not be taken away from the respondent merely on the failure of the designated authority to issue show cause notice or pass an order in proper format. [*CST* v. *Bharti Lakhani*, 2015 TIOL 2163 CESTAT DEL]

Refund on exports - One to one co-relation with input services and export not required: Opining that Notification No. 41/2007-ST does not prescribe a one to one co-relation between input service and export, the Tribunal held that even if services have been availed prior to export, the assessee would be eligible for refund. The assessee argued that it did

not have any domestic sale transaction and it was not possible to establish a one to one co-relation with input services and export. [*Imcola Export Limited* v. *CST*, Final Order No. 41372 /2015, Order dated 7-10-2015, CESTAT, Chennai]

Mark up on currency conversion while using credit card – Not taxable under Credit card services: Accepting both the arguments of the assessee as regards scope of taxable service – Credit Card Services as well as territorial jurisdiction, the Tribunal held that use of card by the card holder outside India to pay in foreign exchange will not be covered under Credit Card services. It further held that the mark up earned on such transactions - since the transaction is converted into INR at a pre-determined rate including mark up - is not taxable. Thus, income attributable to currency conversion will not be exigible to service tax as Credit Card services. The Tribunal also found the argument of service having been rendered outside the taxable territory equally convincing. [*SBI Cards & Payment Services* v. *CST*, Final Order No. 53252/2015 dated 15-10-2015, CESTAT, Delhi]

Service as 'Agency bank' for sale of bonds issued by RBI – Not BOFS : The assessee was the 'agency bank' and acted as a receiving office for sale of certain bonds by the Reserve Bank of India and also maintained accounts of the same, paid out interest etc. The department contended that the service was classifiable under Banking and Other Financial Services (BOFS) rather than Business Auxiliary Services and that the assessee had provided custodial services. However the Tribunal held that in order to be taxable under BOFS, the relationship of client-custodian is essential and RBI was not a client of the assessee nor did the assessee render any custodial services to the buyers of the bond. Thus the commission earned by the assessee–bank for handling the administrative minutiae of bond issue was held as not taxable under BOFS. [*CST* v. *ICICI Bank Ltd*, Appeal No. ST/350/2011, decided on 6-8-2015, CESTAT, Mumbai]

VALUE ADDED TAX (VAT)

Notification

Goa Value Added Tax Act, 2005 – Amendments in rates of composition for developers: Notification No. 4/5/2005-Fin(R&C)(127)1243, dated 26th October, 2015, effective from 1-11-2015 has substituted Entry 5 of Schedule E appended to the Goa Value Added Tax Act, 2005. The new Entry provides the rates of composition for developers as under:

Sr. No.	Class of dealer	Limit of turnover	*Rate of composition*
(5)	Works contractor who undertakes the work of construction of flat/s, dwelling unit/s, house/s, row houses, building/s or premises and transfers them in pursuance of an agreement	9-9-2015	ADD on goods originating from China extended to goods exported from India

Sr. No.	Class of dealer	Limit of turnover	*Rate of composition*
	alongwith land or interest underlying the land, where the aggregate amount of consideration of such flat, dwelling unit, house or row house, building or premises specified in such agreement,—		
	(i) does not exceed Rs. 20 lakhs	Not applicable	Nil
	(ii) exceeds Rs. 20 lakhs but does not exceed Rs. 50 lakhs	Not applicable	0.5%
	(iii) exceeds Rs. 50 lakhs but does not exceed Rs. 100 lakhs	Not applicable	0.5%
	(iv) exceeds 100 lakhs	Not applicable	2%
(5A)	Works Contractor other than the one covered under entry (5).	100 Lakhs	3%

Ratio Decidendi

No penalty on online service provider (e-commerce portal) for non-registration under KVAT: The issue before the single judge bench of the Kerala High Court was whether the assessee, an online service provider operating an e-commerce portal, had violated the provisions of Kerala Value Added Tax Act, 2003 ("KVAT Act") by not taking registration as a dealer and not filing returns and maintaining books of accounts under the KVAT Act. The Court observed that the orders of penalty did not indicate the reasons as to why it considered the assessee as a dealer under KVAT Act. Relying on the well settled principle that notices issued by statutory authorities, more so when they propose to impose penalty, cannot predetermine the guilt of the assessee, the Court quashed the order of penalty against the assessee.

It was noted that the authorities had paid no consideration to the fact that the sales were inter-state in nature, effected by individual sellers who were registered on the assessee's portal and on such sales, CST liability was duly discharged. The Court further observed that a major seller on the assessee's portal was registered as a dealer under KVAT Act and had in their returns reflected NIL taxable turnover as their entire sales turnover pertained to inter-State sales, which was accepted by the authorities. It was held that hence the authorities could not levy tax or impose penalty on the assessee in respect of the same turnover. [*Flipkart Internet Private Limited* v. *State of Kerala* - WP(C) No. 5348 of 2015 (P), decided on 20-10-2015, Kerala High Court]

Supply of de-mineralized water when covered under works contract: The petitioner had entered into agreements with its customers for manufacture and supply of medicinal and pharmaceutical injections based on the formula supplied by the customers. All the required raw materials, inputs, labels and packing material were supplied free of cost by the customers to the petitioner, except the input demineralized water. The issue before the High Court was whether water for injection/ de-mineralized water attracts tax under the Karnataka Value Added Tax Act, 2003 ('Kar. VAT Act') and whether the contract was for service only or a composite divisible contract attracting levy of tax on sale of goods under the Kar. VAT Act.

The Court on a reading of the above Entry 54 of the First Schedule appended to the Kar. VAT Act held that the water for injection appeared to be de-mineralized water used for medicinal preparation and therefore, it would be excluded from Entry 54 and would be taxable under the Kar. VAT Act. As far as the second question is concerned, the Court observed that if all the materials are supplied by the customer/ principal with the formula to manufacture the injections as per their requirements and the petitioner is engaged in the manufacture of such formulized products using only the goods supplied by the customer/principal it would be a contract for labour. On the other hand, if any goods is required to be supplied by the petitioner in the course of manufacture of formulized products, i.e., injection, there is a deemed sale of such goods attracting levy of tax. On the basis of aforesaid reasoning the Court held that the contract executed by the petitioner for supply of water for injection/ de-mineralized water which is an input for the manufacture of injection is a composite works contract involving transfer of property in goods as well as labour and service. It was held that the State is empowered to bifurcate the contract and levy sales tax on the value of goods involved in the execution of the works contract and therefore the goods portion of the contract executed by the petitioner would attract VAT under the Kar. VAT Act. [*Hicure Pharmaceuticals Private Limited v. Deputy Commissioner of Commercial Taxes* - 2015-VIL-453-KAR]

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