Lakshmikumaran & Sridharan tax

TAX amicus

October 2015 / Issue – 52

An e-newsletter from
Lakshmikumaran & Sridharan, India

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October
2015

Article

Does GST continue with distortions of existing tax structure?

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Besides being a source of funding of public expenditure, taxes also enable influencing expenditure patterns thereby distorting individual behavior. Indirect taxes distort expenditures primarily by affecting the price of consumption goods. In India, the existing indirect tax system has become extremely distortionary with its plethora of exemptions and exceptions, and the cascading effect, which favour some goods and services at the expense of others. Consequently, rather than being driven by own needs and preferences, the consumer preferences tend to be driven more by the decisions made in the Ministry of Finance. Thus the distortions yield inefficient resource allocation and in economic terms, come at the price of inferior Gross Domestic Product (GDP) growth.

So the primary question before the policy maker is: how to shift to non-distortionary consumption taxes which enable increase production efficiencies and enhance international competitiveness of Indian goods and services? The Goods and Services Tax (GST) is being proposed as *the* answer to this question.

As regards the industry, the indirect taxes are taken as a pass-through in their hands and hence perhaps are not given the due attention they may deserve by the industry. But the actual reality is quite different.

It may not be possible to shift the entire burden of indirect taxes to final consumers due to say competition from the grey market or other market forces. There is also the cascading effect whenever there is a break in the input tax credit chain. For example, the inter-State purchases are liable for payment of the Central Sales Tax which is not eligible to be taken as input tax credit. Similarly, Cenvat credit of the excise duty paid on inputs is disallowed where a service provider is undertaking a works contract. Further, there are several location/ area-based or end-use based tax incentives and exemptions which also significantly influence supply chains and business decisions.

An ideal GST should be in the nature of a destination-based consumption VAT on all goods and services with no exemptions or exceptions. The question is whether the proposed GST conforms to this ideal or not? To answer this, let us take a look at some features of the proposed GST.

Proposed GST in India

- The proposed GST will be on all 'supplies' of goods and services. The term 'supply' has not been defined as such, but is expected to include both sale and consignment transactions. Though the tax paid on stock transfers would be eligible to be taken as input credit by the recipient, if we take into account the higher GST rate, there could be an impact on the working capital and financial costs incurred depending on the

working capital cycle.

- 'Services' has been defined as anything other than goods and hence goods and services together, at least at the definitional level, constitute everything! However, alcoholic liquor for human consumption is proposed to be kept out of GST. During the initial years, five specified petroleum products will also remain out of the GST net.
- The levy will subsume multiple existing levies such as central excise duty, service tax, cesses and surcharges levied by the Central Government, and the sales tax/ value added tax, purchase tax, entry tax, entertainment tax, etc. as well as the cesses and surcharges levied the State Governments.
- The levy will be dual with separate GST levies by the Centre and also by each of the States. The Central levy will be called the Central GST ('CGST') and the State levy will be called the State GST ('SGST'). The inter-State supplies will attract Integrated GST ('IGST') to be levied by the Centre. This will mean that the compliance requirements for taking and utilization of input credit of SGST and IGST will need to be watched for.
- A temporary levy in the form of a 1% additional origin-based tax is also proposed on inter-State supplies for consideration. This tax is not eligible to be taken as input credit and hence will have a cascading effect.

Rate variations and exemptions

- The Constitutional Amendment allows for the Goods and Services Tax Council (GSTC) to recommend the rates including floor rates and *bands* for the GST. Already there is a discussion on having at least two rates – one lower normal rate and a higher rate for demerit goods such as tobacco and luxury items. GSTC will also recommend on the goods and services which may be subjected to or exempt from GST. Special provisions may apply with respect to 11 specified States.

Place of supply

- GST credit chain will follow the underlying documentation whereas the supply chain will flow with the use/consumption of the goods or services. Input credit availability would require that the GST chain should closely follow and integrate with the supply chain. Otherwise there will be loss of credit and the consequent cascading effect. The Place of Supply Rules which are still being finalized will be crucial in this aspect.

Distortions in GST

Read together, it would appear that the policy elites do not want to give up any of the complications or discretions of the existing indirect tax structure and would like to carry them forward into the GST as well. The 1% additional tax adds to the complexity with some cascading effect as well. The GST will also have multiple levies, multiple rates, exemptions

and exceptions and special dispensation for certain States. Thus the regime of area-based and end-use based exemptions and exceptions may not exactly be over as such, but would only require a more difficult and much more elaborate political process before they can come through.

So the transition into GST may not be as smooth for the industry as is generally made out to be by some tax experts and in certain media presentations. Hence there may also be a case for the industry to take stock of where they stand now vis-à-vis what could be in store for them once the GST is implemented.

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CENTRAL EXCISE

Ratio Decidendi

Rebate on exports – Both inputs and final products are entitled for rebate: The Supreme Court has held that exporters are entitled to both the rebates, i.e. rebate on inputs as well as rebate on final products exported, under Rule 18 of the Central Excise Rules, 2002 and that the benefit will not be restricted to only one kind of rebate. The Court in this regard held that the word 'OR' occurring in Rule 18 cannot be given literal interpretation and hence should be read as 'AND' as intended by the rule maker to carry out the objectives of Rule 18 and also to bring it at par with Rule 19. Historical perspective of the statutory scheme, scheme of the Rules, and Government's own perception were also considered by the Court in this regard. [*Spentex Industries Ltd.* v. *Commissioner* - Civil Appeal Nos.1978 of 2007, 2025-2026/2013, 2027/2013 and 10534/2013, decided on 9-10-2015, Supreme Court]

Printing of logo on wrapping paper amounts to manufacture: The Supreme Court has held that the process of printing of logo of company on GI paper roll as per the specifications and designs provided by the customer amounts to manufacture. The Court in this regard observed that printing of specific design and logo on the GI paper makes a positive change in the end use of the GI paper and the same after such printing can only be used for wrapping a particular product. Allowing the departmental appeal, the Court was of the view that the end-use had positively changed, transforming general wrapping paper to special wrapping paper. Earlier decision in the case of *Servo-Med Industries* was relied by the Court in this regard. [*Commissioner* v. *Fitrite Packers* - 2015-TIOL-235-SC-CX]

Shrink sleeves classifiable under Chapter 39 when printing thereon only incidental : The Supreme Court has held that shrink sleeves will remain classified under Chapter 39 of Central Excise Tariff when printing on shrink sleeves was only incidental as the main purpose of the product was to provide tamper protection to the product – enhancing shatter and puncture resistance and providing tamper proof packing. The Court hence dismissed the departmental appeal seeking classification as product of

printing industry under Chapter 49 of the Central Excise Tariff. The assessee had classified the product as of plastic industry under Chapter 39. [*Commissioner* v. *Paper Products Ltd.* - 2015-TIOL-230-SC-CX]

Valuation - MRP declared on combo-pack of shampoo and face wash gel to be considered: The Supreme Court has upheld the CESTAT Order concerning valuation in a case where face wash gel was supplied free with the shampoo and a single MRP was mentioned on the shampoo pack. Department's appeal contending that the value of face wash gel had to be separately included in the MRP to arrive at the assessable value was rejected by the Apex Court. The Court was of the view that considering Section 4A(2) of the Central Excise Act, 1944 along with *Explanation* thereto it was clear that the MRP mentioned is to be the sole consideration in arriving at the transaction value at which the excise duty is payable. Duty discharged by the assessee on the MRP declared on the combo-pack was hence held to be correct. [*Commissioner* v. *Himalaya Drug Company* - 2015-VIL-97-SC-CE]

Valuation – Freight charges till buyer's premises not includible: The Supreme Court has held merely by virtue of a transit insurance policy in the name of the manufacturer, Central Excise duty is not liable to be recovered on freight charges incurred for transportation of goods from the factory gate to the buyer's premises, treating the buyer's premises as the place of removal. The Court in this regard observed that with effect from the Amendment Act of 1996, the place of removal has reference only to places from which the manufacturer is to sell the goods manufactured by him, and can in no circumstances, have reference to the place of delivery. It was held that that for the period from 28-9-1996 up to 1-7-2000, the place of removal has reference only to places from which goods are to be sold by the manufacturer, and has no reference to the place of delivery, and that for the period from 1-7-2000 to 31-3-2003 there was no extended place of removal, the factory premises or the warehouse alone being places of removal. Earlier decision in the case of *Escorts JCB Ltd.* was relied upon by the Court. [*Commissioner* v. *Ispat Industries Ltd.* - 2015-TIOL-238-SC-CX]

Conversion of Guar Dal powder/flour to Guar Gum amounts to manufacture: The Larger Bench of CESTAT has held that conversion of Guar Dal powder/flour to Guar Gum by addition of Tamrind Kernel Powder, methanol and glycol to increase the viscosity of the resultant product, amounts to manufacture, since the resultant product has new commercial identity, character and use. Further, the three Member Larger Bench of the Tribunal was of the view that since a chemical process is involved in conversion of Guar Dal powder/flour to Guar Gum, the resultant Guar Gum is correctly classifiable under Heading 1301 and not Heading 1101 of the Central Excise Tariff Act, 1985. [*Krap Chem. P. Ltd.* v. *Commissioner* - 2015-VIL-547-CESTAT-AHM-CE-LB]

Modvat Credit not deniable when duty paid character of inputs not doubted: Division Bench of the Allahabad High Court has

held that job-workers had rightly availed Modvat credit on the strength of the invoices endorsed by the principal manufacturers. The Department was of the view that the credit was not available, since the invoices were not marked by the original manufacturer of the inputs. The Court however held that Rule 57G of the Central Excise Rules, 1944 was only procedural in nature and the credit cannot be denied when the invoices contain the details relating to payment of duty, assessable value, name and address of the factory, etc. [*Uni Cast Pvt. Ltd.* v. *Commissioner* - 2015-VIL-432-ALH-CE]

Cenvat credit not deniable for wrong mention of name in B/E: CESTAT Delhi has held that mere wrong mention of name of assessee in the Bill of Entry does not disentitle Cenvat credit to such assessee. The Tribunal in this regard took note of the fact that payment for capital goods was made by the assessee and the goods were physically available in their premises. [*Oriental Carbon & Chemical Ltd.* v. *Commissioner* - Final Order No. 52699-52700/2015-ST(SM), dated 27-8-2015, CESTAT Delhi]

Cenvat credit on rejected goods when only parts retrieved from them used in final product: CESTAT Kolkata has held that Cenvat credit on rejected PSC sleepers is available even if only wires and inserts retrieved after breaking them were used in manufacture of the final product (Pig iron). The duty demand was confirmed on the ground that since the rejected PSC Sleepers as a whole were not used in or in relation to the manufacture of their finished products, Cenvat credit was not admissible. The Tribunal however noted that there was no allegation or finding that the wires and inserts retrieved/extracted out of breaking of such rejected PSC Sleepers, had not been used in or in relation to the manufacture of final product and that the same were cleared without payment of duty. [*Partha Ispat (India) Pvt. Ltd.* v. *Commissioner* - Order No. FO/A/75499/2015, dated 11-9-2015]

CUSTOMS

Circular

Refund of Safeguard duty as Drawback in case of exports: Central Board of Excise and Customs (CBEC) has clarified that Safeguard duty is rebatable as Drawback in terms of Section 75 of the Customs Act, 1962. Circular No. 23/2015-Cus., dated 29-9-2015 issued for this purpose states that since Safeguard Duties are not taken into consideration while fixing All Industry Rates of drawback, the drawback of such duties can be claimed under Brand Rate provisions as provided under Rule 6 or Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995. It is however noted that, in order to get such benefit, goods (which suffered Safeguard duty) should actually be used in the manufacture of the goods exported. It has also been stated that similarly, drawback will also be available under Section 74 of Customs Act when such duty paid goods are re-exported as such.

Ratio Decidendi

Customs duty not payable on goods lost after unloading but before clearance: The Supreme Court has held that Customs duty is payable on the quantity received in India and not the quantity exported from another country. The Court in this regard observed that goods are said to be imported into India when they are brought into India from a place outside India. It was held that unless goods are brought into India, the act of importation which triggers the levy does not take place, and hence if the goods are pilfered after they are unloaded or lost or destroyed at any time before clearance for home consumption or deposited in a warehouse, the importer is not liable to pay the duty levied on such goods. According to the Court, whether customs duty is applicable at specific rate or is *ad valorem* does not make any difference. [*Mangalore Refinery and Petrochemicals Ltd.* v. *Commissioner* - 2015-TIOL-199-SC-CUS]

CVD exemption where exemption notification stipulates condition: Relying on the judgment of the Supreme Court in *SRF Ltd.*, the Tribunal held that an importer is entitled to exemption from payment of CVD under Notification No. 30/2004-C.E. where the proviso to the notification stipulated a condition that the exemption would not be applicable if Cenvat credit of duty on inputs or capital goods has been taken. The Revenue department in this case had relied upon another Apex Court decision in the case of *Motiram Tolaram* and had contended that the decision in the case of *SRF Ltd.* was in direct conflict with the said decision. [*Commissioner* v. *Enterprises International Ltd.* - 2015-TIOL-1887-CESTAT-MAD]

Analysers for enzymes, drug levels and biochemical investigations classifiable as "Auto Analysers": The Supreme Court has held that analyzers that use photometry principle and in which the actual analysis is done automatically, even if a part of the operations is to be performed manually, will be classified as "Auto Analysers" under sub-heading 9030.89 of the Customs Tariff. Allowing the appeal of the assessee, the Court was of the view that the finding of the Commissioner was important in that the model BTS 370 which mixed both samples automatically and did the analysis automatically, was found by the customs authorities to fit the description of auto analyser. [*Dr. Reddy's Laboratories* v. *Commissioner* - 2015-TIOL-197-SC-CUS]

CD containing software – Classification of: CESTAT Mumbai has held that CD containing designs and drawings is classifiable under Tariff Item 8523 80 20 of the Customs Tariff Act, 1975. The Tribunal in this regard noted that the data contained in it could be manipulated using AUTOCAD software. It was also held that drawing in a "soft" form which enables a user to view cross section when used in conjunction with AUTOCAD software is information technology software. Reliance was placed on the Supplementary Note to Chapter 85 of the Customs Tariff. [*ABG Shipyard Ltd.* v. *Commissioner* - 2015-TIOL-1924-CESTAT-MUM]

Project imports – Assessment to be completed in 6 months from receipt of documents: Bombay High Court has held that under the Project Import Regulations, 1986, once the required documents are submitted by the importer, then the departmental authorities are under an obligation to complete the assessment in six months. The Court in this regard asked the departmental authorities not to encash the bank guarantees or to ask for renewal of same as the assessment was not completed within six months in the absence of any exceptional circumstances. The Court placed reliance on Circular No. 22/2011-Cus. [*West Coast Paper Mills Ltd.* v. *Deputy Commissioner of Customs* – 2015-TIOL-2064-HC-Mum]

Valuation – Carnet value is not assessable value under Section 14: ATA Carnet value does not constitute assessable value under Section 14 of the Customs Act, 1962 according to CESTAT Mumbai. It held that Carnet value is the commercial value of goods in the domestic market of country of export, and that according to Rule 8(2)(iii) of the Customs Valuation Rules on residual method of determining the value, value is not to be determined on the basis of price of the goods in the domestic market of country of exportation. The fact that the relationship between the buyer and the seller had not influenced the price, as determined by the SVB Order, was also taken into consideration by the Tribunal. [*Daimler Chrysler India Pvt. Ltd.* v. *Commissioner* - Appeal No. C/1206/2004-Mum., decided on 11-9-2015, CESTAT Mumbai]

Appeal against provisional release – Jurisdiction: Delhi High Court has held that appeal against provisional clearance of goods can be filed before Commissioner (Appeals). The Court in this regard noted that the order in relation to provisional clearance falls within the description of "order or decision" as in Section 128 of the Customs Act, 1962. Writ Petition filed on the mistaken belief that there is no remedy under Customs Act was therefore not entertained and the petitioner was directed to file appeal before the appropriate authority. [*Gurdeep Kaur* v. *Commissioner* - W.P.(C) 4152/2015, decided on 17-9-2015]

Interestingly, CESTAT Delhi has asked the President CESTAT to constitute a 5 Member Larger Bench to consider the question as to whether order of provisional release passed by the Commissioner under Section 110A of the Customs Act, 1962 is appealable under Section 129A before the Appellate Tribunal. The Division Bench of the Tribunal did not agree with the decision of the Larger Bench in the case of *Akanksha Syntax Pvt. Ltd.*, which had held that appeal against such order was not maintainable before the Tribunal. The Division Bench in this regard was of the view that any person aggrieved by decision or order passed by the Commissioner of Customs as an adjudicating authority may appeal to the Tribunal. [*Gaurav Pharma Ltd.* v. *Commissioner* - 2015-TIOL-1994-CESTAT-DEL]

Appeal against provisional attachment when maintainable: CESTAT Mumbai has held that appeal to CESTAT filed before expiry

of 6 month period from date of provisional attachment, is maintainable. The Tribunal however also held that the appeal would become infructuous after expiry of such period since such attachment ceases to be effective after 6 months according to the provisions of the Customs Act, 1962. The order impugned before the Tribunal, attaching the properties provisionally, was found to be non-operative in this regard. [*Ronak Gems Pvt. Ltd.* v. *Commissioner* - Appeal No. C/89472/2014, dated 5-8-2015, CESTAT Mumbai]

No penalty when duty not payable by virtue of exemption notification: Madras High Court has held that no penalty under Section 112(a)(ii) of the Customs Act, 1962 is imposable if the goods in question are not dutiable by virtue of exemption notification. Tribunal's decision setting aside the penalty while relying on the Supreme Court Order in the case of *Associated Cement Companies Ltd.*, was hence upheld by the High Court. [Commissioner v. Jay Ar Enterprises - 2015-TIOL-2241-HC-MAD-CUS]

SERVICE TAX

Notification & Circular

Money changing service – Exemption for past period: Service tax is not required to be paid on service provided by an Indian Bank or other entity acting as an agent to the MTSO in relation to remittance of foreign currency from outside India to India, during the period from 1-7-2012 to 13-10-2014. Notification No. 19/2015 S.T, dated 14-10-2015 has been issued in this regard under Section 11C of Central Excise Act, 1944, as also applicable to matters in service tax. Though by way of Circular No.180/06/2014-ST, it had been clarified that the services were taxable, as per general practice, service tax was not being paid on the said services.

GTA service – Clarification on composite services: CBEC has clarified by way of Circular No. 186/5/2015-ST, dated 5-10-2015 that if ancillary services are provided in course of transportation of goods by road and the charges for such services (which may be provided by other persons) are included in the invoice issued by the GTA, the abatement of 70% will be available on it. Thus, a single composite service need not be broken down to its constituent individual services like packing, unpacking, loading, etc. as they are means for successful provision of principal service.

Ratio decidendi

Mandatory pre-deposit – Amendment is not retrospective: Examining the assessee's petition on filing of stay application without deposit of 7.5% of tax amount confirmed, the Madras High Court opined that the right of appeal accrues from the day the assessee files the return based on which the proceedings are initiated. Thus, since the impugned *lis* had commenced prior to 6-8-2014 the condition of mandatory pre-deposit would not apply to him. The Court observed that the amended provisions had not been given retrospective effect and directed the petitioner (assessee)

to file the stay application without making the pre-deposit of 7.5%. [*Fifth Avenue Sourcing P Ltd* v. *CST* - 2015 (40) S.T.R. 71 (Mad.)]

Taxable value of services when expenses incurred outside India: The dispute revolved around the valuation of services rendered by an advertising agency which undertook advertisement campaigns for Ministry of Tourism. The department contended that service tax should have been paid on media costs incurred by the assessee in respect of bill boards, hoardings and conveyance for print and electronic media and outdoor hoardings put up in London, New York and Paris. Placing reliance on *Cox and Kings* [2014 (35) STR 817 (Tri-Del)], the Tribunal held that said costs / charges were incurred beyond the territorial waters of India and the same is not includible in the taxable value of services. [*Grey Worldwide (India) Pvt Ltd*. v. *CST* -2015-TIOL-2057-CESTAT-MUM]

Entrance fee collected by club when not taxable: The Tribunal has held that the entrance fee collected by a club or association like the appellant is for inclusion into the restricted group that constitutes membership of the club or association and such entrance fees do not usually confer access to services, facilities or advantages for which membership of the club or association is sought and therefore, a provision of service is not perceptible as a *quid pro quo* for payment of entrance fees. Consequently, such entrance fee is not liable to service tax under club or association service. However, if the access to services, facilities or advantages offered by the club or association is solely dependent on the entrance fee, then the liability to service tax may arise. [*The Cricket Club of India Ltd.* v. *CST* - 2015-TIOL-2062-CESTAT-MUM]

Cenvat credit admissible on marine insurance premium paid upto foreign destination: CESTAT, Chennai has upheld that the admissibility of Cenvat credit in respect of marine insurance availed in case of exports, from factory gate till the goods reach abroad. The department denied credit of service tax on the ground that insurance was not integral to export. However, the Tribunal did not find force and set aside the order denying credit. [*Alstom T & D Ltd*. v. *Commissioner* - Final Order No. 41262/2015 dated 22-9-2015, CESTAT Chennai].

Service recipient can file refund claim before jurisdictional Commissioner: Observing that a recipient of a service which is not taxable is entitled to file a claim for refund before the Commissionerate under whose jurisdiction it pursues its taxable activities, the Tribunal granted relief to the assessee. The assessee who had availed industrial construction services in respect of a bridge sought refund of the service tax paid but the department refused to entertain the claim citing lack of jurisdiction both at the place of the service provider as well as the service recipient. [*Jindal Steel & Power Ltd* v. *Commissioner* - Final Order No. A/52675/2015 –SM [BR], dated 20-8-2015, CESTAT Delhi]

Cenvat credit on lease rental and construction services when admissible: The department contended that the assessee could not take

credit of service tax paid on lease rental of land on which factory was set up and on civil construction services used on setting up the factory. It argued that the services related to immovable property and the term 'directly or indirectly' and 'in or in relation to manufacture' cannot be stretched to cover such services. However, the High Court held that land and factory are required for manufacture of the product and the impugned services qualified as input services. Thus, the assessee could take Cenvat credit of service tax paid on the services used during the relevant period. [*Commissioner* v. *Bellsonica Auto Components* - 2015 (40) S.T.R. 41 (P & H)]

Exemption to stem cell banks is not retrospective: The petitioner submitted that it provided services related to health care which were exempt prior to 1-7-2012 and later stem cell banks were specifically covered by the amendment (with effect from 17-2-2014) to mega exemption Notification No.25/2012 S.T. The petitioner advanced a view that the amendment to notification exempting services provided by cord blood banks was clarificatory in nature and to be given retrospective effect and that the department must be prohibited from collecting service tax for services provided for the period from 1-7-2012 to 16-2-2014. However, the High Court opined that where retrospective application had not been specifically provided in the statute, the Court could not construe the same retrospectively. The wording of the amendment did not indicate it was clarificatory and it was to be construed as having effect prospectively. [*Life Cell International* v. *Union of India* - 2015 (40) S.T.R. 77 (Mad.)]

Manufacture of products covered by State Excise, not exigible to service tax: The assessee – a job worker manufactured medicines containing alcohol. The department sought to collect service tax under the head BAS reasoning that the product is non-excisable since it is manufactured using alcohol and is not covered under the Central Excise Tariff Act and also that the activity does not amount to manufacture. Negating this, the Tribunal held that the goods manufactured as per Drugs and Cosmetics Act, were exigible to excise duty by the State. Thus, it was concluded that the activity undertaken by the assessee amounted to manufacture and was not exigible to service tax. [*Mistair Health & Hygiene P. Ltd* v. *Commissioner* - 2015 (40) S.T.R. 148 (Tri.- Mumbai)]

Remittance converted to INR as per RBI guidelines is receipt in foreign exchange: The department argued that the assessee had not fulfilled the condition for export of services namely receipt of consideration in convertible foreign exchange. This was because the remittance in the overseas bank in foreign exchange was converted into INR and sent to the branch in India, complying with RBI regulations issued in this regard. The Tribunal held that this cannot be deemed to be non-satisfaction of the condition and as such the remittance can be said to have been received in convertible foreign exchange. [*Mount Kellet Management (I) P. Ltd.* v. *Commissioner* - 2015 (40) S.T.R. 165 (Tri.- Mumbai)]

Services received at windmills located away from factory – Cenvat credit admissible: Installation and erection, repair and maintenance service received at windmills located away from the factory are eligible input services for the purpose of Cenvat credit. Following the ratio laid down by the High Court of Bombay in *Endurance Technology* [2011 (273) E.L.T. 248 (Bom.)], the Larger Bench of CESTAT, Ahmedabad held that assessee could take Cenvat credit of service tax paid on these services. The department argued that the electricity generated by the windmills was non-excisable and was transferred to the grid before it was supplied to the assessee. However, this argument did not find favour with the Tribunal. [*Parry Engg. & Electronics P. Ltd* v. *Commissioner* - 2015 (40) S.T.R. 243 (Tri.- LB)]

Tax paid erroneously cannot be automatically adjusted against another head without formal demand: Holding against the department's submission that service tax erroneously paid under Manpower Recruitment service need not be refunded and the same should be adjusted towards service tax due under Cargo Handling service, the Tribunal accepted that contention of the assessee that refund of tax paid shall be allowed. The assessee assailed the order of the department rejecting its refund claim. The Tribunal agreed that tax cannot be collected without the authority of law and as no demand had been made under Cargo Handling services, the department could not hold on to the tax which was not due to it. [*Sharam Sewa Associates* v. *Commissioner* - 2015 (40) S.T.R. 377 (Tri. –Del.)]

VALUE ADDED TAX (VAT)

Notifications

Haryana VAT Rules amended: Rule 49-A of the Haryana Value Added Tax Rules, 2003 which provides for Lumpsum Scheme in respect of Developers has been substituted by Haryana Value Added Tax (Third Amendment) Rules, 2015 (Notification No.23/H.A.6/2003/S.60/2015 dated 24-9-2015), with effect from 1-4-2014. In addition to the provisions as contained in the earlier Rule 49-A, the following provisions have been added:

1) In case any goods used in the execution of works contract by the composition developer are procured or purchased from dealers other than the registered dealers from within the State or outside the State, the composition developer shall be liable to pay an amount equal to the amount of tax that would have been payable, had the goods been purchased within the State from a registered dealer.

2) The composition developer shall be entitled to purchase or receive goods, from any place outside the State including imports from out of India, against prescribed declaration forms (i.e. Form C or Form F) to be used in the execution of the contract during the period for which the composition remains in force under this Scheme. However, the composition developer shall pay tax at the rate of 4% on

the purchase price of the goods purchased or received and the same would not be adjustable against his composition tax liability.

3) The composition developer cannot purchase goods within Haryana at the concessional rate of tax against Form VAT-D1.

4) A developer may opt for payment of tax under this Scheme by submitting an application in Form VAT-CD1 within 60 days of the issue of this notification.

5) A registered developer can also exercise such option from the beginning of a financial year by submitting the application within 30 days of the commencement of the financial year concerned.

6) A composition developer who has opted for lump sum payment of tax under the lump sum scheme notified on the 12th August, 2014 shall be deemed to have opted for lump sum payment of tax under this scheme. In case the tax deposited under the scheme earlier notified is more than the tax liability calculated under this Scheme, the excess tax shall be adjusted against the future tax liability but no adjustment on account of such excess tax shall be allowed if the composition developer opts out of the Scheme.

7) A composition developer shall furnish a quarterly return in Form VAT R-13 and also submit proof of payment of tax along with the return.

Delhi VAT Act amended: Form T-2 for providing information to the Department in respect of goods purchased or received as stock transfer or received on consignment agreement basis from outside Delhi by the registered dealers of Delhi has been replaced by a new and simplified online form - Delhi Sugam-2 ("DS2"), by Notification No. F.7(433)/Policy-II/VAT/2012/PF/703-712, dated 10-9-2015. The details of Invoices and Goods Receipt (GR) Notes in respect of all goods purchased or received as stock transfer or received on consignment agreement basis from outside Delhi are to be submitted online, in the new Form, by all the registered dealers in Delhi before physical entry of the goods in Delhi. The said change is effective from 15-9-2015.

Ratio Decidendi

Software implementation – No VAT but service tax payable: Karnataka High Court has answered in negative the question as to whether the activity of implementation of software/customized software involves a deemed sale as contemplated under Article 366(29A) of the Constitution of India. The Court observed that implementation means the customized software is integrated into several other systems so that the client can start using the licensed software. It was held that in the process, there is no transfer of any goods or right to use any goods, and what is rendered is service and therefore, the said consideration paid as service charges is not subjected to VAT but subjected to service tax. The Court noted that the assessee had paid VAT for the customized software, thereafter no VAT is attracted in respect of the consideration

meant or implementation. The Court noted that software implementation is included in the definition of taxable service under the Finance Act, 1994 and hence the State legislature has no power to levy VAT treating it as involving transfer of property in goods or otherwise. It was noted that Section 66E provides for 'declared services' where one such declaration at clause (d), stated 'development, design, programming, customization, adaptation, upgradation, enhancement, implementation of information technology software' as declared service. [*Infosys Limited* v. *Deputy Commissioner of Commercial Taxe* - 2015-VIL-394-Kar]

Software implementation not liable to VAT: Karnataka High Court in another case has also held that Enterprises Resource Planning (ERP) software implementation services undertaken by the assessee, cannot be treated as a deemed sale. The assessee in the case recommended suitable ERP software to the customer after conducting a business process review. The customer then purchased the ERP software from the relevant vendor based on such recommendation and the assessee helped in implementing the ERP into the existing system of the customer. The High Court in this regard observed that the implementation of the ERP software is performed by the assessee's personnel along with the employees of the customer. In the process the experts will take all necessary steps to provide functional data for the installation of the ERP software and it becomes useful for them. It was noted that code writing in the ERP implementation activity did not lead to the creation of a marketable commodity, which could be sold separately and that the ownership of the software vested with the customer at all times. The Court held that there is no transfer of any goods involved in this activity and that since the entire consideration received for providing services to the client had been subjected to service tax, no portion of the consideration received could be attributed to sale of the software. [*State of Karnataka* v. *IBM India Pvt. Ltd.* - 2015-VIL-431-KAR]

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