Lakshmikumaran & Sridharan tax

TAX amicus

September 2015 / Issue – 51

An e-newsletter from
Lakshmikumaran & Sridharan, India

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September
2015

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The Rule 6 conundrum – Whether 'Total' Cenvat credit to be considered for reversal formula?

By **Nalin Bajaj**

Brief background

An assessee who is a manufacturer of dutiable goods or provider of output service or both invariably receives a number of services on which he pays service tax and is eligible to take credit of the same in terms of Rule 3(1) of Cenvat Credit Rules, 2004. However, such input services may also be used in the manufacture of exempted goods or provision of exempted services in which case the assessee is subjected to the rigors of Rule 6 of Cenvat Credit Rules, 2004.

Rule 6(1) of Cenvat Credit Rules, 2004 provides a bar on availment of credit on those inputs and input services which are used for manufacturing exempt goods or for providing exempt services. Rule 6(2) of Cenvat Credit Rules, 2004 provides a mechanism whereby the assessee can maintain separate accounts for services used in the manufacture of dutiable goods as well of exempted goods and services used in the provision of taxable and exempted services and take credit of only those inputs and input services which are exclusively used in the manufacture of dutiable goods or for provision of taxable services. Rule 6(3) of the Cenvat Credit Rules, 2004 provides for proportionate reversal of credit in case the assessee opts not to maintain separate accounts in terms of Rule 6(2) of Cenvat Credit Rules, 2004.

Rule 6(3) broadly gives the assessee 2 options for reversing Cenvat credit of service tax paid on input services. First option is to pay 6% of the value of exempted goods or exempted services. Second option is to pay an amount determined as per the formula prescribed under Rule 6(3A).

The dispute aka bone of contention

It is practically impossible to maintain separate accounts for input services like security, house-keeping, legal, advertisement, audit, sales promotion, etc., which are essential for the business of the assessee and in respect of which the Cenvat credit is often substantial. Let us assume that the assessee has opted to go for second option under Rule 6(3) and wants to reverse Cenvat credit as per the formula prescribed under Rule 6(3A).

The reversal formula under Rule 6(3A) stipulates that *'total'* CENVAT credit taken on input services during the month should be considered. The department has been taking a view that since Rule 6(3A) uses the word 'total' Cenvat credit, the entire Cenvat credit taken by the assessee should be considered for the purpose of reversal. In other words, even the Cenvat credit of services which are exclusively used in the manufacture of dutiable goods or provision of taxable services should be considered in the reversal formula thereby leading to a far more reversal of Cenvat credit.

On the other hand, the assessee have been taking a view that the reversal formula would apply to only common input services for which separate accounts cannot be maintained.

Whose interpretation is correct?

Unfortunately, there seems to be no clear cut answer to this question till date. Even the Chennai and Mumbai Benches of CESTAT seem to be having a difference of opinion on the issue. In *Sify Technologies Ltd.* v. *CCE & ST, LTU, Chennai* [2014-TIOL-958-CESTAT-MAD], the Chennai Bench of CESTAT while deciding the stay application appeared to agree with the contention of the assessee and accordingly waived the demand of pre-deposit on the ground that the assessee was maintaining separate accounts for taxable and exempted services and in respect of common services, the assessee was reversing proportionate Cenvat credit.

However, in *Thyssenkrupp Industries (I) Pvt. Ltd.* v. *CCE* [2014-TIOL-1825-CESTAT-MUM], the Mumbai Bench of CESTAT *prima facie* did not agree with the submission of the assessee and refused to grant an unconditional stay. The Tribunal took a prima facie view that since Rule 6(3A) uses the words 'Total' Cenvat credit, there is no reason to assume that the reversal would apply to only common input services.

At this point, it is worth noting that Rule 6(2) and Rule 6(3) are only machinery provisions which seek to achieve the overall objective of Rule 6(1) that no credit should be taken in respect of inputs and input services which are used in the manufacture of exempted goods or provision of exempted services. Further, Explanation II to Rule 6(3) of the Cenvat Credit Rules, 2004 provides that no Cenvat credit shall be allowed in respect of those input services which are used exclusively for manufacture of exempted goods or provision or exempted services. This explanation thus provides that no credit shall be admissible in respect of inputs or input services used exclusively for manufacturing exempted goods or for providing exempted services.

As a necessary corollary, it must imply that that Cenvat credit of service tax paid on input services exclusively used for taxable services should be allowed in full. In other words, in cases where inputs or input services are exclusively used in the manufacture of dutiable goods or for providing taxable output services, the restriction under Rule 6(1) itself would not be attracted and hence there shall be no requirement to apply the formula under Rule 6(3A) for such input services.

The above interpretation would be in line with the overall objective of Rule 6 that no Cenvat credit of input services used in the manufacture of exempted goods or provision of exempted services should be taken. However, if the department's contention is upheld, the assessee will have to face difficulty and may well have to forego such Cenvat credit of common input services so as to avoid unnecessary litigation with the department and also losing the otherwise full Cenvat credit of input services which are exclusively used for dutiable goods or taxable services.

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CENTRAL EXCISE

Ratio Decidendi

Valuation - Cash Discounts deductible from price: The Supreme Court has held that cash discounts are admissible as deductions to arrive at the assessable value of goods. Earlier, the Tribunal had disallowed such deduction on the ground that it was not passed on to buyers. The Supreme Court held that the basis of "transaction value" is the agreed contractual price and allowed such deduction after considering its earlier decisions in *Bombay Tyre International Ltd.* and *Madras Rubber Factory Ltd.* wherein it was held that discounts allowed in a particular trade (by whatever name such discount is described) will be allowed to be deducted if the allowance and the nature of the discount is known to the buyer at or prior to the time of removal. The Apex Court also held that the term 'sold' appearing in the definition of 'Transaction Value' does not refer to time of sale, but is meant to indicate that goods are the subject matter of an agreement of sale. The court noted that the ratio of these rulings will remain valid under the amended Section 4 also. [*Purolator India Ltd.* v. *Commissioner* - C.A. No. 1959 of 2006, decided on 25-8-2015, Supreme Court]

Vaseline Intensive Care Heel Guard is medicament and not skin preparation: Vaseline Intensive Care Heel Guard is to be classified as a medicament under Chapter 30 and not a preparation for skin under Chapter 33 of the Central Excise Tariff. The Supreme Court in this regard took support from number of its earlier judgments holding relevance of essential character, common or commercial parlance, registration with Drug Controller, functional utility and predominant or primary usage of the commodity, for the purpose of classification. It was also held that importance is to be given to the pharmaceutical properties imparted by the active ingredient and not to its percentage in the total content. The classification under sub-heading 3001.10 as ordered by the Tribunal was upheld by the Court observing that the product contained salicylic acid which imparted medicinal properties. It was also noted that onus was on the Department to show that it is not medicament, and that the department had not discharged the same. [*Commissioner* v. *Hindustan Lever* - C.A. No. 1941 of 2006, decided on 25-8-2015, Supreme Court]

Excise duty not leviable on fly ash but applicable on fly ash bricks: Madras High Court has held that Central Excise duty is not payable on clearance of fly ash, which is produced due to burning of coal for generation of electricity in thermal power stations. The High Court held that excise duty cannot be levied on any goods, only for the reason that the same have been mentioned in the First Schedule to the Central Excise Tariff Act, 1985. Relying on the decision of the Supreme Court in case of *Ahmedabad Electricity Corporation Limited*, which had held that 'cinder' which is unburnt part of coal, is not exigible to excise duty since no manufacturing process was involved to produce the same, the Court held that fly ash which is nothing but fully burnt coal did not satisfy the test of

being manufactured. Further, it was held that the benefit of Notification No. 89/95-C.E., granting exemption to waste, parings and scrap arising in the course of manufacture of exempted goods shall be available for fly ash, since electricity being chargeable to nil rate of duty is an exempted good. However, it was held that duty shall be leviable on clearance of fly ash bricks, since the same are produced when the raw material i.e. fly ash undergoes a change due to operation performed on it and the commodity is recognised as a new and distinct article. [*Mettur Thermal Power Station* v. *CBEC* - 2015-TIOL-1948-HC-MAD-CX]

Valuation, additional consideration - Invalidation of Advance Licence by buyers: The Supreme Court has held that invalidation of Advance License by the buyers, so that the seller may obtain Advance Intermediate License and claim Duty Drawback, amounts to flow of 'additional consideration' from the buyer to the seller. The Court followed its decision in the case of *IFGL Refractories Ltd.* and held that the invalidation of advance licence made it possible for the assessee to claim benefits. Further, it was held that transfer of right to procure duty free imported raw material to assessee by the buyer indicated flow of additional consideration from the buyer to the seller i.e. assessee. [*Commissioner* v. *Indorama Synthetics (I) Ltd.* – Civil Appeal No. 1834/2006, decided on 21-8-2015, Supreme Court]

Windmill doors are part of wind operated electricity generators: The Supreme Court of India has held that windmill doors and electrical boxes are components and/or parts of wind operated electricity generators. Benefit of Notification No. 6/2002-C.E. (List 5, Item No. 13), listing "Wind operated electricity generators, their components and parts thereof", was hence held as admissible to the assessee. The Apex Court noting that door is a safety device used as security for high voltage equipments fitted inside the tower, preventing unauthorised access and preventing entries of reptiles, insects, etc., inside the tower held that such doors are to be considered as part of electricity generator. The Apex Court was of the view that since the tower is part of the generator, door thereof has to be necessarily a part of the generator. [*Commissioner* v. *Hyundai Unitech Electrical Transmission Ltd.* – C.A. 5821/2013, decided on 13-8-2015, Supreme Court]

Nizral Shampoo is a patent and proprietary medicine: The Supreme Court has held that Nizral shampoo containing anti-fungal chemical named 'Ketoconazole' by 2% w/v is a 'patent and proprietary medicine' falling under Heading 3003.10 of the Central Excise Tariff. The Court held that the said shampoo was sold by chemists under prescription issued by certified medical practitioners and the warning contained on the label of the product stated that the product was to be used for short period of time. Further, it was also held that the medical literature showed that diseases such as 'Dandruff' can be cured by the shampoo. The Court followed the decision of *BPL Pharmaceuticals* wherein 'Selsun' hair lotion capable of preventing dandruff was held to be

classifiable as medicine and not as preparation for use on hair. [*Commissioner* v. *Sarvotham Care Ltd.* - 2015 (322) ELT 575 (SC)]

Valuation, discount for transit loss – Benefit, once debit note issued: CESTAT Mumbai has held that discount of 2% given to the wholesale dealers on account of transit loss, is not includible in the wholesale price of the goods. Observing that the discount was sales margin, uniformly provided to all dealers, and while retail price remained same throughout India, the change in the wholesale price was due to the change in sales tax or octroi rates, the Tribunal was of the view that the discount would not be included in the wholesale price. It was also observed that merely because some debit notes were issued, entire sale cannot be weighed in the same manner. The Tribunal however rejected the benefit in respect of sales where debit notes were issued though no amount was recovered from the buyers. It was, in this regard, held that that once a debit note is issued, it is not merely symbolic but the amount becomes legally recoverable from the other person. [*Gits Foods Products Pvt. Ltd.* v. *Commissioner* – CESTAT Mumbai Order dated 27-4-2015 in Appeal No. E/354/05]

No penalty for suo-motu credit of interest on delayed refund of pre-deposit: CESTAT Delhi has set aside penalty imposed for utilisation of credit of interest on delayed refund of pre-deposit, which was taken suo-motu. The Tribunal in this regard observed that there was no mens rea to take such suo-motu credit. The department in the case had denied such suo-motu credit, however after initiation of the proceedings in this regard interest was sanctioned to the assessee. It was observed that suo-motu credit of interest taken by the appellant thus stood corrected with no demand pending against assessee. [*Steel Authority of India Ltd.* v. *Commissioner* - Final Order No. 52383/2015, dated 14-7-2015]

Refund of excess reversed Cenvat credit: CESTAT Delhi has allowed assessee's appeal in a case involving refund of Cenvat credit reversed in excess earlier. Assessee in this case used inputs for job work as well as for own production, and due to a calculation error reversed in excess, Cenvat credit on inputs used in job work. Suo-motu re-credit was taken and on direction of department a refund claim was filed which was rejected for not following the prescribed procedure. The Tribunal however allowed the refund/re-credit of excess credit observing that for excess reversal of Cenvat credit, only the account books/statutory records are the documents to be verified by the authorities below. [*Jay Bharat Maruti Ltd.* v. *Commissioner* - Final Order No. 52367/2015, dated 29-7-2015]

CUSTOMS

Notifications, Circulars & Notices

Procedure for import of metallic waste and scrap: By Public Notice No. 62/2015-Customs dated 27-8-2015, the Commissioner of Customs at the Jawaharlal Nehru Customs House (JNCH) has directed that import of metallic waste and scrap at JNCH will only be allowed if the importer furnishes a Pre-Shipment Inspection

Certificate as per format in Appendix 2H of the Handbook of Procedures 2015-20 (HBP) from any of the Inspection & Certification agencies given in Appendix-2G of HBP along with the other documents as mentioned of Para 2.54 of HBP.

In relation to the categories of processed metallic scrap mentioned in Para (f) of the DGFT Public Notice No. 23/2015-20, dated 30-6-2015, the Commissioner mandates that:

a) Importer shall have to get Post Shipment Inspection Certificate before customs clearance from any of the authorized agencies listed in Appendix 2G of the HBP;

b) Importer shall have to submit the documents as prescribed in Paras 2(a) & 2(c) of the DGFT Public Notice No.23/2015-20 dated 30.06.2015;

c) The Importer shall have to submit a one time Bank Guarantee for Rs.10,00,000 (Rupees Ten Lakh) in the format prescribed; and

d) The importer shall have to ensure that the containers are scanned by the Customs Container Scanning Division at the port.

This procedure for processed metallic strip will be applicable till the time the Radiological Detection Facility at the Jawaharlal Nehru Port is made functional.

Ratio Decidendi

Redemption fine not imposable when goods not available for confiscation: CESTAT Mumbai has held that redemption fine cannot be imposed when goods are not available for confiscation. The dispute involved classification of goods and since the goods were not available for confiscation, redemption fine was imposed by the Commissioner. [*New Drug and Chemical Co. v. Commissioner* - 2015-TIOL-1765-CESTAT-MUM]

Territorial restrictions on import for welfare of people, valid: Notifications issued by the Central Government under Section 5 read with Section 3 of the FTDR Act prohibiting import of palm oil through all ports of Kerala were challenged on the grounds of being discriminatory, irrational and unreasonable and also beyond the powers of the Central Government. The Supreme Court has however held that notifications issued keeping in mind the welfare of the farmers of a State withstand the test of intelligible differentia having a rational nexus with the objective sought to be achieved. It was further held that the ambit of Section 3 of the FTDR Act is wide enough to empower the Central Government to issue notifications prohibiting, restricting or regulating imports through specific ports. The Court in this regard observed that once it is found that there is sufficient material for taking a particular policy decision, bringing it within the four corners of Article 14 of the Constitution, power of judicial review would not extend to determine the correctness of such a policy decision. [*Parisons Agrotech Private Limited v. Union of India* - 2015-TIOL-189-SC-Cus]

STP unit – Sharing of assets: CESTAT's Circuit Bench at Hyderabad has held that while a holding company may have effective control over a subsidiary, such control does not amount to ownership of the holding company over the subsidiaries, which is the condition for sharing

of assets under Notification No. 52/2003-Cus. (Condition No. 12). It was also held that since the sharing of the assets constitutes the contravention of the condition in said notification, which has triggered the liability to duty, it is appropriate that the appellant's liability to customs duty must be calculated from the date of commencement of sharing of the assets. [*Microsoft India (R & D) Pvt. Ltd.* v. *Commissioner* - 2015-TIOL-1786-CESTAT-HYD]

Refund - Unjust enrichment not applicable for security deposits: CESTAT Chennai has held that the bar of unjust enrichment under Section 27 of the Customs Act is not applicable for security deposits and the appellants are eligible for refund thereof. The case involved payment of security deposit when capital goods were imported under Project Import Regulations. The Court in this regard relied upon Madras High Court Order in the case of *Cable Corporation of India Ltd.* [*Commissioner* v. *Pioneer Power Corporation Ltd.* - 2015-TIOL-1793-CESTAT-MAD]

Customs Authority bound by report of Agmark Testing Centres on export eligibility of basmati rice: Delhi High Court has held that once there is a report of the Agmark Testing Centres in terms of Circular No. 33(RE-2008)/2004-2009, dated 30-9-2008 stating that the samples were not having the physical characteristics of basmati rice or did not conform to the requirements of Basmati Rice (Export) Grading and Marketing Rules, 1979, the Customs Authority was bound by such report. The High Court also held that it was not sufficient that the sample conforms to the requirements of length and length/breadth ratio as per Notification No.55 (RE-2008)/2004-09. [*Commissioner* v. *Orion Enterprises* - 2015-TIOL-1991-HC-DEL-CUS]

Suspension of Customs Brokers licence – Appeal to be filed before CESTAT: The High Court has held that where an alternate remedy lies by way of filing an appeal before CESTAT, a writ shall not normally be entertained against an order by the Commissioner under the Customs Brokers Licensing Regulations, 2013, unless the impugned orders are contrary to principles of natural justice or if the acts/ actions of the statutory authorities are beyond or in excess of their jurisdiction. [*DVR Freight Forwarders Pvt. Ltd.* v. *Commissioner* - 2015-TIOL-1930-HC-MAD-CUS]

SERVICE TAX

Ratio Decidendi

Refund claim for a particular quarter need not be necessarily in respect of input services consumed in that quarter : The refund claim of a 100% EOU was rejected by the department under Notification No. 5/2006-ST on the ground that the same did not pertain to the period when exports were made. The exporter had received renting of immovable property service in 2008-09 and claimed refund of input service tax in the quarter April 2011 to June 2011. As per the department, Para 4 of the said notification permitted refund of input service tax only when the same pertained to exports made in the relevant period. Disagreeing

with the department, the Tribunal held that Circular No.120/01/2010-ST, dated 19-1-2010 provided that the refund claim for a particular quarter need not be in respect of input services consumed in that quarter and hence, the refund was to be granted. [*Ionnor Solutions* v. *Commissioner* - 2015-TIOL-1691-CESTAT-DEL]

Services provided by an issuing bank to an acquiring bank not covered under BOFS : The issue for consideration before the Larger Bench of CESTAT was whether the activities undertaken by a banking company, a financial institution, a non-banking financial company or any other body corporate or a commercial concern, towards settlement of payments to an acquiring bank and a merchant establishment ('ME'), in relation to transactions carried out at such ME, constitute credit card services, under 'Banking and Other Financial Services' ('BOFS') for the period from 16-7-2001 to 30-4-2006. Also at issue was, whether the interchange fee earned by an issuing bank from the acquiring bank is subject to the levy of service tax under BOFS.

The scope of BOFS included services provided to a customer. The Tribunal held that in the course of a credit card transaction, various customary relationships are established and the same cannot be limited to relationships emerging due to opening of a bank account. The term 'customer' has to be understood in the light of the transaction. The Tribunal opined that as per statutory provisions, amendments, and circulars BOFS did not seek to include services provided by an issuing bank to an acquiring bank within its ambit. The phrase 'in relation to' has to be interpreted to include only those activities which have a direct and proximate relationship with banking operations. Accordingly, a relationship between an acquiring bank and issuing bank would not fall under BOFS. [*Standard Chartered Bank* v. *CST,* 2015-TIOL-1713-CESTAT-DEL-LB]

Refund claim for service tax paid when not due – Limitation not applicable: The department denied refund of service tax paid by the assessee (petitioner) on certain payments received which qualified as export of services, stating that the claim was barred by limitation. Observing that the payment had been made by mistake and was not relatable to service tax, the High Court held that when service tax is not payable in law, the department had no right to retain the amount. Further, the law relating to limitation in respect of refund, was also not applicable. The High Court directed the department to sanction the refund claimed by the assessee-petitioner. [*Geojit BNP Paribas Financial Services Ltd.* v. *Commissioner* - 2015 (39) S.T.R. 706 (Ker)]

Removal of inputs as such – GTA credit need not be reversed: Granting relief to the assessee the Tribunal held that the assessee is not required to reverse Cenvat credit of service tax availed on GTA service when inputs are cleared as such. The Tribunal also held that the decision in *Lacto Cometics (Vapi) P. Ltd.* v. *Commissioner* [2013 (30) S.T.R.107 (Tri. Ahmd.)] was *per incuriam*. [*Dadu Pipes P. Ltd.* v. *Commissioner* - 2015 (39) S.T.R. 874 (Tri.-Del.)]

Dismantling of plant and shifting to new premises – Cenvat credit admissible: Examining the admissibility of Cenvat credit on service availed by the assessee but invoices being raised in the name of previous address, the Tribunal held that since the services had been used by the assessee, credit was not to be denied. As regards the issue of credit of services availed to dismantle plant and machinery and shifting them to the new premises, the Tribunal held that it was an integral part of the assessee's activity and that credit was to be allowed. [*Paradise Plastics Enterprises Ltd.* v. *Commissioner* - 2015 (39) S.T.R. 889 (Tri.-Del.)]

VALUE ADDED TAX (VAT)

Notifications

Uttar Pradesh VAT Act – Amendments: By Notification No. KA.NI.-2-1309/XI-9(1)/2014-U.P.Act-5-2008-Order-(138)-2015, dated 3-9-2015, issued under Section 3-A of the Uttar Pradesh Value Added Tax Act, 2008 (UPVAT Act), the additional tax on goods covered under Schedule–V (residuary) of the UPVAT Act has been increased from 1.5% to 2%. Thus, the applicable rate of VAT on sale of goods covered under Schedule V of the UPVAT Act has been increased from 14%, i.e. (12.5%+1.5%) to 14.5%, i.e. (12.5%+2%) with effect from 4th September, 2015.

Haryana VAT Act, 2003 – Amendments: By Notification No. 22/ST-1/H.A. 6/2003/S.59/2015, dated 7-9-2015, issued under the Haryana Value Added Tax Act, 2003 (HVAT Act), Schedule E appended to the HVAT Act, which provides for goods and circumstances where input tax credit on such goods is not allowed, has been substituted. S. No. 3(b) of the new Schedule E provides that input tax credit shall be admissible only to the extent of the amount of VAT actually paid on the purchase of goods in Haryana or the CST payable on the sale of such goods under the Central Sales Tax Act, 1956, whichever is lower, in case the goods purchased are either sold as such or used in the manufacture of goods and the manufactured goods are sold in the course of inter-State trade or commerce. Further, in case the goods are sold at a price lower than the purchase price of the goods, input tax credit shall be admissible only to the extent of output tax liability, if any, on sale of such goods.

Ratio Decidendi

Digital still image video cameras whether information technology product: The question before the Court was regarding the applicable rate of VAT on the sale of digital still image video cameras (DSCs) under the Delhi Value Added Tax Act, 2004 (DVAT Act) and whether the same qualified as information technology products for the period from 1-4-2005 to 7-8-2005 ('Period A') and 30-11-2005 to 31-12-2007 ('Period B'). For 'Period A', Entry 41 of the Third Schedule of the DVAT Act covered *"IT products including computers, telephone and parts thereof, teleprinter and wireless equipments and parts thereof"*. Entry 41A,

inter alia, covered *"IT products notified by the Ministry of IT as specified….(vii) Transmission apparatus other than apparatus for radio or T.V. broadcasting".*

The assessee contended that since the expression 'IT product' in Entry 41 of the Third Schedule has not been defined under the DVAT Act, the list of IT products under the Information Technology Agreement (ITA) of the World Trade Organization to which India is a signatory which includes DSCs under Tariff Heading 8525 40 may be relied upon. However, the Court held that the term 'IT product' has been described to include computers, peripherals, etc., but not DSCs which are distinct species as is apparent from Entry 8525 40 listed in the ITA, and that the same were included in the DVAT Act with effect from 30th November, 2005. Thus, for period from 1-4-2005 to 7-8-2005, the DSCs were held to be unclassified items, chargeable to tax at the rate of 12.5% under the DVAT Act.

For 'Period B', Entry 41A was amended (with effect from 30-11-2005) to cover *'Transmission apparatus (other than apparatus for radio broadcasting or TV broadcasting, transmission apparatus incorporating reception apparatus, digital still image video cameras)'* against tariff heading 8525. The question before the Court was whether the said entry which contained two brackets, an opening bracket before the words 'other than' and closing brackets after the word 'cameras', excluded DSCs from the scope of the said entry. The Court noted that DSCs cannot be construed to be a sub-species of 'transmission apparatus' as it refers to something which is capable of receiving the transmission signals. Accordingly, DSCs were held to be covered under S. No. 15 of Entry 41-A of the Third Schedule to the DVAT Act and chargeable to tax at the rate of 4% for Period from 30-11-2005 to 31-12-2007. [*Sony India Private Limited* v. *Commissioner of Trade and Taxes* - 2015-VIL-318-Del]

Input Tax Credit when discounts received from sellers subsequently: The question before the Court was that whether the appellants were required to reverse input tax credit claimed on purchases made by them on account of credit note issued by the selling dealers, despite the selling dealers having confirmed that they have not reduced their output tax liability. The contention of the Department was that in terms of Section 10(1) read with Section 51(a) of the Delhi Value Added Tax Act, 2004 ('DVAT Act') the purchasing dealer was required to reverse ITC after accounting for discounts/incentives received from the selling dealers. The assessee however was of the view that reversal of ITC would be lawful only if the selling dealer had adjusted his output tax and had issued a credit note disclosing the tax amount separately.

Noting that Section 10(5) of the DVAT Act introduced for the first time an obligation on the buying dealer to reduce the ITC in proportion to the differences in the price at which he had purchased the goods and the price at which the dealer sold the goods, if the price at which the goods sold by the buying dealer was lower than the price at which he had purchased the goods, the court held that the provision cannot be presumed to be retrospective. The Court did

not accept that the selling dealer was obliged to issue a credit note under Section 51(a) as it would always be open for the selling dealer not to avail this benefit, which was the only consequence of not following Section 51(a). It was noted that the selling dealers in this case had not claimed any reduction in output tax liability and that unless credit and debit notes are issued under Section 51 of the Act, the tax reflected in the tax invoice would continue to stand. Consequently, it was held that there was no obligation on the buying dealer to resort to the procedure under Section 10(1) of the DVAT Act i.e. no reversal of ITC is required. [*Challenger Computer Limited* v. *Commissioner of Trade and Taxes, Delhi* - 2015-VIL-346-Del]

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