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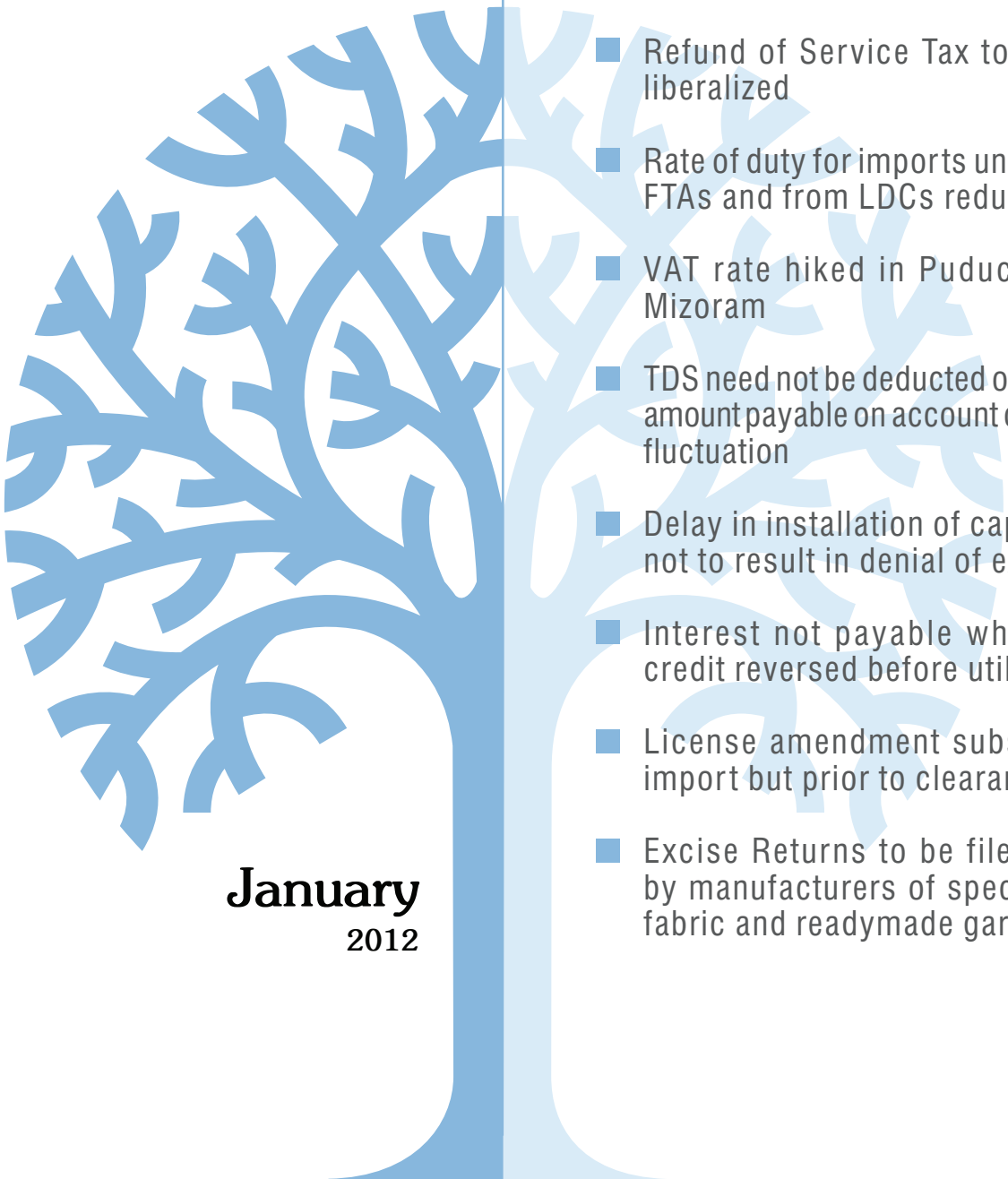

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Punitive charges

By **Gayatri Sridharan**

"Statute law is the will of the legislature; and the object of all judicial interpretation of it is to determine what intention is either expressly or by implication conveyed by the language used , so far as necessary for the purpose of determining whether a particular case or state of facts which is presented to the interpreter fall within it." - These were the opening words of the first edition of P.B. Maxwell's great work, the *Interpretation of Statutes* in 1875. These words were dropped from the subsequent editions. Maxwell was reminding us of the monumental role played by the judiciary in shaping our laws very much in keeping with the democratic tradition.

One subject which has received considerable judicial interpretation is damages or penalty. Breach of law is not a normal incident of business and courts have time and again wrestled with the dichotomy in interpretation of the word 'penalty'. The expression 'punitive' implies involving or inflicting punishment. It is intended to punish a defendant for his or her conduct to provide a deterrent to the future commission of such acts as distinguished from compensatory charges the primary function of which is to put the injured party as far as possible in the position in which he would have been had the contract been performed as intended.

Punitive or exemplary damages are awarded against the defendant as a punishment so that the assessment goes beyond the mere compensation of the claimant. These are over and above such sums as will compensate a person for his actual loss. In addition damages may be liquidated or unliquidated. The term *liquidated damages* apply to situations where the damages have been fixed by contract or statute. *Unliquidated damages* on the other hand include damages which are at large and are left to the courts to determine. A single contract may give rise to both liquidated and unliquidated damages. The parties to a contract may fix a sum as liquidated damages in the event of one specific breach, and leave the claimant to sue for unliquidated damages in the ordinary way if other types of breach occur.

Section 37 of the Income Tax Act, 1961 allows, in computing the income charged under 'profits and gains of business or profession', any expenditure not being personal or capital in nature provided it is laid out 'wholly and exclusively' for the purposes of the business. 'Penalty' as we all know could be the natural concomitant of a breach of law or a breach of contract. While the latter is deemed to be an incident of business being compensatory in nature, the former is not and consequently, any expense on account of the former will not be eligible for a deduction from the profits of business.

The view of the Supreme Court in the case of *M/s Haji Aziz & Abdul Shakoor Bros.* reported in 41 ITR 350 was that no expense which is paid by way of penalty for breach of the law can be said to be an amount wholly and exclusively laid for the purpose of the business. A distinction was sought to be drawn by the appellants between a liability in *personam* and a liability *in rem* by averring that a confiscation of goods is a proceeding *in rem* because an option is given to the owner of the goods to pay in lieu of confiscation such fine as the officer thinks fit for the enforcement of the levy of and safeguarding the recovery of the sea customs duties, and therefore ought to be treated as revenue expenditure only. This argument was rejected by the Apex Court as not sustainable.

> **"Punitive charges – Damages, interest or penalty, are allowed as deduction if they are compensatory in nature."**

In the case of *Prakash Cotton Mills Pvt. Ltd. v. Commissioner of Income Tax* -[1993] 201 ITR 68, however, the Supreme Court, in agreement with its earlier decision in the case of *Mahalakshmi Sugar Mills Co.* reported in [1980] 123 ITR429 and the decision of the Andhra Pradesh High Court in *Hyderabad Allwyn Metal Works Ltd.* reported in [1988] 172 ITR 113, held that whenever any statutory impost paid by an assessee by way of damages or penalty or interest is claimed as an allowable expenditure under Section 37(1) of the Income-tax Act, the assessing authority is required to examine the scheme of the provisions of the relevant statute providing for payment of such impost notwithstanding the nomenclature of the impost as given by the statute, to find whether it is compensatory or penal in nature. If the impost be of compensatory nature the assessing authority has to allow deduction under Section 37(1) and, where the impost is found to be of composite nature, the authorities are bound to bifurcate the two components and give relief to the compensatory component of the impost.

In a recent decision *[ACIT v. Taurian Iron & Steel Co. Pvt. Ltd.* - ITA 1613/Mum/2010] the Mumbai Bench of the Income Tax Appellate Tribunal had an occasion to examine the issue of punitive charges levied by the Indian Railways for overloading of iron ore by the assessee and, by applying the aforesaid decisions of the Apex Court, held that the punitive charges so levied were compensatory in nature and thus entitled to deduction under Section 37(1) of the Income-tax Act. The Tribunal noted that the Railways permitted overloading and relied on the earlier decision of the Nagpur Bench of the Tribunal in *Western Coalfields Ltd. v. ACIT* in ITA Nos. 289 & 290 /Nag/2006 for AY 2002-03 & 2003-04 and ITA no. 261/Nag/2008 for AY 2003-04 dated 30-6-2009 in an identical case where it held that it was not in dispute that the quantity treated as overloaded was unloaded by the railways nor was it a case of violation of safety rules/norms, hence, the overloading charges could only be compensatory in nature. *Might we say that Maxwell's faith in the judiciary stands vindicated?*

[The author is Head, Direct Tax Team, Lakshmikumaran & Sridharan, Bangalore]

CUSTOMS

Notifications & Circulars

Customs Tariff amended from 1st January, 2012:

Customs Tariff Act, 1975 has been amended by Finance Act, 2011 with effect from 1st of January, 2012 to align it with HSN changes. The present set of changes cover several commodities touching all the chapters of the Tariff. A host of new heading/sub-headings has been provided in chapters covering animals & fish including their products, chemicals, paper and paperboard, special woven fabrics, copper and aluminium products, machinery, electrical and electronic goods and miscellaneous manufactured articles. Several notifications (Notifications No. 115-128/2011-Cus.) have been issued to amend exemption notifications to reflect the new/revised headings/sub-headings even while maintaining the exemption to specified imported goods.

Revised classification also cover notifications relating to various FTAs and PTAs concerning imports from Malaysia, imports under agreement with ASEAN countries, imports from Pakistan and Sri Lanka under SAFTA and imports from Japan, Korea, Chile and Thailand. Amendments have also been made in jumbo effective rate Notification No. 21/2002-Cus., to accommodate revised classification of specified items. Consequently, notifications relating to exemption from Education Cess and Special CVD have also been amended. Similar amendments in the Second Schedule to the Customs Tariff (export tariff) have not been made while Notification No. 27/2011-Cus., providing for effective rate of export duty and exemption to specified products has been amended.

Rate of duty for imports under various FTAs and from LDCs reduced: India has substantially reduced the rate of duty on several goods imported from Singapore, Korea, and Malaysia and under Indo-ASEAN FTA from 10 specified countries of East Asia. Exemption has also been deepened in case of imports from specified Least Developed Countries while also adding two more countries (Republic of Liberia and Union of Comoros) to the list of already 27 specified countries. Further, in the case of Japan, duty rate has been cut marginally for two products namely, automobile engines of specified capacity and gear boxes and parts thereof. While the reduced rates in case of imports from Singapore are effective from 1-12-2011, the lower rates will be applicable from this year in respect of other countries. Notification Nos. 106/2011-Cus., 113/2011-Cus. and 123 to 128/2011-Cus., have been issued in this regard. Notifications No. 67/2006-Cus., and No. 68/2006-Cus., providing for exemption under SAFTA have been superseded by a new Notification No. 125/2011-Cus. The new notification provides for further reduction in effective rate of import duty to specified goods from Pakistan and Sri Lanka. Other countries under SAFTA viz., Bangladesh, Bhutan, Maldives, Nepal and Afghanistan are already covered under a different notification [Notification No. 99/2011-Cus., dated 9-11-2011].

Nepal – Special CVD exemption widened: Exemption from Special Additional Duty (SAD) or Special CVD for imports from Nepal has been extended to more goods. The new Notification No. 107/2011-Cus., dated 5-12-2011 provides such exemption to all goods which are exempted from basic customs duty under Notification No. 104/2010-Cus., subject to conditions specified therein. The earlier Notification No. 78/2006-Cus., which granted such exemption to listed items has been rescinded by Notification No. 108/2011-Cus.

Jute products from Bangladesh – Additional duty exemption widened: Jute products falling under Headings 5307 (jute yarn) and 5607 (twines and ropes, etc.) of Customs Tariff, are now exempted from additional duty of customs also when the same are imported from Bangladesh. The exemption was earlier available only for products classifiable under Headings 5310, 5705 and 6305. Notification No. 114/2011-Cus., dated 23-12-2011 has been issued in this regard.

Iron ore – Export duty enhanced: Iron ore and concentrates (both agglomerated and non agglomerated), except for iron ore pellets, will attract a higher rate of export duty @ 30% as against 20% rate enjoyed by them. Notification No. 129/2011-Cus., dated 30-12-2011 issued in this regard omits entries 21 and 22 in the basic Notification No. 27/2011-Cus., thereby withdrawing the exemption and providing for the tariff rate in case of such exports.

Deemed export benefit on imported goods clarified: Ministry of Commerce, India has clarified that the benefit of deemed export drawback is not available when the imported capital goods are supplied as such to the project authorities. Deemed export benefit is available to goods manufactured in India as per Para 8.2 of Foreign Trade Policy and hence, the clarification. D.G.F.T. Policy Circular No. 50 dated 28-12-2011 quotes Policy Interpretation Committee meeting held on 15-3-2011in this regard.

Ratio decidendi

Delay in installation of capital goods not to result in denial of exemption: The CESTAT, New Delhi has held that on account of mere delay in installation of capital goods, which was condonable, the benefit of duty exemption cannot be denied if the imported capital goods have been used for intended purpose of manufacture of export goods and export turnover target had been achieved. In the case before the Tribunal, capital goods imported under Notification No. 53/97-Cus. could not be installed within one year as stipulated in the notification. *[Bholanath Industries Limited v. Commissioner* - 2011-TIOL-1722-CESTAT-Del].

License amendment subsequent to import but prior to clearance, valid: The Delhi High Court, in its recent order, has clarified that an authorization subsequent to the import may be granted under Clause 2.2.6 of the

Handbook of Procedures. In the case in question, while the importer had license to import horses from Australia, some horses were imported from Austria and Germany and the importer sought to amend the license after the horses arrived at the customs port. The request was denied on the ground that the import license had already expired. The court held that Clause 2.13 of the Handbook of Procedures clearly permitted revalidation of the import license for upto six months from the date of expiry of its validity and it was for the DGFT to extend the validity of the license taking facts into account [*Arjun Sahlot* v. *Union of India* - 2011 TIOL 832 HC-Del-Cus].

Gold findings and mountings to be classified as jewellery: Gold findings were semi-finished jewellery and would amount to be jewellery under Rule 2(a) of the General Rules of interpretation under the Customs Tariff Act. Holding so, the Tribunal concluded that disputed goods would be excluded from the benefit of Notification No. 62/2004-Cus. The respondent's had claimed the benefit based on C.B.E. & C.'s Circulars (No.40/2004-Cus., dated 4-6-2004 and No. 13/2006-Cus., dated 29-3-2006) clarifying that gold mountings do not amount to jewellery. The Tribunal, however, observed that the Board cannot expand the scope of an exemption notification as was sought to be done in the present case. *[Commissioner v. VK International* - 2011-TIOL-1676-CESTAT-Del].

Stealth 3D mouse with additional functions classifiable as "mouse": 3D mouse designed by a collaboration of professionals from mapping and ergonomic design fields is classifiable as regular computer mouse under Tariff Item 84716060 of Customs Tariff. CESTAT, New Delhi in its recent decision has held that 3D mouse for two hand operations, which is bigger in size, more expensive and performs additional functions as compared to a regular mouse cannot be held to be a device other than a mouse [*Commissioner* v. *Computer Infinite* - 2011-TIOL-1631-CESTAT-Del-Cus].

Meat exports - DGFT Notification 82/2011 is clarificatory: The Bombay High Court in its recent judgement has held that Notification 82/2011 dated 31-10-2011 issued by the DGFT is valid and, is clarificatory. It held that the said notification was issued to resolve the doubt that arose under the earlier scheme as to whether it was sufficient if the meat processing plant alone was registered with APEDA or whether in addition the raw material had to be sourced from an APEDA registered integrated abattoir/abattoir. The Court held that the fundamental right of carrying out business under Article 19(1)(g) of the Constitution is subject to reasonable restraints under Article 19(6), and the notification was not ultra vires the Constitutional provisions. The notification in dispute placed a condition that both the meat processing plant and the place wherefrom the meat is sourced as a raw material have to be duly registered with APEDA. As per the High Court, the Union Government was not acting ultra vires its statutory powers when it imposed these restrictions as these restrictions were as a matter of fact in existence since 2004 and the notification dated 31-10-2011 is clarificatory to set the matter beyond any doubt. *[Al Zubair Exporter v. Union of India* – W.P. No. 9043 of 2011 decided on 1-12-2011]. Subsequently, on 15th of December, 2011, DGFT has issued Notification No. 89 which postpones the effect of the disputed notification till 15-6-2012 instead of 31-10-2011.

CHA passing examination under the 1984 Regulations has no vested right for licence under 2004 Regulations: The Bombay High Court has held that those who have passed examination under the CHA Regulations, 1984 have no vested right for a license under the CHA Regulations, 2004. The Court held that a license is a privilege to carry on business and an applicant for a license has a right only to be considered for grant of such license. The new Customs House Agents Licensing Regulations, 2004 provided that a person who has passed the examination conducted under Regulation 9 of 1984 Regulations, but has not yet been granted a license, would be granted license under the new regulation only after passing examination conducted in certain additional subjects. This provision was challenged as being violative of Article 14 of the Constitution. *[Bombay Customs House Agents Association v. Union of India* – W.P.(Lodg.) No. 1522 of 2011, decided on 7-12-2011].

CENTRAL EXCISE

Notifications

Central Excise Tariff amended from 1st of January, 2012: Central Excise Tariff Act, 1985 has been amended by Finance Act, 2011 with effect from 1st of January, 2012 to align the tariff with HSN. Notifications to provide for consequential changes have been issued amending classification of specified goods in various exemption notifications. Notifications specifying the general effective rates of duty, namely Nos. 3/2006-C.E., 4/2006-C.E., and 5/2006-C.E. and Notification providing for a reduced peak rate of basic excise duty i.e. 2/2008-C.E. have been amended.

Amendments have been made in Notification Nos. 1/2011-C.E., 2/2011-C.E. and the MRP notification to provide for revised classification of diapers, sanitary towels etc. Notification Nos. 62/95-C.E. and 74/93-C.E. providing for exemptions to goods manufactured by Central Government and State Government factories respectively for government departments have also been amended accordingly. Some consequential changes have also been made in Notification no. 18/2009-C.E. which provides for effective rate of duty on petroleum products. For tobacco products, Notification Nos. 20/2005-C.E. & 9/96-C.E. providing for effective rate of Additional duty [AED(GSI)] and Notification Nos. 21/2005-C.E. & 26/2001-C.E. providing for effective rate of NCCD have also been amended. Notification Nos. 42 to 45/2011-C.E. all dated 30-12-2011 have been issued in this regard.

As per the latest amendments, Tariff rate of 5% is specified in respect of Khandsari sugar (Chapter 17) and for furniture bases for sewing machines (Chapter 84), whereas the earlier rate was nil. Subsequently, Notification No. 1/2012-C.E., dated 3-1-2012 has been issued granting exemption after these items were under 5% rate for two days.

Monthly Excise Returns for manufacturers of specified yarn, fabric and readymade garments: With effect from 1st of February, 2012, manufacturers of processed yarn, unprocessed fabrics falling under Chapters 50 to 55, 58 or 60 and manufacturers of readymade garments falling under Chapter 61or 62 have to file monthly Excise Returns. Second proviso to Rule 12(1) of the Central Excise Rules, 2002 is being omitted in this regard with effect from 31st of January, 2012 by Notification No. 32/2011-C.E. (N.T.), dated 30-12-2011. These manufacturers will, however, have to file quarterly return as before for the quarter October-December, 2011.

Ratio decidendi

Interest on delayed refund of encashed bank guarantee: The Allahabad High Court, in its recent order, has directed payment of interest @ 12% in case of delay in refund of encashed bank guarantee. The bank guarantee was encashed at the time of finalization of assessment and when assessee applied for interest, the Tribunal had rejected it on the ground that the bank guarantee was in the nature of security and was not a duty deposited in advance. The court however held that in case of provisional assessment, bank guarantee is not in the nature of advance duty but is a security and when the bank guarantee is encashed, it takes shape of duty deposited. [*Pace Marketing Specialists* v. *Commissioner* - 2011 (274) E.L.T. 13 (All.)]

Tribunal has power to direct pre-deposit while remanding the matter: The Punjab and Haryana High Court has held that Tribunal has jurisdiction to direct payment of pre-deposit while remanding a case. The court held that order of direction to deposit a particular amount, while remanding the matter, was a direction in exercise of powers conferred on the Tribunal under Section 35C of the Central Excise Act, 1944 and that the same was not a condition to entertain appeal under Section 35F ibid. The court further while distinguishing two earlier cases *[Voltas* – 1999 (112) E.L.T. 34 (Del.) and *Satvik Industries* – 2010 (252) E.L.T. 182 (Del.)] held that such direction

to make payment has to meet the test of reasonableness. [*Samrat Plywood Ltd.* v. *Commissioner* - P&H CEA No. 105 of 2011 decided on 17-11-2011]

Interest not payable when Cenvat credit reversed before utilization: The Karnataka High Court has held that if the assessee had reversed the wrong entry of availing credit on being pointed out, it was as if the Cenvat credit was not availed and hence, there could not be any question of payment of interest. The court distinguished the Supreme Court judgement in the case of *Ind-swift Laboratories* and held that the credit is "taken" only when the goods are removed and duty is paid. The High Court further held that interest cannot be claimed from the date of wrong availment of Cenvat credit and that same is payable only from the date Cenvat credit is taken or utilized wrongly. *[Commissioner v. Bill Forge Pvt. Ltd.* - 2011-TIOL-799-HC-KAR]

Transfer of Cenvat credit on amalgamation – Effect of exemption: The Karnataka High Court has held that benefit of transfer of Cenvat credit would be available in all cases except where notification granting exemption based on value or quantity of clearances is availed. The court allowed transfer of credit from a unit which closed its operation, to another unit to which it was amalgamated as per court orders. The court ruled that Rule 11(1) of Cenvat Credit Rules, 2004 was not applicable in respect of Notification No. 6/2003-C.E. *[Commissioner v. Hewlett Packard India Sales Ltd.* - 2011-TIOL-777-HC-KAR-CX]

News Nuggets

Budget 2012 – Major reforms may miss the bus but changes to impact more

A point of reasonable certainty in the Budget exercise is the date of presentation. This year's budget story has begun with rejig of dates. It is likely to be presented only by mid-March, after state elections. The Direct Taxes Code (DTC) and Goods and Services Tax (GST) are set to be delayed. The report of the Parliament Standing Committee has not yet been tabled and passing the DTC bill in the budget session does not seem a workable option. However, reports suggest that in respect of DTC provisions like Controlled Foreign Corporation (CFC) and General Anti-Avoidance Rules (GAAR) may be incorporated in the budget proposals. The GAAR rules also provide for 'recharacterising any debt into equity or vice versa' or Thin Capitalisation Rules. On the indirect taxes front, duty rate hike in excise and service tax is being spoken about due to non-realisation of revenue targets and the deficit getting out of control. A negative list for taxing services also seeks to promise the exchequer more and with public opinion already with it, the Budget 2012 may well witness a new Service Tax regime.

Fattening of tax revenues

Exploring tax as an avenue for boosting health rather than revenue gains, Peru is seriously considering imposition of tax on food with high fat, salt or sugar content. There is not enough evidence to prove or disprove if taxes actually deter consumption and improve health. Yet many nations have implemented 'health taxes'. Denmark seeks to tackle incidence of cardiovascular problems while Peru hopes to add to its healthcare budget. Finland reintroduced the tax on sugary goods in 2010. Hungary taxes foods with high fat, sugar and salt content, as well as soda and alcohol. France 's tax on sugary drinks also called 'soda tax' is in effect from 2012. Critics of these measures argue that broadbasing such taxes by merely choosing all chocolates or all fats works against the specific industries. Also valid scientific opinion on beneficial effects of fats or sugars must be considered and regulating intake is a better option to enforcing a blanket levy leading to raise in prices.

SERVICE TAX

Notifications & Circulars

Service tax on rail freight deferred again: The provisions for levy of Service tax on carriage of goods by rail, though made in 2009, but have since been deferred till now. Notification Nos. 49 to 51/2011-S.T., all dated 30-12-2011 further postpone such levy till 31st March, 2012.

Refund of Service Tax to exporters liberalized: Exporters have been extended option to avail automatic refund of Service Tax through the ICES system of Customs in line with the Drawback scheme. The refund will be calculated by applying the rate specified for goods of a class or description, as a percentage of the FOB value of the said goods. Notification 52/2011-S.T., dated 30-12- 2011 issued in this regard, while superseding earlier Notification No. 17/2009-S.T. with effect from 3-1-2012, also specifies the rates applicable for Service Tax refund. The rates vary between 0.03% to 0.2% in relation to export of various products or class of products. Refund at present is limited to 18 specified services. Instead of e-refund, exporters, at their option, can avail refund by the traditional route as was earlier provided. Circular No. 149/18/2011-S.T., dated 16-12-2011 has also been issued in this regard. To empower Customs officers to act as Central Excise Officers and process and grant such Service Tax refunds, Notification No. 33/2011-C.E. (N.T.) dated 30-12-2011 has also been issued.

Movie distribution – Service Tax liability clarified: The arrangements when the distributor and the exhibitor of the movie enter into some revenue sharing agreements are also liable for Service Tax. Circular No. 148/17/2011-S.T., dated 13-12-2011 clarifies that the transactions where the distributor and the exhibitor enter into an understanding to share revenue or profits and not provide the service on principal-to-principal basis, a new entity emerges which is distinct from its constituents. As the new entity acquires the character of a "person", the transactions between it and the other independent entities namely the distributor / sub-distributor / area distributor and the exhibitor etc will be a taxable service. The circular further, while holding that the earlier circular issued in this regard in 2009 was misinterpreted, states that arrangements mentioned in the said circular will apply mutatis mutandis to similar situations across all the services taxable under the Finance Act, 1994. The present clarification, however, does not specify the category under which the present transaction will be liable.

Service Tax Registration – Documents to be submitted with application, prescribed: The C.B.E. & C. has specified documents to be submitted by those seeking Service Tax registration. Copy of Permanent Account Number (PAN), residence proof, constitution of applicant and power of attorney for authorized person(s) should be provided within 15 days of filing of application for registration application as per Order No. 2/2011-S.T. dated 13-12-2011.

Ratio decidendi

Cenvat credit of Service Tax paid for celebration allowed: Cenvat credit on shamiana and photography services was allowed by the Karnataka High Court when the said services were taken in respect of celebration of Kannada Rajyostava Day and inauguration of Kengeri Police Station. The court allowed the credit considering services to be in relation to security of the factory while it observed that it was not uncommon that when such festivals were not celebrated there would be trouble not only inside the factory but also outside. The court further noted that such functions go a long way in preserving peace in the establishment and that security of the establishment is well protected. [*Toyota Kirloskar Motor Pvt. Ltd.* v. *Commissioner* - 2011 (24) S.T.R. 645 (Kar.)].

Rate of Service Tax when payment received before rate enhancement: The Delhi Bench of CESTAT has held that the Service Tax rate that was prevalent at the time of receipt towards value of service would apply in a case where the assessee chose to pay tax on the advance amount received even when the rate was enhanced by the time the service was provided. It was held as not proper to rely on explanation to Rule 6(1) of Service Tax Rules, 1994 to conclude that rate as prevalent on time of providing service was relevant. The Tribunal also relied on the fact that from 1-4-2011, Rules 4 and 9 of Point of Taxation Rules, 2011 also provide the same. [*Vigyan Gurukul* v. *Commissioner* - 2011-TIOL-1724-CESTAT-DEL].

VALUE ADDED TAX (VAT)

Notifications

VAT rate hiked in Puducherry: The rate of tax on all goods covered under Third Schedule of the Puducherry Value Added Tax Act, 2007 ('PVAT Act') has been increased from 4% to 5% and the rate of tax on all goods covered under Fourth Schedule of the PVAT Act has been increased from 12.5% to 14.5%, with effect from 1-1-2012. The press release issued in this regard cites the reason as approval of Empowered Committee of State Finance Ministers to an increase in the VAT rates [Ref: Notification No. G.O.Ms No. 68/F2/2011 dated 31st December, 2011].

VAT rate increased in Mizoram: The rate of tax on all goods covered under Part 'C' of Schedule II of the Mizoram Value Added Tax Act, 2005 ('MVAT Act') has been increased from 4% to 5% with effect from 1.1.2012. Further, the rate of tax on all goods covered under Part 'D' of Schedule II of the MVAT Act has been increased from 12.5% to 13.5% with effect from 1-1-2012 [Ref: Notification No. J.11020/1/2005-TAX dated 9th December, 2011].

E-payment made compulsory: Electronic payment of tax, interest, penalty or any other amount due under Delhi Value Added Tax Act, 2004 will be compulsory with effect from 31-1-2012 as per Notification No. F.7(400)/Policy/VAT/2011/1006-1018 dated 28-12-2011.

Ratio decidendi

U.P. Entry Tax valid: The validity of U.P. Tax on Entry of Goods into Local Areas Act, 2007 ('Entry Tax Act') has been upheld by the Allahabad High Court by its order dated 23-12-2011. Section 17 of the Entry Tax Act validating the amount of entry tax levied, assessed, realized and collected under the U.P. Tax on Entry of Goods Act, 2000 and authorising the State to keep the entire amount for the purposes of its utilisation for facilitating trade, commerce and intercourse in the local areas of the State was also held to be valid [ITC Limited v. State of UP - 2011-VIL-57-ALH].

Ginger and garlic paste classifiable under processed vegetables: The Karnataka High Court has held that ginger and garlic paste would be classifiable under Entry No. 3 of the Third Schedule of the Karnataka VAT Act which read as *"All Processed fruit and vegetables including fruit jams, jelly, pickle, fruit squash paste, fruit drink and fruit juice (whether in sealed container or otherwise)"* and attract tax at the rate of 4% and not under the residuary list at the rate of 12.5%. The court, while relying on Supreme Court judgement in the case of *State of West Bengal* v. *Washi Ahmed,* noted that in the absence of specific mention of 'ginger and garlic paste' in the Schedules, the most proximate entry was entry 3 of the Third Schedule which included fruits and vegetables. The court rejected the classification of the disputed paste under masala paste. [*Desai Brothers Ltd. v. Additional Commissioner*– 2011 46 VST 289 (Kar)]

INCOME TAX

Notification

Form 15CA amended: Form 15CA which is used for furnishing information regarding remittance to a non- resident has been amended. Detailed guidelines regarding procedure for furnishing information in Form 15CA and the form as such are available online in the relevant NSDL site.

Ratio decidendi

Expenditure on removal of encroachment facilitates existing business and is revenue in nature: The Full Bench of the Delhi High Court held that expenditure incurred with a view to enable the management to run the business effectively, efficiently and profitably leaving the fixed assets untouched would be an expenditure of a revenue nature even though the advantage obtained may last for an indefinite period. The taxpayer had incurred huge cost in removing the encroachments on its land and in providing alternate accommodation to the habitants of encroached land. The tax authorities treated this expenditure as a capital expense and denied deduction thereof and this was affirmed by a divisional bench of the Delhi High Court. The Full Bench reversed this and held that the expenditure was essentially incurred not for initiating a new business, rather for removing an obstruction to facilitate an existing business. The object of the expenditure determines its character and the fact that the expenditure is 'once and for all' is not a conclusive test. Following, the decision in the case of *Bi-*

kaner Gypsum v. *CIT* 187 ITR 39 (SC), it was held that the payment was made to facilitate smooth functioning of the business and hence revenue in nature. [*Airport Authority of India* v. *CIT* - ITA 432/2008, 433/2008, ITA 437/2008, ITA 517/2008 (Delhi High Court Full Bench)].

Offshore supply of equipment and software embedded therein not taxable: Examining the taxability of offshore supply of equipment and whether payment under the supply contract was royalty, the Delhi High Court ruled as follows. The taxpayer, a foreign company was engaged in the business of supply of hardware and embedded software which is used in the business of rendering telecommunication services. The Court held that the income on account of offshore supply of equipment is not taxable in India as the title in the goods passes outside India by virtue of a specific clause in the agreement. While the contract stated that equipment was to be accepted by Indian buyer only after successful completion of acceptance test in India, this did not affect the transfer of title outside India. On the second question of royalty, it held that software loaded on hardware does not have independent existence and cannot be taxed separately even if the price is separately agreed for both. Further, keeping in mind the distinction between 'copyright' and 'copyrighted article', in the absence of any right to commercially exploit the software, the income cannot be characterized as royalty. [*DIT* v. *Ericsson AB* - ITA 504 of 2007 (Delhi High Court)]

Assessing Officer cannot question genuineness of transaction found to be at Arm's Length Price by TPO: In this case the taxpayer, an Indian company, was engaged in the business of rendering real estate services. The taxpayer had made certain payments to its associated enterprise (AE) in the nature of referral fee. The Transfer Pricing Officer (TPO) had accepted the transaction as being at Arm's Length Price (ALP), however, the assessing officer (AO) doubted the genuineness of the transaction and alleged that no services were rendered by AE so as to warrant any payment. He therefore disallowed the same in the assessment order. On appeal, the ITAT held that the payment of referral fee was supported by evidence and also found to be at ALP by the TPO. Given this, the AO could not revisit the transaction under the normal provisions of the income tax law, and therefore the disallowance deserves to be deleted. [*Cushman & Wakefield India Pvt. Ltd.* v. *ACIT* - ITA No.3933/Del/2010 (Delhi ITAT)]

TDS need not be deducted on enhanced amount payable on account of exchange fluctuation: The taxpayer had availed technical services from a non-resident and had deducted applicable tax at source at the time of crediting the amount payable in its books of accounts. Some part of the total liability was payable in subsequent financial years. During the year under consideration, the taxpayer paid the fourth installment of fees on which it suffered foreign exchange fluctuation loss. The AO disallowed the payment on the ground that taxpayer had not deducted tax at source on the amount representing foreign exchange fluctuation. On appeal, the Tribunal held that the TDS on the total liability in foreign currency denomination was already deducted at the time of credit thereof hence no further deduction was required to be made. [*Sandvik Asia Limited* v. *JCIT* - ITA No 758/PN/99 & CO No 58/PN/05]

Long term capital gains on sale of shares held taxable despite payment of STT: The taxpayer had converted the shares held by it as its capital asset into stock in trade and later sold the same through stock exchange on payment of securities transaction tax (STT). The AO denied exemption on capital gains. On appeal, the ITAT upheld the denial of deduction stating that the STT was not paid on the transfer of capital asset which occurred at the time of conversion of capital asset into stock in trade, rather STT suffered was actually on sale of stock in trade. [*Smt. Alka Agarwal* v. *ADIT* - ITA No.80/Del/2011 (Delhi ITAT)]