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## Tax Amicus enters 4th year

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## Articles

# Legal status of clarifications through Budget instructions of CBEC

By **V. Sivasubramanian**

In this year's budget, i.e. Budget 2014-15, the Joint Secretary, Tax Research Unit [JS (TRU)-I], Central Board of Excise & Customs ['CBEC' or 'Board'], has sought to clarify the legal position involving interpretation of certain Customs and Central Excise notifications through an annexure to his covering letter[1] addressed to the Chief Commissioners and Commissioners of Customs and/or Central Excise. These clarifications, though beneficial to the assessees, have not been backed up with any specific statutory backing and the legal question which has arisen with respect to this mode of clarification is whether they would be binding on the department or not.

In order to appreciate this question better, let us first understand some basic facts about the budgetary process. The provisions contained in the Finance Bill are explained in simple terms through a pink coloured document called Memorandum or the Pink Book which is part of the budget documents presented to the Parliament on the day of the Annual Budget.

The Customs, Central Excise and Service Tax notifications for grant of exemptions and changes in rules are issued under delegated powers of the Central Government and they neither form part of the Finance Bill nor a part of such budget documents. However, the Finance Minister's Budget Speech incorporates the changes made through these notifications and hence there is normally a mention in the FM's Speech that the notifications giving effect to the changes he mentioned will be laid on the Table of the House in due course.

As part of the budget exercise, the Tax Research Unit (TRU) of the Central Board of Excise & Customs (CBEC or 'the Board') issues a separate document called the Explanatory Notes, to explain the changes in the rates of Customs and Central Excise duties effected through such notifications in simple terms. The Joint Secretary (TRU) also issues a covering letter addressed to the Chief Commissioners and Commissioners *inter alia* explaining the salient features of the budget, thanking them for their inputs, discussing the budget day restrictions (which are no longer in force now) and also calling for certain price data and/or post-budget reports from them. The letter is increasingly being used to clarify the legal position on certain matters and in this year's budget a full annexure has been introduced for such clarifications as already mentioned above.

The Customs and Central Excise notifications usually become effective from the midnight of the budget day. It may be recalled that the Budget used to be presented earlier[2] at 5 pm which meant that by the time the FM's Speech was over, it would be about 7 pm and the industry had only about five hours to get adjusted to the changes effected through these notifications. Hence the industry used to eagerly await the Explanatory Notes as being the only lucid documents which could perhaps help them to understand the complex changes waiting

[1] Refer Annex-III to letter D.O.F.No.334/15/2014-TRU dated 10th July, 2014 issued by Joint Secretary (TRU)-I, Tax Research Unit, Central Board of Excise & Customs, available at http://indiabudget.nic.in/ub2014-15/cen/JSTRU-I10072014DO.pdf

[2] However, since 1999 the General Budget is being presented at 11 A.M. on the last working day of February. Refer http://www.parliamentofindia.nic.in/ls/intro/p4.htm. Also refer para 2 of FM's Budget 1999-2000 Speech at http://indiabudget.nic.in/ub1999-2000/bs/bs1.htm

to hit them in just about five hours later.

Neither the Explanatory Notes nor the JS (TRU)'s letter have a statutory backing and it would appear they may lack statutory force as well. As a matter of abundant caution, the JS(TRU) also usually takes care to mention in his covering letter that only the provisions of the Finance Bill and the notifications have legal force. In this year's budget, the JS (TRU)-I's letter goes even further to record[3] that the Annexures provide only a summary of the changes made and should not be used in any quasi-judicial or judicial proceedings, where only the relevant legal texts need to be referred to.

It is important to note here that the said JS (TRU)'s letter cannot be said to be a Board's circular[4] or a Board's order issued under Section 37B of the Central Excise Act, 1944 or Section 151A of the Customs Act, 1962. The Board has been granted statutory powers under Section 37B of the Central Excise Act, 1944 to issue orders, instructions and directions to the Central Excise Officers for the purpose of uniformity in the classification of excisable goods and with respect to levy of duties of excise on such goods. But the last time it issued an order under these powers was in 2007! Corresponding powers in respect of the levy of customs duties has been granted to the Board under Section 151A of the Customs Act, 1962.

So the question which arises for consideration is whether the clarification given only through JS (TRU)'s letter and with no other statutory backing, would bind the department or not, particularly when such instructions themselves present a caveat about their non-binding nature. What happens if a departmental formation ignores such clarification and say raises a demand on an assessee? In fact, this is not without precedence.

It is observed that even the statutorily backed Board's circulars and Section 37B orders have been a subject matter of extensive dispute by the department's own officers. The Supreme Court[5], while allowing a revenue appeal that the circulars cannot be given primacy over the judicial decisions, has upheld the departmental right to dispute a Board's circular. The Supreme Court has also categorically held that "a circular which is contrary to the statutory provisions has really no existence in law". Hence it would appear that the clarification issued through a mere JS (TRU)'s letter which admittedly has no legal force, is even more liable to dispute and litigation.

The avowed policy of the Government is to usher in a stable and predictable taxation regime which is also a commitment made by the Finance Minister in his Budget 2014-15 Speech. The issue is whether the Board's practices follow this policy directive or not. Surely the issue of clarifications through mere non-binding letters does not enable a movement in this direction. Hence there may be a case for the Board to revisit its practices and the powers under which it issues instructions particularly where they are beneficial to the assessees, so that they bind the departmental officers and bring certainty to the tax regime at least to this limited extent.

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3 Para 2.1 of JS (TRU)-I's letter, ibid.

4 Rule 31 of the Central Excise Rules, 2002 read with Section 37(2)(xx) of the Central Excise Act, 1944 empowers the Board, the Chief Commissioner or the Commissioner to issue written instructions providing for any incidental or supplemental matters, consistent with the provisions of the said Act and Rules.

5 A 5-Judge Constitutional Bench of the Supreme Court In the case of *Commissioner* v. *Ratan Melting & Wire Industries* [2008 (231) ELT 22 (SC)] held that the earlier decision in the case of *Kalyani Packaging Industry* v. *Union of India* [2004 (6) SCC 719] expounded the correct position of law.

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- *Taxation of Real Estate Investment Trust – Tax creases to be ironed out* by Sumeet Khurana & Ashish Karundia, Lakshmikumaran & Sridharan, Chandigarh / New Delhi in www.taxsutra.com
- *Finance (No. 2) Bill, 2014 – Key corrections for Finance Minister to take note of* by Sumeet Khurana & Ashish Karundia in Lakshmikumaran & Sridharan, Chandigarh / New Delhi in Taxmann's International Taxation, July 2014 edition
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## Tax treatment of exchange fluctuation loss on ECB

By **Sumeet Khurana and Rajat Juneja**

### *Backdrop*

One of the most apprehensive subjects for India for last couple of years has been the dwindling rupee value which besides triggering inflation and broadening the current account deficit has also augmented certain tax related issues. One such issue stems from the concerns relating to the treatment of foreign exchange loss arising on revaluation of External Commercial Borrowing (ECB) for assets acquired within India. Whether such loss can be capitalised with the cost of assets or can be claimed as revenue loss is a question many taxpayers are grappling with today.

### *Law on the subject*

If the proceeds of ECBs are utilized to acquire capital assets from any place outside India, the provisions of Section 43A of the Income-tax Act, 1961 ("the Act") would govern the situation. Section 43A provides for capitalisation of the loss with the cost of asset at the time of repayment of the ECB resulting in crystallisation of loss. However, the said section is inapplicable in the context of indigenous assets as its language confines its applicability only to a case "where an assessee has acquired any asset from a country outside India".

In the absence of any specific provision in law on this facet, coupled with some distinct judicial pronouncements in the past, there is an element of uncertainty surrounding this aspect.

There are no precise rules formulated to distinguish a loss on revenue count *vis-à-vis* a loss on capital count and there lies a thin line of demarcation between the two, but certain judicial pronouncements are worth noting in the present issue under consideration to

understand the nature of such a loss. While revenue loss is allowable, the capital loss on the other hand cannot be allowed as a deduction while computing business income[1].

Section 43A of the Act, was introduced by the legislature *vide* Finance (No. 2) Act, 1967 *with effect from 1st April, 1967*. Supreme Court in *Tata Iron & Steel* [TISCO - (1998) 231 ITR 285 (SC)] had an occasion to deal with this issue for a period prior to its introduction. The assessee in that case acquired certain depreciable assets using foreign currency loans, and adjusted the foreign exchange fluctuation with the cost of the asset. The apex court, on these set of facts, besides observing that section 43A is inapplicable (as was being introduced later), held that, *"the manner of repayment of loan can't affect the cost of the assets so acquired. What is the actual cost must depend on the amount paid to acquire the asset. The company might have raised the funds to purchase the asset by borrowing but what the company had paid for it was the price of the asset. That price could not change by any event subsequent to the acquisition of the asset. What has to be borne in mind is that the cost of an asset and the cost of raising money for purchase of the asset are two different and independent transactions."*

Given that the provisions of Section 43A requiring foreign exchange gain/loss to be adjusted with the cost of the assets, apply only with respect to imported assets, the case of indigenous assets will continue to be governed by the ratio of the *Tata Iron & Steel's* decision (supra). However, the matter becomes complex as there are certain judicial pronouncements analogous to the issue under consideration, which have denied deduction by holding such loss to be on capital count. But before we proceed to discuss those cases, following decisions are relevant for setting the things in perspective.

In *the Shell Company of China Ltd.* [22 ITR 1 (CA)] the Court of Appeals held that, *"gains arising on deposits (in foreign currency) are capital receipt as the deposits were in essence loan/capital and not a trading receipt."*

Further in *Sutlej Cotton Mills Ltd.*, [(1979) 116 ITR 1 (SC)] it was held by Supreme Court that, *"the law may, therefore, now be taken to be well settled that where the profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be a trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as a part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature."*

Also in *Tata Locomotive & Engineering Co. Ltd.* [TELCO - (1966) 60 ITR 405 (SC)] a similar view was again reiterated.

The aforesaid decisions were later consistently followed by some High Courts in *Bestobell (India) Ltd.*[2], *Union Carbide India*[3], *Oil India Limited*[4], *Bharat General and Textile Industries Limited*[5], *Groz-Beckert Saboo Ltd.*[6], *Sandoz (India)*[7], *Electric Lamp Manufacturers (India) Limited*[8] and *V. S. Dempo & Co. (P) Ltd.*[9] in the context of ECB holding that if the foreign exchange fluctuation loss arises on restatement of ECBs utilized for acquiring capital asset indigenously in India, then such loss will be capital in nature.

1 *Hasimara Industries* v. *CIT* (231 ITR 842) (SC)
2 (1979) 2 Taxman 62 (Cal.)
3 (1981) 130 ITR 351 (Cal.)
4 (1982) 137 ITR 156 (Cal.)
5 (1986) 157 ITR 158 (Cal.)
6 (1981) 127 ITR 608 (P&H)
7 (1994) 206 ITR 599 (Bom.)
8 (1992) 198 ITR 760 (Cal.)
9 (1994) 206 ITR 291 (Bom.)

As is evident from above analysis, the controversy really finds its foundation when the decision of Court of Appeal in the case of the *Shell Company of China* was first followed by Calcutta High Court. Later decisions also drew support from the decisions of *Sutlej Cotton Mills* and *TELCO* though rendered in the context of foreign currency held as an asset as against a foreign currency loan.

Many corporate taxpayers find it a safe proposition to capitalise the exchange loss and claim depreciation thereon rather than claiming it as revenue loss. One should however bear in mind that if in a subsequent year the tax authorities deny depreciation on the capitalised loss relying on the decision of Supreme Court in *TISCO* (supra) then in such an eventuality taxpayers may find it difficult to revisit the earlier years' return and claim it as revenue loss therein. It is therefore important that the decision in this regard shall be taken after a thorough research and analysis of the legal position both from the perspective of technical merits as well as from the perspective of strategy.

### *Summing up*

Many multinationals, small and medium enterprises and corporate houses in India prefer availing foreign currency borrowings with a view to save on interest cost. Very often those funds are utilized to acquire capital assets indigenously in India and hence the issue of dealing with foreign exchange fluctuation calls importance.

This short write-up attempts to highlight that the determination of correct treatment of exchange fluctuation loss is extremely complex since the ratio of the decision in *Tata Iron and Steel* is apparently in contrast with the ratio of the decision in *Sutlej Cotton Mills* and various other High Courts. Fundamentally, by raising loan itself no capital asset comes into existence and hence expenses for raising loan should in authors' view be treated as revenue in nature. Further the variation in the loan amount has no bearing on the cost of the asset as the loan is a distinct and independent transaction. The authors believe that the claim of exchange fluctuation loss as revenue on count is founded on strong legal arguments. Nevertheless, given the contrary judicial precedents the matter is undoubtedly prone to litigation.

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## Budget 2014 – Common changes

**Stay and pre-deposit provisions set to be amended:** Section 129E of the Customs Act, 1962 and Section 35F of the Central Excise Act, 1944 are proposed to be amended by Clauses 83 and 98 of the Finance (No. 2) Bill, 2014. The proposals provide for mandatory pre-deposit of specified percentage of duty or penalty or both in case of appeals to Commissioner (Appeals) or the Appellate Tribunal (CESTAT). After the enactment of the Finance (No. 2) Bill, assessee-appellant would be required to deposit 7.5% of the duty or penalty or both in case of first appeals before the Commissioner (Appeals) or the Tribunal and amount of 10% in case of second appeals [against order passed by Commissioner (Appeals)] to Tribunal. These provisions, which would not be applicable to pending stay applications and appeals, however provide for upper limit of Rs. 10 crore in respect of such deposits.

Amendments have been further proposed in sub-section (2A) of Section 129B of the Customs Act and similar provisions in Section 35C of the Central Excise Act to omit the three provisos which provide for time period for disposal of appeals by the Tribunal in case of stay orders and subsequent vacation of stay orders if the appeals are not

disposed accordingly. Proviso allowing Tribunal to extend the stay order in case the appeal is not disposed within prescribed period is also proposed to be omitted.

**Advance Ruling benefit available to resident private limited companies:** Resident private limited companies are now entitled to apply for Advance Ruling under Central Excise, Customs and Service tax law. Notification Nos. 18/2014-C.E. (N.T.), 51/2014-Cus. (N.T.) and 15/2014-S.T., all dated 11-7-2014 have been issued for this purpose.

## Budget 2014 – Central Excise

**Valuation – Price less than manufacturing cost and profit is deemed transaction value:** Selling price less than manufacturing cost and profit, where no additional consideration is flowing from the buyer, will be deemed to be the transaction value of goods sold in cases where price is not the sole consideration of sale. Proviso, in this regard, has been inserted in Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 with effect from 11-7-2014 by Notification No. 20/2014-C.E. (N.T.), dated 11-7-2014. This amendment became necessary consequent to Supreme Court's judgment in the case of *Fiat India Ltd.*, wherein declared value was rejected on the ground that the same was less than manufacturing cost and the assessee had lowered the sale price to penetrate market and such factor was an additional consideration.

**Payment of duty – Electronic payment and penalty in case of default:** Central Excise duty is required to be mandatorily paid electronically through internet banking by all assessees with effect from 1st of October, 2014. As per the provisions set to be introduced, Assistant/Deputy Commissioner of Central Excise can however allow the assessee to pay duty by any other mode after recording reasons for the same. Rule 8 of the Central Excise Rules, 2002 is being amended in this regard from 1-10-2014 by Notification No. 19/2014-C.E. (N.T.), dated 11-7-2014. This notification further substitutes sub-rule (3A) of the said Rule 8, with effect from 11-7-2014, to provide for imposition of penalty equal to 1% of the amount of duty which has been declared as payable in the returns but has not been paid within one month from due date. This 1% penalty is payable for delay of each month or part thereof calculated from the due date. Hitherto, the provisions provided for non-utilisation of Cenvat credit in case of default in payment of duty.

**Cenvat Credit Rules – Amendments:** Cenvat Credit Rules, 2004 (CCR) have been amended or in some cases set to be amended with effect from 1-9-2014, by Notification No. 21/2014-C.E. (N.T.), dated 11-7-2014 as follows:

- ***'Place of removal'*** has now been defined in CCR. This definition, effective from 11-7-2014, is same as provided in Section 4 of the Central Excise Act, 1944.
- ***Time limit*** has been prescribed for the purpose of taking Cenvat credit of inputs and input services by manufacturers and output service providers. According to amendments in Rule 4 effective from 1st September, 2014, Cenvat credit cannot be taken after six months from the date of issue of prescribed documents.
- ***LTUs denied facility of transfer of Cenvat credit:*** Large Tax-payer Units (LTUs) are now not eligible to transfer Cenvat credit available with one of the registered manufacturing premises or premises providing taxable service, to its other registered premises. As per the amendment, effective from 11-7-2014, in Rule

12A of CCR, credit taken till 10-7-2014 alone is eligible for such transfer.

- ***Full reverse charge cases, credit available after tax payment:*** Cenvat credit of Service tax paid on input services received is now available to the service recipient who is liable to pay the tax fully under reverse charge, even when the payment for the service has not been made to the service provider. This amendment in sub-rule (7) of Rule 4 is effective from 11-7-2014.

**Assessees, IT, VAT, banks & other authorities to file information return with excise / service tax authorities:** Finance (No. 2) Bill, 2014 proposes to insert Sections 15A and 15B in the Central Excise Act, 1944. Section 15A seeks to lay down provisions where specified persons like assessees, income tax authorities, banks, electricity boards, stock exchanges, VAT / sales tax authorities, Registrar of Companies, etc., would be required to furnish information return to the authority to be notified for such purpose. According to the notes on clauses given in the Finance (No. 2) Bill, 2014 information can be collected to identify tax evaders or recover confirmed dues. New Section 15B further provides for imposition of penalty on failure to furnish such information return. These provisions are also being made applicable in respect of service tax.

## Budget 2014 – Customs

**Advance Bill of Entry for imports by land:** Customs Act, 1962 is proposed to be amended to provide for filing of advance bill of entry, i.e. B/E before the Import Report (Manifest), in case of land imports through vehicle. Sections 15 and 46 of the Act are proposed to be amended in this regard by Clauses 74 and 76 of the Finance (No. 2) Bill, 2014. Presently, permission from Commissioner of Customs is required for the purpose.

**Settlement of cases – Coverage expanded:** Disputes relating to imports or exports through courier or by post are proposed to be covered under the provisions relating to settlement of cases. As per the amendments proposed in Section 127B of the Customs Act, 1962, application for settlement can also be filed in cases where the importer or exporter had made baggage declaration or a label or declaration accompanying the goods imported or exported through post or courier. Other conditions relating to other modes of imports/exports, for filing settlement applications, will also apply to such cases.

Further, an explanation is proposed to be inserted in Section 127L to clarify that imposition of penalty by Settlement Commission for concealment of duty liability from the customs officer will debar an applicant from filing a subsequent application. The ambiguity as to whether concealment of liability is from Settlement Commission or the Customs Officer will hence would come to rest after the enactment of Clause 79 of the Finance (No. 2) Bill, 2014.

## Budget 2014 – Service Tax

**Negative list to be amended:** At present, as per negative list under Section 66D of Finance Act, 1994, sale of space or time slots for advertisements is not covered under service tax levy except for those broadcast by radio or TV. Now, as per the amendment proposed in the Finance (No. 2) Bill, 2014, sale of space for advertisements will not be taxable only in respect of print media. Service tax will be payable from the date to be notified after the Bill becomes Act on sale of space for advertisements

in the internet, bill boards, conveyances, mobile phones, buildings, etc. Also, amendments have been proposed whereby services provided by radio taxis / radio cabs will come under service tax ambit.

**Exemptions modified:** As per amendments made to Notification No. 25/2012-S.T., exemption has been extended or expanded in respect of several services. A few of them are services of treatment of bio-medical waste by common bio-medical waste treatment facility operator provided to a clinical establishment; services of loading, unloading, packing, storage, warehousing or transportation of cotton (ginned or baled); services received by RBI from outside India in respect of management of foreign exchange; tour operator services provided to a foreign tourist for tour conducted wholly outside India and life insurance services under life micro-insurance products where maximum cover is Rs. 50,000. In the case of services of technical testing or analysis of newly developed drugs relating to clinical trials, exemption has been removed by omitting S. No. 7 in the said notification. The amending Notification No. 6/2014-S.T., dated 11-7-2014 also restricts exemption in respect of services relating to educational institutions by omitting the term 'auxiliary education services' and by specifying services of transportation, catering, security, cleaning, house-keeping and admission or conduct of examinations provided to an educational institution as exempt.

**Works Contract – Valuation rules to be amended from 1-10-2014:** As per Notification No. 11/2014-S.T., dated 11-7-2014, Rule 2A of Service Tax (Determination of Value) Rules, 2006 will stand amended from 1-10-2014. Services covered under category 'B' and 'C' of works contract service are to be merged and charged service tax at 70% of the value. At present, the rules provide for taxing of works contract under three categories viz., 40% for original works, 70% for repair & maintenance of goods and 60% for any other contract.

**POPS Rules to be amended:** As per the amendments to Place of Provision of Services Rules, 2012, to be effective from 1-10-2014 vide Notification No. 14/2014-S.T., dated 11-7-2014, 'intermediary' will include broker or agent or any person who arranges or facilitates supply of goods also. At present, this definition covers those facilitating provision of service only. Rule 9 of POS Rules deems the location of service provider as the place of provision of service in respect of hiring all means of transport for specified period. The amendment as per the Budget change, will exclude aircrafts and vessels (except yacht) from the purview of this rule.

**Point of Taxation Rules to be amended:** As per Notification No. 13/2014-S.T., dated 11-7-2014, Point of Taxation Rules, 2011 will stand amended from 1-10-2014. Where service recipients are liable to pay, the point of taxation shall be the date of payment as per Rule 7 and if such payment is not made within 6 months from date of invoice, POT is date of invoice or completion of service, whichever is earlier. This time-period is being reduced to 3 months as per the amendments.

**Reverse charge – Notification amended:** Notification No. 30/2012-S.T. specifying services on which service tax is payable fully or partially by recipients of service has been amended by Notification No. 10/2014-S.T., dated 11-7-2014. Major changes include making recipients 100% liable in respect of services rendered by recovery agent to a banking company, financial institution or NBFC; widening of coverage to include any body corporate in respect of services provided or agreed to

be provided by directors and revision of abatement percentage, from 1-10-2014, to 50% each for service provider and service recipient in respect of rent-a-cab services (without abatement).

**Other important changes:** E-payment for payment of service will be mandatory from 1-10-2014 as per amendments to Service Tax Rules by Notification No. 9/2014-S.T. As per Notification No. 12/2014-S.T., dated 11-7-2014, effective from 1-10-2014, rate of interest for delayed payment of service tax will stand revised to 18% for delay upto 6 months, 24% for period exceeding 6 months (plus 18% for first 6 months) and 30% for delay of more than one year which includes interest @ 18% for the first 6 months of delay and 24% for the period beyond 6 months and within one year.

## Budget 2014 – Income Tax

**Tax Regime of Real Estate Investment Trust (REIT):** Finance (No. 2) Bill, 2014 proposes to incentivize real estate sector by giving tax incentives to the REITs investors by seeking to tax REITs on their income (except interest from SPV) at the inception and to treat such distributed income as exempt in the hands of the investors at the time of receipt. It is also proposed to defer the tax liability that may arise in the hands of sponsor on transfer of shares in lieu of units of REIT to the time of subsequent sale of units.

**Period of holding for units and unlisted securities:** It has been proposed that an unlisted security and unit (except unit of equity oriented funds) shall be long term capital asset when held for more than 36 months instead of present threshold of 12 months. The concessional rate of tax @ 10% on units as per Section 112 would not apply.

**Benefit of investment allowance extended:** Finance (No. 2) Bill, 2014 proposes to amend Section 32AC and provide that investment allowance @ 15% would be available to companies in manufacturing sector when investment in plant and machinery exceeds Rs. 25 crore in a previous year (as against present threshold of Rs 100 crores). The allowance can be claimed on plant & machinery acquired and installed till previous year ended 31st March 2017.

**Extension of Sunset clause for undertaking in power sector:** It has been proposed to amend Section 80IA and extend the sunset date for availing benefits by undertakings as regards generation, distribution, transmission of power or modernization of existing network, up to 31st March 2017.

**Disallowance of CSR expenses:** It has been proposed that expenses incurred on CSR activities as per Section 135 of the Companies Act, 2013 will not be allowed as deduction under Section 37(1). The deduction of CSR expenses can be claimed if they fall in the ambit of Section 30 to 36 if the conditions of these sections are fulfilled. For illustration, capital expenditure relating to CSR activities *may* be eligible for depreciation under Section 32.

**Taxability of forfeiture of advance money:** Advance forfeited by assessee in relation to a capital asset is proposed to be taxable as an Income from Other Sources under Section 56 in the year of forfeiture itself. The amount shall not be deducted from cost or Written Down Value or FMV as stated in Section 51.

**Taxability of dividend in hands of Indian holding company:** It has been proposed to extend the benefit of concessional rate of tax of 15% on dividends received by an Indian holding company from foreign subsidiary company without any terminal date.

**Transfer Pricing:** Finance (No. 2) Bill, 2014 proposes to amend Section 92B (2) so as to expand the scope of definition of international transaction to include transactions with unrelated residents ('domestic transaction') if the AE of the assessee had a prior arrangement in relation to such domestic transaction. It is also proposed to introduce roll back mechanism in Advance Pricing Agreement. ALP determined in APA for an international transaction can be used in relation to an international transaction for preceding four years in addition to five ensuing years.

**Disallowance on non deduction or deposit of TDS:** It has been proposed that expenditure requiring payments to a non resident would be allowed as deduction in the previous year of incurrence of expense even if TDS thereon has deposited up to due date of filing of return of income under Section 139(1) as against the existing provision which require depositing of TDS within the due date provided in section 200(1). It has also been proposed that Section 40(a)(ia) shall extend to all the payments made to resident on which TDS is deductible but not deducted or paid. However, the amount to be disallowed is proposed to be 30% of the expense instead of whole of the amount.

**Nature of gain / loss on securities held by FIIs:** Section 2(14) is proposed to be amended to provide that any security held by FII shall be a capital asset and resultantly any income arising from transfer thereof would be capital gains.

**Rate of tax on overseas borrowing:** It has been proposed that interest on borrowing on any long term bond issued to non residents by Indian companies shall be taxable under Section 115A @ 5% and also tax shall be deducted @ 5%. The scope has been expanded to include any long term bonds as against long term infrastructure bonds.

**Grossing up of 'Dividend Distribution tax':** The dividend distribution tax payable by domestic company shall be computed by grossing up the amount of dividends payable.

# CENTRAL EXCISE

## Ratio decidendi

**Cenvat credit of duty paid on non-dutiable inputs, available:** Gujarat High Court has held that department cannot deny Cenvat credit of the duty paid by the supplier on non-dutiable zinc dross when assessment at supplier's end had not been challenged. The court observed that payment of duty by supplier to the department was not in dispute and though amount declared by the original manufacturer did not take the character of excise duty, Cenvat credit of such duty cannot be denied to the purchaser who otherwise fulfilled all conditions for availing Cenvat credit. It was noted that the department has accepted the declarations and duty payment. Supreme Court judgement in the case of *MDS Switchgear Ltd.* was also relied on in this regard. [*Commissioner* v. *Nahar Granites Ltd.* – 2014 (305) ELT 9 (Guj.)]

**SSI exemption is optional – Duty payment after utilizing credit, correct:** Delhi High Court has held that SSI exemption is optional and the assessee may decide not to claim such exemption and pay duty after utilization of Cenvat credit. The dispute pertained to option to avail exemption under Notification No. 1/93-C.E. or credit under Rule 57A of erstwhile Central Excise Rules, 1944. The High Court in this regard observed that the scheme of Cenvat credit and notification granting exemption to SSIs are beneficial in nature and that such beneficial legislations are to be strictly interpreted initially to determine eligibility, but once eligibility is

determined, they have to be read liberally to grant benefit to the assessee. The court also said that if the contention of the department is accepted, it would be against the intention of the legislation of granting benefit to small manufacturers and will become disadvantageous to some manufacturers. [*Commissioner* v. *Grand Card Industries* – 2014 (305) ELT 19 (Del.)]

**Cenvat credit available on fuel used for generation of electricity when part of electricity supplied to another unit:** Allahabad High Court has allowed Cenvat credit of duty paid on furnace oil used as fuel in DG sets for generation of electricity when part of electricity was supplied to another unit of the assessee engaged in manufacture of polymer chips, which was the main input of the assessee. The High Court in this regard observed held that having multiple power plants or DG sets for different units located adjacent to each other and owned by one person is commercially not feasible. The Supreme Court judgment in the case of *Maruti Suzuki Ltd.* [2009 (240) ELT 641 (SC)], which denied Cenvat credit on inputs used in generation of electricity wheeled out, was not discussed in this case. [*Commissioner* v. *Jindal Polyster* – 2014 (305) ELT 43 (All.)]

**Cenvat credit on inputs when additional duty paid on value addition:** CESTAT, Mumbai has held that Cenvat credit cannot be denied on steel sheets which were de-coiled, cut to length, de-greased, cleaned, etc., and cleared on payment of duty. The Tribunal, without deciding whether such activity amounts to manufacture or not but observing that there is value addition on the goods and the assessee had paid additional duty on such value addition, resulting in benefit to the government, held that Cenvat credit cannot be demanded from the assessee. Bombay High Court ruling in the case of *Ajinkya Enterprises* was also relied upon by the tribunal in this regard. [*Colour Roof (India) Ltd.* v. *Commissioner* – 2014 (305) ELT 129 (Tri.-Mum.)]

**Area based exemption - Increase in installed capacity when capacity of some machines not increased:** CESTAT, Delhi has held that merely because capacity of two machines remained same, it cannot be said that the additional capacity has been achieved merely by process improvement and not by installation of additional machinery and equipment. It was observed in this case that there were actual machines installed which had resulted in increase of production capacity. It was held that the exemption can be denied only in case where without installation of any additional machinery, capacity is increased by increasing efficiency or by improving process. [*Commissioner* v. *Sudershan Pine Products* – 2014 (305) ELT 158 (Tri-Del.)]

**Adjustment of refund and rebate against other demands:** CESTAT, Chennai has held that refund of excess duty arising out of finalization of provisional assessment can be adjusted against the demand of differential duty also arising out of finalization of provisional assessment. [*Coromandel Fertilizers Ltd.* v. *Commissioner* – 2014-TIOL-963-CESTAT-MAD]

However adjustment of admissible rebate of duty against other arrears pending against the assessee was held as not justified by the CESTAT, Ahmedabad in the case where separate appeals/ stay applications in respect of said arrears were pending before the appropriate appellate authorities. Tribunal in this case granted interest on delayed payment of rebate to the assessee. [*Ronald Pharmaceuticals Pvt. Ltd.* v. *Commissioner* – 2014-TIOL-918-CESTAT-AHM]

**MRP based excise exemption not applicable to exports:** CESTAT, Mumbai has held that the requirement of affixing MRP under Standards of Weights & Measures Act, 1976 read with Standards of Weights & Measures (Packaged Commodities)

Rules, 1977 is only meant for goods required to be sold in India and has nothing to do with the goods exported. It was held that any exemption given on the basis of MRP applies to goods sold in India and has no application whatsoever in respect of identical goods exported and hence biscuits enjoying excise exemption on the basis of their MRP would not be considered as exempted when they are exported. Cenvat credit of duty/tax paid on inputs / input services was, therefore, held as available to the assessee. [*Modi Bakers* v. *Commissioner* – 2014-TIOL-1018-CESTAT-MUM]

**No unjust enrichment if duty refunded through credit notes:** There is no unjust enrichment in the case where assessee gave discounts to its dealers on sale of old stock/ prompt payment, which was known to the dealers in advance but raised invoices on pre-discounted assessable value and passed the discount (along with duty component on it) to the dealers by way of credit notes. CESTAT, Mumbai while holding so, noted that the appellant has shown the amount of duty refunded to them in the balance sheet as receivable and got confirmation from the dealers that they have received credit of the discount through credit notes. Andhra High Court judgment in the case of *AP Paper Mills Ltd.* [2014-TIOL-448] was also relied upon by the Tribunal in this regard. [*Tata Motors Ltd.* v. *Commissioner* – 2014-TIOL-1163-CESTAT-MUM]

**Cenvat credit not available on extra/photocopy of excise invoice:** CESTAT, Mumbai has held that Cenvat credit on the basis of extra copy or Xerox/ photocopy of duty paid documents is not available as these documents are not specified under law. Argument that credit can be taken even when there is procedural infraction was found not acceptable relying on 5 Member Bench of the Apex Court in the case of *Hari Chand Sri Gopal* [2010 (260) ELT 3 (SC)] and *Indian Oil Corporation Ltd.* [2012 (276) ELT 145 (SC)] where it was held that in order to claim the benefit under law, substantial compliance is not enough and the procedures prescribed in the statute should be mandatorily followed. [*Century Rayon* v. *Commissioner* – 2014-TIOL-1165-CESTAT-MUM]

**No suo-motu demand by excise authorities if there is error in DTA entitlement of EOU:** Excise authorities cannot suo-motu raise demand on the assessee if there is an error in DTA entitlement of 100% EOU, which is considered and fixed by Development Commissioner. Holding so, the Tribunal also held that excise authorities should refer the matter to Development Commissioner before taking any suo-motu action. [*Shreyas Intermediates Ltd.* v. *Commissioner* – 2014 (304) ELT 419 (Tri.-Mum.)]

# CUSTOMS

## Ratio decidendi

**Seeds for sowing are not parts of a plant:** CESTAT, Mumbai has held that seeds cannot be considered as parts of plants so as to be prohibited for import through courier in terms of Courier Import & Export (Clearance) Regulations, 1998. It was noted that even the Customs Tariff recognizes seeds for sowing and plants and parts thereof differently under different Chapters. [*Commissioner* v. *Chandra Nursery* – 2014-TIOL-1016-CESTAT-MUM]

**No unjust enrichment when price of finished goods unchanged post importation of capital goods:** No change in price of finished goods before and after importation of impugned capital

goods was accepted by the Tribunal as one of the grounds for establishing that excess duty paid by the importer did not form a part of the cost of production of finished goods. It was hence held that the appellant had passed the bar of unjust enrichment. [*Garden Silk Mills* v. *Commissioner* – 2014-TIOL-1110-CESTAT-MUM]

**Endorsement of non-availability of SAD credit on invoice for availing refund merely procedural:** Larger Bench of the CESTAT has held that condition 2(b) of Notification No. 102/2007-Cus., dated 14-9-2007, requiring an endorsement that no credit of SAD shall be admissible, is merely procedural. It was held that the purpose of such an endorsement could be achieved when the duty element itself was not specified in the invoice. [*Chowgule & Company Pvt. Ltd.* v. *Commissioner* – 2014-TIOL-1191-CESTAT-MUM-LB]

**Review Committee's order cannot be reopened/reviewed:** Once the order passed by the lower authority has been examined and the Review Committee has decided not to file an appeal before CESTAT, a subsequent review of this decision is not legal as the Committee had become *functus officio*. The Kolkata Bench of CESTAT noted that there are no provisions under Sections 129A and 129D of the Customs Act to reopen/ review the Review Committee's order. [*Commissioner* v. *Payodhi Foods Pvt. Ltd.* – 2014-TIOL-1134-CESTAT-KOL]

**No appeal lies before Tribunal against the interim order of Commissioner (Appeals):** CESTAT, Mumbai has held that an appeal against the interim order (Order directing pre-deposit) passed by the Commissioner (Appeals) is not maintainable as it only has the power to entertain appeals against the final orders passed by the lower authority under Section 128A and not under Section 129E of the Customs Act. [*Siddarth Engg. & Shipbuilding Co. Pvt. Ltd.* v. *Commissioner* – 2014-TIOL-1155-CESTAT-MUM]

**Export of Indian currency exceeding Rs. 10,000/- without RBI's permission liable for absolute confiscation:** The question before the Larger Bench of the Tribunal was that export of Indian currency exceeding Rs. 10,000/- without RBI's permission is liable for absolute confiscation or can it be redeemed upon payment of fine and penalty. The limitation on the amount to be exported is provided in FEMA (Import and Export of Currency) Regulations, 2000 wherein an application is required to be made to the RBI for carrying excess currency and the same may be allowed subject to certain terms and conditions. The Larger Bench of the Tribunal in this regard held that this regulation would act in the nature of a restriction and thus would render the excess currency as prohibited goods liable to absolute confiscation. [*Peringatil Hamza* v. *Commissioner* – 2014-TIOL-1156-CESTAT-MUM-LB]

**Red Bull Energy Drink classifiable under Tariff Item 2202 9090:** The Tribunal relying upon Rule 3(c) of the General Rules of Interpretation and the common parlance test has held that Red Bull Energy Drink being a caffeinated beverage will be classified under TI 2202 9090 and not under TI 2202 1010 of Customs Tariff. It was also noted that in common parlance also the product is known as energy drink other than mineral water and aerated water. [*Commissioner* v. *Narang Hospitality Services Pvt. Ltd.* – 2014-TIOL-1190-CESTAT-MUM]

**Redemption fine imposable even after goods allowed to be re-exported:** Madras High Court has held that mere facility of re-export does not take the case out of the purview of Section 125 of the Customs Act, 1962 which provides for levy of redemption fine. It was held that redemption fine can be imposed even when the goods have been allowed to be re-exported. [*Chennai Marine Trading Pvt. Ltd.* v. *Commissioner* – 2014 (304) ELT 354 (Mad.)]

# SERVICE TAX

## Ratio decidendi

**Marketing on principal to principal basis – Service tax not payable:** The appellant, engaged in marketing of petroleum products, purchased Compressed Natural Gas (CNG) from an entity ('seller') and sold the same to dealers. The gas was compressed at the sale outlets for which space and other facilities were provided by appellant and cost of the same was borne by the seller of CNG. The seller had registered sale outlets for the purpose of payment of excise duty as compression took place in such outlets. The department contended that the activity amounted to marketing of CNG and appellant was liable to service tax under BAS. The CESTAT held that the appellant bought the goods, the seller was paying VAT on such sales and the transactions were on principal to principal basis with no commission being received by appellant and therefore, the appellant was not liable to pay service tax. [*BPCL* v. *Commissioner* – 2014-TIOL-1114-CESTAT-MUM]

**Refund of Cenvat credit on export of services – Time-limit and relevant date:** The assessee contended that for refund of accumulated Cenvat credit, no time-limit has been provided under Notification No. 5/2006-C.E. (N.T.) and time-limit, if any, has to be computed from the date of receipt of the money in respect of the export of service or at least from the last day of the quarter for which the refund claim pertained. It was held by the Tribunal that a combined reading of Rule 5 of Cenvat Credit Rules, Section 11B of Central Excise Act and Notification No. 5/2006-C.E. (N.T.) would indicate that the period of one year is to be computed from the date of export of the service. It held that export of service takes place at the time of issuing invoice and the payment condition is only to ensure that the service provider receives the payment in convertible foreign exchange so as to get applicable benefit. Thus, the date of receipt of payment was held as not relevant for such refund. [*Affinity Express India* v. *Commissioner* – 2014-TIOL-1035-CESTAT-Mum]

**Cenvat credit admissibility on debit note:** The question before the Tribunal was whether Cenvat credit would be admissible on debit note. The Bench observed that there was no dispute over receipt of service and payment for such service and the debit note contained all the requirements of Cenvat credit. After taking note of the fact that the debit note was rectified later by issuing invoice, the appellant was held as entitled to Cenvat credit. [*Mahindra & Mahindra Ltd.* v. *Commissioner* – 2014-TIOL-1182-CESTAT-MUM]

**Fabrication of steel structures – Activity being excisable, not covered under BAS:** Fabrication of steel storage tanks, structures, platform and railing would amount to 'manufacture' under Central Excise Act and such fabrication along

with erection and installation would not be covered under Business Auxiliary Services. The department had raised the demand on the ground that the steel items after being erected and installed become embedded to earth and became non-excisable goods and hence the activity was covered under BAS. [*Commissioner* v. *Shri Shanker Engineering Works* –2014-TIOL-1208-CESTAT-DEL]

**Taxability when bonds guaranteed by government:** When bonds are issued by the body established by the government for promotion of investment and industrial development and when such bonds are kept by such body in its own name, the mere fact of reimbursement of certain administrative charges from the government would not render the activity as one of 'Banking & Other Financial Services'. The CESTAT held that government guarantee of repayment of loan would not amount to issue of bonds by the government and the expenditure incurred by appellant was for its own activity and no taxable service could be considered as rendered to state government. [*Rajasthan State Industrial Development and Investment Corp. Ltd.* v. *Commissioner* – 2014-TIOL-1227-CESTAT-DEL]

**Teaching yoga liable to service tax:** Service tax was demanded under 'Health and Fitness Service' on the ground that the appellant was teaching asanas / yoga for which book published by appellant was relied upon. The demand was resisted contending that certain ailments were being cured combining yoga with medicines. The CESTAT noted that the relevant book mentioned name of asanas being taught by appellant along with benefits and that the appellant was registered as a trust to teach art of yoga. It held that yoga being therapeutic and restorative, the services provided were expressly covered under 'Health and Fitness Service'. [*Sansadhan Vikas Ani Sanshodhan Manch Kabir Baug Matha Sanstha* v. *Commissioner* – 2014-TIOL-1192-CESTAT-MUM]

# INCOME TAX

## Ratio decidendi

**Mere presence of employees in India for more than 183 days will not trigger PE:** The assessee, a Non Resident entity rendered supervisory services for erection and commissioning of plants in India in connection with which its employees resided in India for a period of 220 days. It offered the income received by it to tax as 'Fee for Technical Services'. The department contended that the assessee had a Permanent Establishment ('PE') in India. The ITAT held that, PE under the Income Tax Act, 1961 ('the IT Act') will not get constituted without a fixed place at the disposal of the assessee for rendering such services. The ITAT also held that mere rendition of supervisory services will not trigger PE, unless the building or construction or assembly activity itself is carried out by the assessee. [*GFA Anlagenbau Gmbh* v. *ADIT* – Order dated 27-6-2014 in ITA 1292/Hyd/2011, ITAT, Hyderabad]

**'Make available' clause can be read into France DTAA through protocol:** The assessee, had received certain services from French service provider in relation to using a system developed for carrying out certain processes in airline ticketing and other services, electronically. Arguing

against the department stand that this amounted to technical services, the assessee contended that the foreign service provider did not 'make available' technical knowledge or skill of the service provider. Therefore, in terms of Protocol to India France DTAA read with India USA DTAA beneficial treatment of FTS should be extended to India France DTAA also. The ITAT, referring to the Protocol between India and France, held that the beneficial treatment provided to residents of USA should be extended to residents of France in terms of the specific agreement between the countries through a Protocol, though not specifically in the DTAA. [*DDIT* v. *IATA BSP India* – Order dated 11-6-2014 in ITA 1149/Mum/2010, ITAT, Mumbai]

**Assigning Indian contracts to overseas entity and participation in their execution can trigger PE:** The assessee, incorporated in USA was assigned a contract awarded to its Indian group company for supply and installation of certain telecom equipments. The ITAT held that the assessee would have agency PE as the Indian group company negotiated the contract and immediately thereafter assigning it to the taxpayer. This was understood as equivalent to concluding contract on behalf of the US company. [*Nortel Networks India International Inc* v. *DCIT* – Order dated 13-6-2014 in ITA No 1119/Del/2010, ITAT, Delhi]

**No liability to deduct TDS arises where subsequently law is amended retrospectively:** The assessee paid a certain sum as 'Pay Channel charges' to satellite channel companies on which TDS was not deducted. The revenue department disallowed the sum opining that it was royalty exigible to TDS under Section 195 of the Act. The Tribunal held that, though in view of the retrospective insertion of Explanation 6 by the Finance Act, 2012, the payment made by the taxpayer as 'pay channel charges' constitutes 'royalty', the decision of the assessee not to deduct TDS was supported by the decision of Delhi HC in *Asia Satellite*, which prevailed at the time of making remittance, the assessee cannot be penalized by relying on the subsequent amendments made in the Act with retrospective effect. [*Kerala Vision Ltd* v. *ACIT* (Trib-Cochin) – Order dated 6-6-2014 in ITA No. 794 of 2013, ITAT, Cochin]

**Explanation to Section 37(1) not triggered for procedural irregularity:** The assessee paid certain job work charges to its related party without obtaining a prior approval of the government as contemplated in Section 297 of the Companies Act, 1956; however the same was subsequently ratified by the Company Law Board. The Tribunal held that, the Explanation to Section 37(1) is a deeming provision and has to be restricted to what is expressly stated therein, therefore if the expenditure is otherwise lawful and neither amounts to offence nor is prohibited by law, mere procedural irregularity would not make the expenditure itself as unlawful and accordingly deleted the disallowance. [*Jai Surgicals Ltd* v. *ACIT* (Trib-Del) – Order dated 26-6-2014 in ITA No. 844 of 2013, ITAT, Delhi]

# VALUE ADDED TAX (VAT)

## Notifications

**Jharkhand VAT Act - Amendment in Schedule:** Entry 74 of Part B of Schedule II of the Jharkhand Value Added Tax Act, 2005 has been substituted by Notification No. S.O. 8, dated 1-7-2014 with effect from 1-7-2014. The said entry now reads *"IT products including computers, Telephones and*

*parts thereof, cell phones, DVD, CD, Pendrive, teleprinter and wireless equipments and parts thereof excluding Uninterrupted Power Supply (UPS)".* Prior to this substitution, the said entry covered IT products as listed by the Government of India.

**Chhattisgarh Entry Tax – Amendments:** Definition of "market value" has been specified for minerals and iron ore lumps and fines, coal including coke, bauxite and laterite, and in case of stock transfers. Notification No. F-10/65/2014/CT/V (67) dated 1-7-2014 issued in this regard under Chhattisgarh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976, *inter alia*, provides that in case of stock transfer of goods either from outside Chhattisgarh or from within Chhattisgarh, the market value of goods will be the sale price of goods in the hands of the selling dealer who has caused the entry of goods by way of stock transfer.

**Uttar Pradesh VAT Rules, 2008 – Amendments:** Uttar Pradesh Value Added Tax (Fifth Amendment) Rules, 2014 have been notified vide Notification No. KA.Ni.-2-684/XI-9(295)/07-U.P.VAT Rules-08-Order-(114)-2014, dated 27-6-2014. In Rule 21 of the Uttar Pradesh Value Added Tax Rules, 2008, input tax credit shall not be allowed, to the extent of the rate provided under Section 8(1) of CST Act, 1956, in respect of goods which are,

a) consigned outside the State otherwise than as a result of sale in the same form and condition in which those were purchased; or

b) used or consumed in manufacture or processing of any taxable goods or in packing of such goods and such manufactured or processed goods are consigned outside the State otherwise than as a result of a sale.

Further, as per Rule 22, the amount of input tax credit to the extent of the rate provided under Section 8(1) shall be reversed. It may be noted that prior to the said amendment in Rule 21, an amendment to this effect had already been made in Section 13 and hence now Rule 21 has been aligned with Section13.

## Ratio decidendi

**Use – Purchase for own use by hospital:** Kerala High Court has held that penalty under Section 70B of the Kerala Value Added Tax Act, 2003 cannot be imposed on hospital which had purchased a scanner with its accessories and transported the same from Bangalore to Kerala on the strength of Form 16 under the KVAT, declaring that the goods as purchased for own use. Section 70B of KVAT Act imposes a penalty for commercial use of goods brought from outside Kerala by any person under a declaration of own use by such person. The court in this regard held that the assessee had not made commercial use of the goods in so far as the goods were not transferred or alienated. It was also held that generation of profit by making use of goods will not detract from the use being its own use and since the assessee, a hospital, was using the goods for its own use, penalty under Section 70B of the KVAT Act cannot be imposed. [*State of Kerala* v. *Leo Hospital* – 2014-VIL-168-KER]

**Interest and penalty for late payment of Additional Sales Tax:** Madras High Court has held that interest cannot be demanded and penalty cannot be imposed for belated payment of additional sales tax as there was no substantial provision in the Tamil Nadu Additional Sales Tax

Act, 1970 during the relevant assessment year (1984-85). The court in this regard also noted that the provisions of the Tamil Nadu General Sales Tax Act, 1959 cannot be extracted for the purpose of levy of interest or penalty under the additional sales tax provisions. The petitioner had filed returns and paid sales tax under the TNGST Act and additional sales tax under the TN Additional Sales Tax Act, 1970 for the assessment year 1984-85, the same, however, was paid belatedly. The question before the court was whether interest and penalty on late payment of additional sales tax (which is imposed under the TNAST Act) were attracted when a proceeding was initiated under Section 24(3) of the TNGST Act which provided for payment of interest on the amount of sales tax left unpaid. [*S. Gurunathan* v. *DCTO, Thirupathur* – 2014-VIL-162-MAD]