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Article

Trading of goods under negative list & Cenvat credit

By **Dipa Devani**

The term 'service' is defined under Section 65(44) of the Finance Act, 1994 ("the Finance Act") as under:

> Service means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-
>
> (a) An activity which constitute merely-
>
> (i) A transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
>
> (ii) ....
>
> (iii) .....

Under Section 66B of the Finance Act, service tax shall be levied on the value of all services, other than those service specified in the negative list. Negative list denotes the list of services on which no service tax is payable under Section 66B of the Finance Act, 1994. As per Section 66D (e), trading of goods is a service specified under the negative list. Accordingly, on the activity of trading of goods, no service tax is payable.

If trading of goods is not specified under the negative list then?

Section 66B provides that service tax is leviable on all '*services*' other than the services specified under the negative list. Therefore, for being exigible to service tax an activity needs to qualify as a service first. The term 'service' is defined under Section 65B (44) which specifically excludes an activity of mere transfer of title in goods by way of sale. Thus, the activity of trading which is merely buying and selling of the goods is not a service. Hence, the question of service tax levy on the same does not arise.

Accordingly, even if trading activity is not specified under the negative list of services, it is not liable to service tax, as it is not a service. Further, negative list of services comprises services but an activity of trading of goods is not a service, therefore it cannot be specified under the negative list of services. Therefore, it is worth pondering as to why the activity of trading, which is not a service, is provided under the negative list. The present article aims to highlight real intention behind specifying trading of goods under the negative list of services. To comprehend the actual intention, it is necessary to refer to the treatment given to trading of goods under the old regime of service tax.

Treatment under the old regime

With effect from 1-4-2011, activity of trading of goods was included under the definition of 'exempted service' under Rule 2(e) of the Cenvat Credit Rules, 2004 (hereinafter referred as 'Rules'):

> Rule 2(e) "exempted service" means taxable services which are exempt from the whole of the service tax leviable thereon, and includes.....
>
> Explanation- For the removal of doubts, it is hereby clarified that "exempted services" includes trading;

This amendment was carried out specifically to overcome the judgment of CESTAT, Ahmedabad in the case of *Orion Appliances Ltd.,* reported at 2010 (9) STR 205, wherein the department had asked the asssessee to do proportionate reversal of credit availed on common input service used for trading activity and for providing taxable service. The Tribunal held that trading activity was covered under sales tax law and cannot be called as a service. Therefore, provision of Rule 6 (3) would not be applicable to an assessee engaged in providing taxable service and trading activity.

Since, trading was not considered as an exempted service, some of the manufacturers and service providers were taking advantage of the same and taking Cenvat credit of service tax paid on input service used in trading activity without any restriction.

Therefore, to overcome this apparent lacuna in the provisions of Cenvat Credit Rules, 2004, the definition of the exempted service was amended and by specifically bringing trading activities within the ambit of exempted service, the provisions of Rule 6 of the Cenvat Credit Rules were made applicable to the manufacturer or service provider undertaking trading activities apart from manufacturing dutiable goods or providing taxable service i.e., a person carrying on manufacturing and trading activity is obligated to reverse the proportionate Cenvat credit availed in respect of trading activity.

The negative list regime

Now, since trading of goods has been specified under the negative list of services, it is a service which is not liable to service tax under Section 66B of the Finance Act. Hence, it would qualify as an exempted service. Consequently, under the provisions of Rule 6 of the Cenvat Credit Rules, 2004, obligation to reverse proportionate Cenvat credit availed in respect of trading activity would arise. Thus, the treatment of trading activity under the old and new regime of service tax is unaffected as far as Cenvat credit is concerned.

However, here it is difficult to understand as to how an activity of trading of goods, which is specifically excluded from the definition of the service, could be included under the negative list of services by considering it as a service. The activity of the trading of goods is excluded from the scope of the service because the Constitution of India authorizes levy of sales tax on sales and purchases of the goods and service tax on the rendition of service. The distinction between the sale and purchase of goods and act of rendition of service is clearly brought out for the purpose of payment of tax.

It is true that the legislature has wide power to create a legal fiction for the purpose of assuming existence of a fact which does not really exist. However deeming trading of goods as exempted service by including the same under the negative list of service does not seem to be in accordance with the principles of the Constitution of India.

Further, recently the Madras High Court in the case, *FL Smidth P Ltd.* v. *Commissioner* reported at 2014-TIOL-2186-HC-MAD-CX dealt with the issue, whether entire Cenvat

credit of service tax on service used partly for manufacturing and partly for trading was available for the period prior to 1-4-2011. In this case the appellants used service of commission agent commonly for manufactured goods and traded goods and availed full credit of the same. The department disallowed Cenvat credit relating to trading activity. The order was upheld by the Tribunal against which appeal was by the assessee before the Madras High Court. The High Court held that credit to the extent used for manufactured goods would only be available and credit to the extent used for traded goods was not available.

In arriving at the above conclusion, the High Court relied on Rule 2(l) of the Cenvat Credit Rules, 2004 ("Credit Rules") which defines input service as services which are used by the manufacturer directly or indirectly in relation to the manufacturing of final product and clearance of final product from the place of removal. As this definition did not cover services used in relation to trading of goods, the High Court held that credit of services used in relation to trading was not available.

In this decision, the High Court has rightly decided that the Cenvat credit of input service attributable to trading is not available. However, the issue as to whether partial reversal of Cenvat credit can be demanded on the common input service used for trading and taxable output service and whether value of trading turnover can be taken to be the margin 10% of cost of purchase as is presently taken under Rule 6 of Credit Rules still remain undecided.

Conclusion

Thus, by specifying the activity of trading of goods under the negative list of services, it becomes an 'exempted service'. However, an activity of trading of goods, which constitutes merely a transfer of title in goods by way of sale, is specifically excluded from the definition of service, thus the question of considering it as exempted service raises more questions. It is a moot point whether the provisions of Rule 6 of the Cenvat Credit Rules, 2004, would be applicable to those cases where input services are commonly used for trading activity and manufacturing of dutiable goods or providing output services and whether proportionate reversal of Cenvat credit would be required.

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CUSTOMS

Notifications, Circulars & Notices

New Foreign Trade Policy, 2015-20 and Handbook of Procedures, 2015-20 notified:

The new Foreign Trade Policy, Hand Book of Procedures, Appendices and Aayat Niryat Forms have been notified. DGFT Notification No. 1/2015-2020 & DGFT Public Notice No. 1/2015-2020, both dated 1-4-2015 have been issued in this regard. The noteworthy changes are:

- Duty Scrips Reward Schemes *viz.* FPS, FMS, MLFPS, Agri Infrastructure Scrips and VKGUY have been merged into one scheme - Merchandise Exports from India

Scheme (MEIS). List of countries and products eligible for Merchandise Exports from India Scheme (MEIS) have also been notified vide DGFT Public Notice No. 2/2015-20, dated 1-4-2015;

- Served from India Scheme (SFIS) has been replaced by Services Exports from India Scheme (SEIS). DGFT Public Notice No. 3/2015-20, dated 1-4-2015 lists services eligible, rates and conditions for benefit under SEIS;
- Scrips issued under MEIS and SEIS will be freely transferable. The same can be utilized for payment of customs duty, central excise duty and service tax;
- Status holder manufacturers will be allowed to self-certify their manufactured goods as originating in India for claiming benefit under PTAs, FTAs, CECAs and CEPAs. The scheme in this regard shall be notified separately;
- Imports against Advance Authorization are eligible for exemption from transitional product specific safeguard duty;
- Pre-export Duty Free Import Authorisation (DFIA) Scheme has been withdrawn;
- To promote the domestic industry, export obligation under EPCG scheme in case of domestic procurement of capital goods has been reduced from 90% to 75% of normal export obligation;
- EOUs, EHTPs and STPs can share infrastructural facilities among themselves;
- Inter-unit transfer of goods and services is allowed among EOUs, EHTPs, STPs and BTPs;
- EOU can supply spares/ components upto 2% of value of manufactured articles to a buyer in domestic market for the purposes of after-sale services; and
- Validity of SCOMET export authorization has been increased from 12 months to 24 months.

FTP 2015-20 - Implementation of various schemes notified: After the announcement of the new Foreign Trade Policy by the Ministry of Commerce, customs, central excise and service tax notifications have been issued by the Ministry of Finance for implementing various new export incentive schemes and also in order to incorporate changes in the old schemes. EPCG Scheme, Post-Export EPCG Scheme, Advance Authorisation Scheme, Duty Free Import Authorisation Scheme, Advance Authorisation Scheme for annual requirement, Advance Authorisation Scheme for Deemed Export, Advance Authorisation Scheme for export of prohibited goods, Merchandise Export from India Scheme and Service Export from India Scheme have been notified/renotified in this regard by Notification Nos. 16-22/2015-Cus., all dated 1-4-2015 and Notification Nos. 24 & 25/2015-Cus., both dated 8-4-2015. Further, while Notification No. 18/2015-C.E., dated 1-4-2015 and Nos. 20 & 21/2015-C.E., both dated 8-4-2015 have been issued on the central excise side, Notification Nos. 10 & 11/2015-S.T., both dated 8-4-2015 have been issued to implement the schemes for service tax exemptions.

Advance authorization and EPCG - Suo motu payment of customs duties and interest in case of bona fide defaults, allowed: To enable quicker payment of customs duties and interest in cases of bona fide default, CBEC has prescribed a

procedure to facilitate payment of duties and interest by the authorization holder on basis of own calculation, during the pendency of the detailed calculation by the Regional Authority. Circular No. 11/2015-Cus., dated 1-4-2015 issued for this purpose states that the procedure may be adopted by the authorization holder who has obtained acknowledgement from the concerned RA of its application for regularization of bona fide EO default.

SAD refund – One refund claim per month allowed at a Customs station: One refund claim for refund of SAD can now be filed per month at every Customs station where imports have been made. CBEC Circular No. 12/2015-Cus., dated 9-4-2015 issued in this regard amends earlier Circular No. 6/2008-Cus. which provided for filing of one refund claim per month in a Commissionerate.

Optional use of Digital Signature Certificate allowed for filing customs documents through Remote EDI System (RES): From 1-4-2015 importers, exporters, customs brokers, shipping lines, airlines or their agents have been given an option to use Digital Signature Certificate for filing Customs documents such as bills of entry, shipping bills, and other specified documents through Remote EDI System (RES). CBEC Circular No. 10/2015-Cus., dated 31-3-2015 however, makes it mandatory for Accredited Client Programme (ACP) importers to file bills of entry using digital signature, from 1-5-2015.

Vehicle import allowed from Kattupalli and Pipavav ports: Till date, new vehicles could be imported through 12 notified customs ports as per Policy condition No. 2(II) (d) of Chapter 87 under schedule 1 to ITC(HS), 2012. By DGFT Notification No. 117 (RE-2013)/2009-2014, dated 13-3-2015, two new seaports have been added to the list namely, Kattupalli port and APM Terminals, Pipavav port from where new vehicles can be imported into India.

Ratio decidendi

Suo motu refund of EDD on finalization of provisional bills of entry: Madras High Court has held that assessee is entitled to suo motu refund of extra duty deposit under Section 18 of the Customs Act arising out of finalization of provisional bills of entry prior to July, 2006. The court in this regard held that provisions of Explanation II to Section 27 of the Customs Act would not apply to such refunds. Para 104 of the Supreme Court's judgement in the case of *Mafatlal Industries* was relied by the court here. [*Commissioner* v. *Sayonara Exports Pvt. Ltd.* - 2015-TIOL-740-HC-MAD-CUS]

Importer is deemed manufacturer for availing benefit of central excise notification for determination of CVD: Relying upon the case of *Thermax Private Limited* [(1992) 4 SCC 440], the Supreme Court of India has held that an importer has to be deemed as a manufacturer for the purpose of applicability of Notification No. 64/93-C.E for the purpose of calculating CVD. Accordingly, the benefit of this notification was extended to importers of saloon cars when such cars were used as tourist taxis. [*Aidek Tourism Services Pvt Ltd.* v. *Commissioner* - 2015-TIOL-23-SC-CUS]

Relying on the judgement in the case of *Thermax*

Private Ltd. and taking note of the above Order, the Supreme Court of India has, in another case held that benefit of exemption from CVD, which is subject to the condition that no credit on inputs or capital goods is used in the manufacture of the goods, will be available to the importer also. [*SRF LTD.* v. *Commissioner* - Civil Appeal Nos. 9440 of 2003 and 1623 of 2009, decided on 26-3-2015, Supreme Court]

Assessment order – Date of communication relevant: The CESTAT Chennai, relying on the order in the case of *Redington India Ltd.* [2007 (212) ELT 187 (Mad.)]has held that the date of communication of the printed copy of the importer's bill of entry and the out of charge order is the effective date of communication of an assessment order. The Tribunal hence found the appeal filed before the Commissioner (Appeals) against the assessment order as not time-barred. [*Bharat Sanchar Nigam Ltd.* v. *Commissioner* - 2015-TIOL-424-CESTAT-MAD]

Exemption at the time of filing ex-bond bill of entry: Clause (b) to Section 15 of the Customs Act provides that where goods are cleared from a warehouse under Section 68, the applicable rate of duty shall be the rate prevalent on the date on which a bill of entry for home consumption is filed. Chennai Bench of CESTAT has held that an importer would be entitled to claim benefit under an exemption notification even at the time of filing an ex-bond bill of entry subject to fulfillment of the conditions of the said notification. Department's contention that the importer should have opted for the exemption at time of in-bond bill of entry, was hence rejected. [*Commissioner* v. *Cethar Vessels* - 2015-TIOL-452-CESTAT-Chennai]

Clubbing of free allowance of passengers not permitted: Rule 3 read with Appendix A of the Baggage Rules, 1998 provides that a person residing in India returning from another country shall be permitted to duty free clearance of articles in his baggage upto the value of Rs. 25,000/-. Relying on the explanation to the said appendix, Calcutta High Court has held that such free allowance allocated to a passenger cannot be pooled with the free allowance of another passenger. The court in this regard also held that the definition of 'family' in Rule 2(iv) of the Baggage Rules does not create any ambiguity. [*Dinesh Kumar Goyal* v. *Air Customs Superintendent* - 2015-TIOL-690-HC-KOL-Cus]

Interest under Section 27A to commence from date of cessation of three months of refund application: CESTAT Bangalore, relying upon the case of *Ranbaxy Laboratories Ltd.* [2011 (273) ELT 3 (S.C.)], has held that date for computation of the interest amount will commence from the date of cessation of three months of the refund application, and not from the date when the refund amount was finally paid after issuance of order by the appellate authority. The Tribunal was of the view that Explanation to Section 27A of the Customs Act, 1962 has relevance only for the purposes of sub-section (2) of said section and not for the purpose of computation of interest liability. [*Pfizer Products India* v. *Commissioner* - 2015-TIOL-442-CESTAT-BANG]

Error by adjudicating authority rectifiable under Section 154: Noting that charging of duty on goods, which was not payable otherwise as per the prevailing practice, is a case of rectification under Section 154 of the Customs Act, 1962, CESTAT Ahmedabad has allowed the appeal of the assessee in this regard. The Tribunal allowed rectification of assessment order relying in this regard on the CESTAT Bangalore Order in the case of *Bennet Coleman & Co. [Indian Oil Corporation* v. *Commissioner* – Order No. A/10250/2015, dated 13-3-2015, CESTAT Ahmedabad]

CENTRAL EXCISE

Ratio decidendi

Security holograms classifiable as product of printing industry: Supreme Court of India has held that security holograms manufactured by embossing, adhesive coating and release coating of coated metallised film, are classifiable under Heading 4901 of the Central Excise Tariff and not under Heading 3919 covering plastic self adhesive products. The court in this regard observed that the primary use of the product is security and not the quality of being adhesive. Department's contention that Heading 4901 would only include knowledge based products of the printing industry was rejected by the court taking note of the Explanatory Notes to the HSN. Further argument that printing industry would only include printing presses was also found incorrect by the Court while it allowed the appeal filed by the assessee. [*Holostick India Ltd.* v. *Commissioner* - Civil Appeal Nos. 2729-2730 of 2004, decided on 30-3-2015, Supreme Court]

The Supreme Court in another case relating to classification of printed trade advertising material upheld the classification under Heading 4901 and held the goods as not classifiable under Heading 9405 of the Central Excise Tariff. The Court in this regard noted that printing was done by using thermocopied machine and no lamps and lighting fittings or search lights or spotlights were used by the assessee for the purpose of illuminated signs or illuminated name plates and sign boards. [*Commissioner* v. *Classic Strips Pvt. Ltd.* - 2015-TIOL-14-SC-CX]

Blended marble vinyl flooring classifiable under Chapter 68: In another case relating to classification, the Supreme Court relying on essential character test as provided in Rule 3(b) of the General Interpretative Rules, held the product (blended marble vinyl flooring) to be correctly classifiable under Heading 6807 and not under Heading 3918 covering plastic products. Noting that CESTAT had observed that use of limestone was to the extent of 84.10%, while use of plastic only as a binder clearly indicated that it was the characteristic of limestone that conferred upon the material its use, the Court dismissed the appeal filed by the department. It was also noted that the department was not able to produce evidence that the product was known as plastic tiles in the market. [*Commissioner* v. *Inarco Ltd.* - Civil Appeal No. 8330 of 2003, decided on 16-3-2015, Supreme Court]

Valuation – Related person – Normal price prior to year 2000: Supreme Court of India has held that in case of absence of concessional or manipulative considerations, where a sale is between a manufacturer and a related person in

the course of wholesale trade, and it is proved by evidence that price is the sole consideration for the sale, then such price would be the "normal price" for valuation of the goods. The Court in this regard, rejected department's contention that the assessee and other company were related just because they had holding-subsidiary relationship. It was observed that from such relationship, it did not follow that there was any arrangement of tax avoidance or tax evasion on the facts of the case and hence proviso (iii) to Section 4(1)(a) would not be applicable. Absence of predominant sales to the other company by the assessee was also noted by the court while it dismissed the appeal filed by the department. [*Commissioner* v. *Detergents India Ltd.* - 2015-TIOL-56-SC-CX]

Electro deposition coating is not manufacture: Supreme Court of India has held that ED coating which would increase shelf life of spare parts and provide anti-rust treatment to the same, would not convert these bumpers, etc., into a new commodity known to the market as such merely on account of value addition. It was held that inputs procured by the appellants continued to be the same inputs even after ED coating and that Rule 57F(ii) proviso (of erstwhile Central Excise Rules, 1944) would therefore apply when such inputs were removed from the factory for home consumption. The Apex Court also rejected the contention of the department that value addition made on account of such processing would be chargeable to duty under Rule 57F(3A). [*Maruti Suzuki India Ltd.* v. *Commissioner* - 2015-TIOL-30-SC-CX]

Textiles – Option of two notifications when input duty credit not availed: CESTAT Delhi has held that the assessee would be eligible to pay 4% duty on clearances for export under Notification No. 29/2004-C.E. and clear goods for domestic consumption at nil rate of duty availing exemption under Notification No. 30/2004-C.E. when there was no dispute that during the period of dispute no input duty credit was availed. The Tribunal rejected the contention of the department that once the appellant did not avail input duty credit and they were eligible for Notification No. 30/2004-C.E., they have no option but to avail of the said exemption only and that they cannot opt for Notification No. 29/2004-C.E. and pay 4% duty. [*Winsome Yarns Ltd.* v. *Commissioner* - 2015-TIOL-565-CESTAT-DEL]

Refund of redemption fine - Section 11B not applicable: CESTAT Ahmedabad has held that for refund of redemption fine, provisions of Section 11B of the Central Excise Act, 1944 are not applicable as redemption fine is not a duty of excise. It was held that hence in case of refund of redemption fine, limitation of one year or unjust-enrichment will not be applicable. [*Husmun Enterprises* v. *Commissioner* - Order No. A/10213/2015, dated 9-3-2015, CESTAT Ahmedabad]

Provisions of Section 11B (limitation) were also held as not applicable in case relating to rebate claims, during the relevant period. Madras High Court in this regard noted that Notification No. 19/2004-C.E. (N.T.), prescribing conditions, limitations and procedures for considering the claim for rebate, did not contain the prescription regarding limitation. [*Deputy Commissioner* v. *Dorcas Market Makers Pvt. Ltd.* - Writ Appeal No.821 of 2012, decided on 26-3-2015, Madras High Court]

SERVICE TAX

Circular

New service tax rate not yet in force – CBEC clarifies: CBEC has clarified by Circular No. 183/02/2015-S.T., dated 10-4-2015 that the new rate of service tax i.e. 14% shall come into effect from a date to be notified by the Central Government after the enactment of the Finance Bill, 2015. This date for new rate will be notified in due course after enactment. It has been further clarified that no change has been made in Rule 2C of the Service Tax (Determination of Value) Rules, 2006 in respect of services provided in relation to serving of foods or beverages by a restaurant, eating joint or a mess and therefore, service tax on such services continues to be chargeable @12.36% on 40% of the gross amount charged (i.e. @4.944%) till the date from which new rate of service tax comes into force.

Ratio decidendi

Inspection and rectification of defects of export goods is not Technical Testing service: The department sought to tax the service rendered by a motor garage in inspecting and rectifying vehicles under Technical Inspection and Certification Service (TICS). The Tribunal explained that the purpose of certification along with inspection was to ensure that the characteristics of the goods met certain standards as to functionality, utility, etc. Reasoning that definition of technical testing cannot be read to mean any checks on functionality or safety the Tribunal held that the liability to service tax did not arise under TICS. [*Antony Garage P. Ltd.* v. *Commissioner* - 2015 (38) S.T.R. (Tri.- Mumbai)]

Activity undertaken as job worker when not exigible to service tax: An activity amounting to manufacture will be so even when undertaken on job work basis and the assessee will not be liable to pay service tax under Business Auxiliary Services. The department argued that since the assessee was engaged in conversion of black bars to bright bars for certain clients, they were processing goods on behalf of the client and hence liable to pay service tax. However, the Tribunal accepted the argument of the assessee that the activity amounted to manufacture though it was carried out on job work basis and further the assessee had correctly availed benefit of exemption to certain final products made from the specific products as a manufacturer and therefore he cannot be made liable to service tax for the said activity. [*Commissioner* v. *Paramhari Engineers* - 2015-TIOL-612-CESTAT-MUM]

Payment made in absence of concluded contract cannot be consideration for services: Examining the terms of the contract and the argument of the department that amount received by the assessee (demerged company) was advance for services rendered rather than inter-corporate loan, the Tribunal held that the said master agreement was not a concluded contract and only an agreement to negotiate terms for services to be provided. Thus the amount received was not in nature of advance

for services to be rendered. The disputed amount was accounted as unsecured loan in the balance sheet. [*Reliance Infratel* v. *Commissioner* - 2015-TIOL-602-CESTAT-MUM]

Construction of building for charitable organisation not per se non-commercial: The assessee argued that construction of hospitals for charitable purposes and construction of flats for use by Delhi Development authority would not be exigible to tax under Commercial or Industrial Construction Service (CICS) or Construction of Complex Service. The Tribunal held that construction of hospitals for charitable purposes per se would not make the activity non-commercial and since flats were allotted by DDA to individuals and not used for itself or its employees, the activity of construction was taxable under CICS. It observed that even municipal buildings are not outside the purview of the CICS since many of the buildings were rented to other organisations. [*Ahluwalia Contracts India Ltd* v. *Commissioner* - 2015 (38) S.T.R. 38 (Tri.-Del.)]

Cenvat credit on excisable inputs used to provide output service, admissible: Ruling on admissibility of Cenvat credit on inputs (tower parts) used to provide output service (passive telecom infrastructure - Business Support Services), the Tribunal held that credit cannot be denied in such cases. It observed that there was direct nexus of the output services and the goods procured such as steel, racks, bolts, etc. The department, relying on various rulings argued that credit would not be admissible since there was no excise liability on towers, being immoveable property. However, the Tribunal distinguished the same on facts and held that the assessee cannot be precluded from availing the statutory right to credit which was admissible. [*Reliance Infratel* v. *Commissioner* - 2015-TIOL-516-CESTAT-MUM]

Refund claim – Date of e-filing of claim relevant: Date of filing of refund claim electronically should be considered as date of filing of refund claim. The assessee was aggrieved by the department's stand that since he had not filed the hard copy of the refund claim filed electronically, the claim was time-barred. The Tribunal held in favour of the assessee who submitted that the electronic filing had been acknowledged and date of filing the refund claim electronically should be considered as date of filing of claim. [*Transcend MT Services* v. *Commissioner* - 2015-TIOL-448-CESTAT-DEL]

Outdoor catering is input service irrespective of size of organisation: Terming that the proposition that outdoor catering service can be an input service only when mandated by Factories Act is incorrect, the Tribunal held that outdoor catering can be an input service even in smaller organisations. It was argued that providing canteen facility to workers is in nature of a fringe benefit and the assessee was not have operations 24 x 7 necessitating provision of refreshment to workers. However, the Tribunal held that it was wrong to interpret the Factories Act with respect to input services as requiring only large organisation to provide food to workers. [*Commissioner* v. *Reliance Capital Asset Management* - 2015-TIOL-447-CESTAT-MUM]

Access deficit charges whether provision of service or facility: The assessee availed the services/facility of network provided by another telecom service provider in remote areas where it did not have network facility. The department contended the charges (Access Deficit Charges) paid towards the same cannot be treated as payment towards an input service and therefore credit of service tax on the same was denied. It also argued that no service had been provided to the assessee and the charges had been paid for fulfilment of license obligation. However, the High Court held that the service used by the assessee were in turn used to provide telecom services and hence qualified for input tax credit. [*Commissioner* v. *Aircel Cellular Ltd.*, Judgment dated 26-3-2015 in CMA 545 of 2015, Madras High Court]

VALUE ADDED TAX (VAT)

Notifications & Circular

Input tax credit allowed under Tamil Nadu VAT Act on inter-State sale of goods: The Tamil Nadu Value Added Tax (Amendment) Act, 2015 has been enacted with effect from 1-4-2015 by G.O.Ms No. 46, dated 31-3-2015, which has, *inter alia,* amended Section 19 of the Tamil Nadu VAT Act, 2006. Post 1-4-2015, full input tax credit is available if the goods purchased in Tamil Nadu are sold as such or used in the manufacture of goods and sold by way of inter-State sale with/without Form C. Prior to the said amendment, no input tax credit was allowed in cases of inter-State sale of goods without Form C. In case of inter-State sale of goods against Form C, input tax credit to the extent of 3% was required to be reversed.

Cell phones – Rate of VAT reduced in Tamil Nadu: As per Notification No. II(2)/CTR/143(a-3)/2015, dated 22-3-2015 (effective from 1st April 2015), sale of cellular telephone (mobile phone) by any dealer will attract VAT at the rate of 5% in Tamil Nadu. The rate of tax on cell phones has been decreased from 14.5% to 5% under the Tamil Nadu VAT Act, 2006.

Battery for cellular phone is accessory – Circular issued under Andhra Pradesh VAT Act: Commissioner of Commercial Tax, Andhra Pradesh has clarified that cellular battery sold along with cellular phone is an accessory to the phone and hence an independent product taxable as an unclassified item under Schedule V to the A.P.VAT Act, 2005. Circular No. E3/268/2015 dated 26th March 2015, issued for this purpose draws analogy from the decision of the Supreme Court in the case of *Nokia India (P) Ltd.* v. *The State of Punjab.*

Mobile phone charger – Tax rate under Karnataka VAT Act: With effect from 1-4-2015, sale of mobile phone charger whether along with mobile phone in sealed pack or otherwise attracts VAT at the rate of 5.5% in Karnataka. Notification No. FD 40 CSL 2015, dated 31-3-2015, has been issued in this regard.

Residuary rate of tax increased from 13% to 14% under Madhya Pradesh VAT Act: By Notification No. F-A-3-11/2015/1/V (19), dated 31-3-2015, the rate of tax on goods covered by Entry 1 of Part IV of Schedule II of the Madhya

Pradesh VAT Act, 2002 i.e., *all other goods not covered by Schedule I and any other part of this Schedule* has been increased from 13% to 14%, with effect from 1-4-2015.

Ratio decidendi

Manufacture whether covers diluting goods with water: Kerala High Court has held that after diluting with water the goods, i.e., *"Ujala Supreme"* and *"Ujala Stiff and Shine"* continue to remain classified under the same HSN number and hence they continue to remain in list "A" under the Third Schedule covering industrial inputs and packaging materials of the Kerala Value Added Tax Act, 2003 and therefore, chargeable to VAT at the rate of 5%. The issues before the Supreme Court were (i) whether there was a process of manufacture and new excisable goods had arisen in the preparation of the product *"Ujala Supreme"* and *"Ujala Stiff and Shine"* and (ii) whether the said products would fall under List "A" of Third Schedule or residuary entry under the Kerala Value Added Tax Act, 2003.

Reliance was placed by the Court on the decision in the case of *Jyoti Laboratories* v. *CCE, Cochin* [1994 (72) ELT 669], wherein it was held that no new product emerged by diluting AV dye with water; and the decision in the case of *Jyothy Laboratories* v. *CCE, Calicut* [(2007) (78) RLT 276] wherein it was ruled that the dilution undertaken by the company did not result in the emergence of new product and that the diluted product in question, i.e., *"Ujala Supreme"* would continue to be classifiable under tariff item 3204 12 94. Reliance in this regard was also placed on test certificates certifying that *"Ujala Stiff and Shine"* contained 55.78% water and 43.87% solid concluding that there was only dilution in water and no new product emerged. The Court observed that the commodities which are HSN aligned should be given the same meaning as given in the Customs Tariff Act, 1975. Those commodities, which are not given with HSN number should be interpreted in common parlance or commercial parlance. [*M.P. Agencies* v. *State of Kerala* - 2015-VIL-12-SC]

Transfer of right to use trademark – Liability under Maharashtra Sales Tax: Bombay High Court has held that the amount received by the assessee on transfer of right to use the trademark would be liable to be taxed under "Maharashtra Sales Tax on the Transfer of the Right to use any Goods for any Purposes Act, 1985". The assessee had entered into a 'Brand Equity and Business Promotion Agreement' which provided detailed guidelines for use of the TATA name and the trademarks in the course of business by the subscribing companies, i.e., the transferees. The issue before the High Court was whether the right to use the trademark would amount to "sale" within the meaning of Section 2(10) of the said Act.

The High Court observed that the right was transferred by an agreement with the transferee by which the transferee was allowed to use the trademark of the assessee on payment of consideration by way of royalty at the rate specified therein and that such transfer for consideration clearly fell within the provisions of the Act of 1985. The court distinguished the

decision in the case of *BSNL* v. *Union of India* [(2006) STC Vol. 195] on facts and held that the Act of 1985 does not give any indication that the right to use the incorporeal/intangible goods should be exclusively transferred in favour of the transferee. The court held that there can be a transfer of the right to use these goods and it need not be exclusive and unconditional and that the transferor may simultaneously use it during the period of the agreement. [*Tata Sons Ltd.* v. *State of Maharashtra* - 2015-VIL-69-BOM]

Vouchers are goods for levy of local body tax and octroi: Noting that vouchers (pre-printed Sodexo meal vouchers) are capable of being sold, delivered and possessed after they are brought within the limits of the Maharashtra Municipal Corporation Act, 1949, and have utility of its own, the Bombay High Court has held that said vouchers are goods for the purpose of levy of local body tax and octroi. The petitioner company was conducting the business of providing pre-printed Sodexo meal vouchers. The printed vouchers were sold to customers for the value printed on said vouchers and the customers in turn handed over them to their employers who used the same for acquiring ready to eat food and beverages.

The High Court referred to the decision in the case of *Burmah Shell Oil Storage and Distributing Company of India Limited* v. *Belgaum Borough Municipality* [AIR 1963 SC 906] wherein it was held that for the levy of octroi the commodity concerned should be brought within the municipal limits for consumption, for being totally used up or it was to be used for an indefinite period within the municipal limits so that it ultimately rests within the municipal limits and does not go out subsequently or the commodity concerned must be shown to have been brought within the municipal limits for the purpose of sale within the said limits. The court while holding the goods to be liable to octroi also discussed the meaning of the term 'goods' as held in the case of Tata Consultancy Services [(2005) 1 SCC 308]. [*Sodexo SVC India Private Limited* v. *State of Maharashtra* - 2015-VIL-132-BOM]