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## Article

# Transfer of Status Holder Incentive Scrip – Some issues

By **Atish Laddha**

### *Introduction*

Recently India launched 'Make in India' campaign to make India a global manufacturing and export hub. For the said goal to be fulfilled, it is highly desirable that firstly, at policy level, Government removes the burden of all taxes from export goods so that total cost of finished goods is reduced which would allow goods made in India to compete in the international markets. Secondly, at implementation level, the officers should interpret the law in proper perspective and avoid narrow construction of the law. This article highlights one of the illustrations where narrow construction of law by the officers has led to disputes between the customs department and industry.

Chapter 3 of the Foreign Trade Policy (FTP) issued by Ministry of Commerce enlists various export promotion schemes to incentivize exports. One of the important schemes in this regard is Status Holder Incentive Scheme (SHIS) which was introduced by Foreign Trade Policy 2009-14 (FTP) for exports made in F.Y. 2009-10 or thereafter. The scrip introduced with the objective to promote investment in upgradation of technology, provides for duty credit of 1% of FOB value of exports which can be used for import of capital goods. The benefit of this scheme which, at that time was available only to selected industrial sectors as notified in Para 3.16.4 of FTP, has since then been extended to other specified sectors also.

Since the government at that time intended to grant the benefit to selected sectors only, the said SHIS scrip was not allowed to be transferred freely. Initially in 2009-10 the SHIS scrip was issued under actual user[1] condition, unlike various other Chapter 3 scrips. Further, since the scrip could be utilized only for import of capital goods[2] duty free and not for any other imports, even though relating to the specified sectors, majority of the industries who had obtained such scrip were not able to utilize the same.

The restrictions relating to transferability were however subsequently relaxed by the Ministry of Commerce on persistent demand from the industry finding it difficult to derive any benefit from such scrip. By Annual Supplement to FTP, issued in 2012 limited transferability of the said scrip was introduced with effect from 5-6-2012 and SHIS scrip was made transferable, provided the said scrip is transferred by a status holder to another status holder. It may be noted that by allowing such limited transferability, the government ensured that the scrips are used within the specified sectors only as initially intended.

Restriction on transfer of SHIS scrip was further relaxed in 2013 by Notification No. 3(RE-2013)/2009-14, dated 18-4-2013 wherein the scrip was allowed to be transfered to the

1 Actual user as defined in Para 9.4 of FTP

2 Capital goods as defined in Para 9.12 of FTP.

manufacturer group company[3] of the status holder even if the group company is not a status holder. Correspondingly, Para 3.10.5(d) was introduced in Handbook of Procedures to FTP prescribing procedure for transferring such scrip.

In the above circumstances, a status holder having unutilized scrip can either transfer the scrips to its another manufacturer sister company or will have to search for a buyer in the open market who should be a status holder.

### *Transaction model questioned*

Status holders who were not able to utilize the scrip appoint scrip brokers to identify a suitable buyer for such scrip. However, while executing the sale transaction of the said scrip, the invoice is usually issued by seller status holder in favor of the broker / intermediary and appropriate VAT liability on such sale price is discharged. The broker / intermediary further sells the scrip to the purchaser status holder after retaining certain profits and discharge appropriate VAT liability on such sale price. However, while producing the documents for endorsing the scrip before concerned Regional Authority (RA), the application is made from seller status holder for endorsing the scrip in favor of the buyer status holder.

The above transaction model is followed commonly in the market for various reasons, including non-disclosure of profit earned by the broker and when the buyer for the scrip is not immediately available. However, the department has recently raised objections in respect of such *modus operandi*. It is being contended that since the sale invoice is issued by seller status holder in favour of broker / intermediary, it amounts to transfer of scrip in favour the broker / intermediary, and that the same is in violation of FTP as well as Notification No. 104/2009-Cus.. Seller status holders are in this regard receiving show cause notices from DGFT proposing to cancel the scrip, impose penalty, etc. under Foreign Trade (Development & Regulation) Act, 1992 and rules made there under.

### *Issues to be addressed in the new FTP*

It may be noted that under the above *modus operandi*, the scrip ultimately is transferred by one status holder to another status holder wherein the broker has merely facilitated the transfer. Will mere issuance of sale invoice in favour of broker / intermediary by the seller status holder amount to transfer of scrip? Considering that the intention of the government behind allowing limited transferability (as discussed above) has not been vitiated in the present case, will the transaction still violate the FTP and Customs notification? Can this dispute be avoided by ensuring that the intermediary / broker facilitating the transfer acts as an agent of either buyer status holder or the seller? These and many other issues have created hassles to genuine exporters. The incentive scheme is turning out to be a major disincentive drifting away from the very objective of upgradation of technology and increasing exports. It is hoped that the new Foreign Trade Policy, expected to be unveiled after Budget 2015, will iron out such issues.

**[The author is a Senior Associate, Lakshmikumaran & Sridharan, Pune]**

[3] Group company as defined in Para 9.28 of the FTP.

# CUSTOMS

## Notifications, Circulars & Public Notices

**All Industry Rates of Drawback revised:** Duty drawback rates for some specified products have been revised. The changes which are in force from 13-2-2014, include changes in drawback caps for goods specified under 17 tariff items covering leather goods, iron & steel products, carpets, paper products, stainless steel cutlery items and sports nets. Separate entries have also been created for protective industrial wear, leather/synthetic gaiters or chaps and number of other items. While drawback rate of 1% has been provided for optical fibre cable, provisions have been made to allow brand rate of drawback on export of rice. Circular No. 6/2015-Cus., dated 11-2-2015 and Notification Nos. 20 & 21/2015-Cus. (N.T.), both dated 10-2-2015 have been issued in this regard.

**IEC – System for online submission of application operationalised:** Online application for issue of IEC, which was introduced vide Public Notice No. 76 (RE-2013), has been made operational from 1st February, 2015. As per DGFT Public Notice No. 83(RE-2013)/2009-2014, dated 30-1-2015 issued for the purpose, it is not mandatory to apply through online mode. The manual form (ANF-2A) remains applicable for those who do not have access to net banking facility with ten specified banks in this regard. Further, a new format for issue of IEC numbers in electronic form i.e. e-IEC, has been notified by the DGFT. Public Notice No. 84(RE-2013)/2009-2014, dated 10-2-2014 issued for this purpose notifies the new format under new Appendix 18B-1. Policy Circular No. 17, dated 30-1-2015 further provides guidelines for processing of online IEC applications.

**Dual use of social and commercial infrastructure facilities in non-processing area of SEZ by both SEZ and DTA entities:** Rule 11A has been inserted in the SEZ Rules, 2006 which allows Board of Approval to approve dual use of social and commercial infrastructure facilities set up in the non-processing area of SEZ by both SEZ and DTA entities. However, benefits available under the SEZ Scheme such as concessions, exemptions and drawback shall not be available in respect of such infrastructure facilities. According to Special Economic Zone (Amendment) Rules, 2014, dated 2-1-2015, such use is allowed subject to fulfillment of other specified conditions including area restrictions.

**Re-exports - Power to allow re-export of goods imported inadvertently, delegated:** To obviate delays in cases of granting permission to re-export goods which are destined for elsewhere but imported inadvertently, the power to allow re-export of such goods has now been delegated to the Customs officers in accordance with their adjudication powers under Section 122 of the Customs Act and Circular No. 24/2011-Cus., dated 31-5-2011. Circular No. 4/2015-Cus., dated 20-1-2015 issued in this regard modifies earlier Circular No. 100/2003-Cus.

**Shipping related Customs procedures simplified:** Following guidelines have been issued by Circular No. 2/2015-Cus., dated

15-1-2015 for simplifying and streamlining the customs procedures relating to shipping. Now,

- Only two hard copies of Import General Manifest (IGM) are required to be submitted apart from electronic submission;
- Option has been given to steamer agent to give a continuity bond and merge the guarantee with the continuity bond in place of separate bonds and guarantees which are to be given each time a vessel enters;
- In the case of transshipment cargo, one hard copy of the Sub Manifest Transshipment Permit (SMTP) will be sufficient apart from electronic submission;
- No separate permission is required from the jurisdictional customs authorities in case of change of mode of transport under the Goods Imported (Conditions of Transshipment) Regulations, 1995, subject to the fact that the bond covers both modes of transport.

**Import and Export of Indian Currency by passenger resident in India:** Central Board of Excise and Customs has, by Circular No. 3/2015-Cus., dated 16-1-2015, clarified that the amount of Indian currency which a person resident in India may take outside India or bring into India from a temporary visit outside India has been enhanced from Rs. 10,000/- to Rs. 25,000/-. It is also stated that the amount allowed to a specified person resident outside India has also been enhanced from Rs. 10,000/- to Rs. 25,000/-. It may be noted that Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 was amended in this regard by the RBI in June 2014 by Notification No. FEMA. 309/2014-RB.

**Natural Rubber as input under Advance Authorization/DFIA - Export obligation period reduced:** A new entry relating to natural rubber has been added to the list of specified inputs as provided in Appendix 30A to Hand Book of Procedures, 2009-14. This Appendix provides for period for fulfillment of export obligation if these inputs are imported under Advance Authorization/DFIA. According to DGFT Public Notice No. 81 (RE-2013)/2009-2014, dated 9-1-2015, in case of natural rubber export obligation has to be fulfilled in six months from the date of clearance of each import consignment by the customs authorities.

**Mobile phones - Import policy condition revised:** GSM mobile handsets with duplicate or fake International Mobile Equipment Identity (IMEI) number, and CDMA mobile handsets with duplicate or fake Electronic Serial Number (ESN) or Mobile Equipment Identifier (MEID), are now prohibited for import. DGFT Notification No. 107/(RE-2013)/2009-2014, dated 16-1-2015 issued in this regard amends the Import Policy condition under ITC (HS) code 8517 of Chapter 85 of ITC (HS), 2012 – Schedule-1.

## Ratio decidendi

**Classification of product having certain naturally occurring therapeutic properties:** The Mumbai Bench of CESTAT has held that Inca Inchi Oil (encapsulated virgin vegetable oil) would be classifiable under tariff item 1515 90 91 of the Customs Tariff Act, 1975. According to it merely because a product possesses certain therapeutic properties which are naturally occurring, the same cannot be said to be classified as medicament under heading 3004

as contended by the Department. The decision in the case of *Banner Pharmacaps (I) Pvt. Ltd.*, [2005 (183) ELT 151] was followed by the Tribunal in this regard. [*Supreme Enterprises* v. *Commissioner* - 2015-TIOL-102-CESTAT-MUM]

**Valuation - Lumpsum payments towards trademark use and royalty for technical know-how when not includible:** Payments towards use of trademark and royalty for technical know-how, under agreements with foreign collaborator, would not be includible in the assessable value under the Customs Valuation Rules as a condition of sale for purchase of bulk raw materials from the same collaborator. The CESTAT noted that besides the existence of separate contracts for procurement, there was never a stipulation that the raw materials were to be procured from the foreign collaborator only. [*Can Pack (India) Pvt. Ltd.* v. *Commissioner* - 2015-TIOL-158-CESTAT-MUM]

**SFIS available to Indian subsidiaries of foreign entities:** Delhi High Court has held that benefit of Served From India Scheme (SFIS) cannot be denied to Indian subsidiaries of foreign entities on the ground that they do not represent any Indian brand and do not further the objective of SFIS. It was held that the expression 'All service providers' or 'Indian Service Providers' cannot exclude service providers which are subsidiaries of foreign entities. It was further held that DGFT cannot introduce new conditions and criteria under the guise of interpreting the policy as that would amount to amending the provisions of FTP for which DGFT was not empowered. [*Yum Restaurants Pvt. Ltd.* v. *Union of India* - 2015-TIOL-225-HC-DEL-CUS]

**SAD refund – Limitation and rectification of mistake in claim:** Following the judgment of *Sony India* passed by the Delhi High Court, Mumbai Bench of CESTAT has held that limitation period of one year for filing refund claim under Notification No. 102/2007-Cus. shall not be applicable in cases where assessment of bill of entry was made prior to amendment by Notification No. 93/2008-Cus. It was further held that while calculating the time limit of one year specified under Notification No. 102/2007-Cus., time period during which it was beyond the control of the importer to file a refund claim for the reason that the goods were detained by the customs authorities and released only after issuance of order by High Court after two years of import, should be excluded. [*Dev International* v. *Commissioner* - 2015-TIOL-155-CESTAT-MUM]

CESTAT, Mumbai in another case allowed rectification of mistake in the SAD refund claim where the amount was mentioned incorrectly by mistake. It was held that the apparent mistake can be rectified under Section 154 of the Customs Act, 1962. The matter was remanded to allow the importer to file rectification application. [*Standard Galva Steel Pvt. Ltd.* v *Commissioner* – Final Order A/1501/14/SMB/C-IV, dated 24-11-2014]

**Inkjet printers, ribbon cartridges, and software imported along with printer – Classification of:** Ink cartridges, ribbon cartridges and printer software when imported together with the printer will not be classifiable under single sub-heading 8471 60 as printer but would be separately classifiable under sub-headings

8473 30 and 8524 99 of the Customs Tariff Act, 1975. To come to the above conclusion, CESTAT, Chennai relied upon the fact that in the invoice and the bill of entry all the impugned goods were described separately with separate unit price. [*Epson India Pvt. Ltd.* v. *Commissioner* - 2015-TIOL-210-CESTAT-MAD]

**Refund - Limitation - Date of deposit to be excluded:** Relying upon the provisions of General Clauses Act and Limitation Act, the CESTAT has held that while calculating the period of limitation of six months, the date of duty deposit has to be excluded. In this case, refund claim filed on 10-6-2009, in respect of duty paid on 10-12-2008, was rejected on account of delay of one day in filing the refund claim. The Tribunal however, relying on Section 9 of the General Clauses Act, 1897 and Section 12 of the Limitation Act, 1963, held that the refund claim filed by the importer was within the period of limitation. [*Positive Packaging Industries Ltd.* v. *Commissioner* - 2015-TIOL-114-CESTAT-MUM]

**Recovery of penalty under FTDR – Charge over property:** Kerala High Court has held that there is no statutory provision under the Foreign Trade (Development and Regulation) Act or rules made thereunder which creates charge on the property of an exporter or importer, who violates the provisions of the said Act and rules for the amount of penalty to be recovered or for any amount due. [*Sam Marine Exports* v. *Union of India* - 2015 (316) ELT 50 Ker]

**CVD exemption – Non-availment of Cenvat credit, proof:** CESTAT, Delhi has denied the benefit of Notification No. 1/2011-C.E. (in respect of CVD) to homeopathic medicines imported from Germany. The Tribunal in this regard relied on the mandate of WTO on its member-countries to allow input stage rebate in order to not to export taxes. It noted that no evidence was provided by the importer that input stage rebate/credit was not taken in Germany, which is a member of the WTO. [*Commissioner* v. *Dr. Roshan Lal Agarwal & Sons Pvt. Ltd.* - 2015 (316) ELT 153 (Tri-Del)]

**CVD Exemption for "Pediasure" and "Ensure" as kinds of food mixes:** Noting that both "Pediasure" and "Ensure" are products mainly comprising of starch, sugar, protein, etc., with miniscule quantities of vitamins and minerals, Mumbai Bench of CESTAT has rejected the contention of the Department on classifying the products as medicaments. Benefit was hence granted under Notification 2/2011-C.E. (Sl. No. 8) which provides for exemption to "kinds of food mixes, including instant food mixes". It was noted that said notification did not stipulate that it should be for consumption by all people or by all age groups. [*Abbot Health Care Pvt. Ltd.* v. *Commissioner* - 2015-TIOL-170-CESTAT-MUM]

**Bulk cargo of crude oil – Assessment as per transaction value and not shore tank quantity:** Relying on the earlier order in the case of *Mangalore Refinery & Petrochemicals Ltd.* [2006-TIOL-325-CESTAT-BANG], the CESTAT has held that duty on import of liquid bulk cargo is to be determined as per the transaction value and not on the shore tank receipt quantity. The Tribunal also held that in the event of finalization of bills of entry, short payment in some bills of

entry cannot be adjusted with excess payments made in other bills of entry as each transaction is to be examined separately to consider unjust enrichment. It was further held that for the period prior to 2007, ship demurrage charges were not includible in the transaction value. [*Bharat Petroleum Corporation Ltd.* v. *Commissioner* - 2015-TIOL-211-CESTAT-MUM]

# CENTRAL EXCISE

## Circular

**Summons in Central Excise and Service Tax matters - Guidelines:** Stressing that summons need not always be issued when a simple letter, politely worded, can also serve the purpose of securing documents relevant to investigation, the Central Board of Excise and Customs (CBEC) has issued guidelines for issuance of summons in Central Excise and Service Tax matters. As per Instruction F. No. 207/07/2014-CX-6, dated 20-1-2015, summons by Superintendents should be issued after obtaining prior written permission from superior officer stating reasons in this regard. In case of oral permission, same has to be written down at earliest opportunity and intimated to officer giving such permission. The Board further emphasizes that use of summons is to be made only as last resort when it is absolutely required and senior management officials like CEO, CFO and General Managers of a large company or a PSU should not generally be issued summons at the first instance.

## Ratio decidendi

**Cenvat credit on capital goods used in R&D permissible:** Delhi Bench of CESTAT has allowed Cenvat credit on capital goods brought to the factory for R&D work during the period from March 2008 to November 2012. The Tribunal in this regard observes that for Cenvat credit on capital goods, their use in or in relation to manufacture of final product is not required and their use in the factory of manufacture for any purpose would be enough. [*Maruti Suzuki India Ltd.* v. *Commissioner* - Final Order No. 50173-50174 /2015-Ex(Br), dated 15-1-2015]

**No confiscation of goods manufactured using brand name of another, unless cleared from factory:** Goods manufactured using brand name of another while availing exemption under SSI exemption notification, cannot be confiscated while they are still in the factory of manufacture. In the case before CESTAT, the appellant's factory was visited by the Central Excise Officers and stock of goods was seized on the basis that goods manufactured were liable to duty. The Tribunal however relying on order in the case of SIP Industries held that confiscation of goods was not required. Redemption fine and penalty were also consequently set aside by the Tribunal. [*Getex Automobiles* v. *Commissioner* - Final Order No. 50110/2015-EX(SM), dated 13-1-2015]

**SSI exemption when declaration sent by post but not received by department, available:** Benefit of SSI exemption under Notification No. 9/2002-C.E. cannot be denied just because the declaration was not received by the department. CESTAT, Delhi while holding so observed that the department had not disputed the appellant's

claim regarding sending of declaration from post office under certificate of posting, and had in fact produced copy of declaration before the Assistant Commissioner. Further, taking note of the fact that there was no dispute on eligibility to exemption, the Tribunal held that requirement of filing of the declaration was substantially complied with. [*Sun Food Tech.* v. *Commissioner* - Order No 54966/ 2014, dated 26-12-2014]

**Jobwork exemption when declaration not filed, available:** CESTAT, Delhi has allowed the benefit of exemption under Notification No. 214/86-C.E., meant for job work in a case where the principal manufacturer had not filed the requisite declaration with the jurisdictional central excise authorities, as required in terms of the said notification. The Tribunal in this regard observed that other procedures, like movement of goods on basis of challans, clearance of goods on payment of duty, etc., were followed. It was held that mere non-filing of declaration would not lead to denial of benefit more so by invoking extended period of limitation. [*Bhoday Steel Rolling Mills* v. *Commissioner* - Final Order No. 54622/2014, dated 2-12-2014]

**Penalty – Suppression absent when credit reflected in return:** Reflection of entire amount of credit in ER-1 Return, though does not impart any knowledge (of use in different unit) to the departmental officer, the same reflects absence of suppression on part of assessee. CESTAT, Bangalore while observing so has upheld non-imposition of penalty. The assessee had availed Cenvat credit of duty paid on inputs as also input services which were not utilized by their Head Office at Hyderabad but were inputs for their Chennai unit. The Tribunal in this regard noted that ingredients for invoking the penal provision are relatable to the mala fide on part of the assessee. [*Commissioner* v. *Victory Electricals* - Final Order No. 20043/2015, dated 9-1-2015]

**Area based exemption when village name and khasra number subsequently figuring in notification after substitution:** Exemption under Notification No. 50/2003-C.E. has been allowed by Delhi Bench of CESTAT to a unit located in Uttrakhand in a case where the khasra number and the name of the village were not figuring in the notification but were substituted by Notification No. 7/2014-C.E. later. The original notification had Khasra No. 288A and name of the village as 'Sakhardkeda', which were substituted as 288/1 and 'Sarvarkheda' in 2014. [*Prakash Industries Ltd.* v. *Commissioner* – Final Order No. 54733/2014, dated 9-12-2014]

**No unjust enrichment in case of re-credit of excess adjusted credit:** CESTAT, Delhi has held that restoration of Cenvat credit adjusted in excess in the credit account would not amount to unjust enrichment. The dispute involved excess adjustment of Cenvat credit against confirmed duty demand. Noting that assessee was only seeking restoration of credit adjusted in excess, the Tribunal held that such restoration would only restore the position to the extent of credit which was not required to be adjusted, and hence unjust enrichment cannot be invoked. [*Vardhaman Spinning & General Mills* v. *Commissioner* – Final Order 50209/2015, dated 19-1-2015]

# SERVICE TAX

## Ratio decidendi

**Reimbursement of payment made on behalf principal-service recipient, not taxable:** To determine the taxable value of services, the Tribunal examined the terms of contract between the service provider (C&F agent) and the recipient when the former had arranged for transportation from godown, loading and unloading of goods and was reimbursed for the expenses. The Tribunal held that being liable to pay rent, the service provider had acted as a pure agent and could not be taxed for the amount received as reimbursement. As regards bills of labour contractors for loading and unloading, the bills were in the name of the principal-service recipient and payment had been made by the provider on behalf of the principal. Hence, this also could not be exigible to service tax as no service had been rendered. [*Venkatesh Merchantiles* v. *Commissioner* - 2015 (37) S.T.R. 606 (Tri.-Del.)]

**No service element in activity undertaken by dealer of used cars to enhance value of goods:** There is no service element in activities like refurbishing of vehicle and repair which are undertaken to enhance value of goods - used cars in the instant case. The department contended that activity undertaken by the assessee in taking possession of used cars after paying a certain sum, refurbishing the same and finding buyers for the car did not satisfy 'sale' since registration of the car remained with the old owner and was transferred to the buyer through signed blank forms. The Tribunal agreed with the asssessee that non-transfer of registration does not take away the character of sale of the car from owner to the assessee. The transaction between the assessee and buyer of used car was also of sale. It therefore did not agree with the contention of the department that refurbishment etc were undertaken as Business Auxiliary Services rendered to the old owner. [*Sai Service Station* v. *Commissioner* -2015 (37) S.T.R. 516 (Tri.-Bang.)]

**Cenvat credit - Time lag between date of receiving input service and actual production of goods, not fatal:** At issue was the denial of credit on service tax paid in relation to technical knowhow on the ground that the knowhow has not been used in manufacture of the final product. The assessee contended that there was no timeframe within which the products were to be manufactured using the knowhow and hence credit would be admissible. The Tribunal held that credit would be admissible since credit for input services becomes available on or after the date on which payment is made for the value of the input service. Time lag between the date of acquiring such input service and the actual production of the goods is likely for any product and this time lag would depend upon the nature of product. Such time lag cannot be a reason to deny credit when on facts, there was not doubt on payment being genuine. [*Indswift Laboratories* v. *Commissioner* - Final Order No.50026/2015,dated 9-1-2015, CESTAT, Delhi]

**Service which is an input for another service is covered under the definition of input service:** Examining the credit admissibility of advertisement service which was used as an input service for manpower service which in turn was an input service for the assessee, the Tribunal held that any service which was an input for another service will get covered under the definition of input service. The Tribunal reasoned that the scope in respect of service used to provide export services covered those used 'for' providing output services and the services in question were used in relation to its business. [*Commissioner* v. *J P Morgan Services India P ltd,* Order No. S 1320 /1321 – CSTB/C-1,dated 25-11-2014, CESTAT, Mumbai]

**Credit distribution by head office when invoices in the name of branch office:** Head office registered as Input Service Distributor (ISD) can distribute Cenvat credit of service tax when the invoices were in the name of branch office and payment towards relevant input services was made by branch office even though such branch office was not registered as ISD. In the instant case, the branch offices did not have separate accounts and their accounts formed part of the head office. Allowing the appeal of the assessee the Tribunal hence held that distribution of credit by the head office as ISD based on invoices issued in the name of the company was proper. [*Mahindra &Mahindra* v. *Commissioner* - Order No. A/1481/14/SMB/ C-IV dated 29-10-2014, CESTAT, Mumbai]

**Recovery towards cost of materials & expenses – Activity not a service:** The dispute revolved around exigibility to service tax of the amount recovered from the service recipient for advertisement copy and out of pocket expenses. The department sought to deny benefit of Notification No. 12/2003-S.T., dated 20-6-2003 stating that the said goods had not been sold during course of providing the service. The Tribunal agreed with the assessee that this was sale of goods and not part of the consideration for sale of space or advertisement. It also held that the sample invoices produced by the assessee were sufficient evidence to determine eligibility for exemption. [*CMGRP India Ltd* v. *Commissioner* - 2015 (37) S.T.R. 502 (Tri.-Bang.)]

**Intermittent provision of service outside India when both parties located in India – Not export of service:** The Tribunal considered the classification of service under Supply of Tangible Goods for use (SOTG) and place of provision of services in respect of drilling rigs which were supplied along with personnel for drilling operation to be carried out within and outside the territory of India. It held that for SOTG, supply of tangible goods without transfer of right of possession had been satisfied and use of goods by service recipient and the argument of availing drilling services rather than the rig was not forceful. As regards the argument of export of service, the Tribunal opined that even though Place of Provision of Service Rules, 2012 were not in force at the relevant time, the same could be adopted. It held that since both service provider and recipient were

in India, the place of provision of service was India. [*Greatship India Ltd* v. *Commissioner* - 2015 (37)S.T.R. 533 (Tri.- Mumbai)]

**Remittance of money from aboard by Indian agent to beneficiary in India – not taxable in India:** Determining the place of provision of services when agents in India were recruited by overseas entity to transfer money from abroad to persons situated in India, the Tribunal held that since the recipient of the service – principal overseas was located outside India, and the consideration was received in foreign exchange, the service undertaken by the Indian provider amounted to export of services. Thus, the impugned services are not taxable in India. The department had contended that the beneficiary was situated in India and the services were taxable in India. [*Wall Street Finance Ltd* v. *Commissioner* - 2015 (37) S.T.R. 642 (Tri.- Mumbai)

**Raw material emerging after process, without any change – Activity not covered under 'production or processing not amounting to manufacture':** Process of chilling of milk enabling carriage over long distance without spoiling is not production or processing of goods not amounting to manufacture. The department sought to tax the service of chilling of milk under Business Auxiliary Service (BAS). The Tribunal held that for 'production' there must be some change in the raw material subjected to the process. In the instant case, no new product came in to existence and there was no change either permanent or temporary in the milk. Thus, the process of chilling of milk was held to be not taxable under BAS. [*Sharma Ice Factory* v. *Commissioner* - 2015 (37) S.T.R. 660 (Tri.- Del.)]

# VALUE ADDED TAX (VAT)

## Notifications

**Rajasthan VAT Act amended:** Notification dated 9-2-2015 has been issued by Rajasthan Government whereby Amnesty Scheme-2015 has been notified ("the Scheme"), for waiver of interest and penalty under Section 51A of the Rajasthan Value Added Tax Act, 2003 ("R-VAT Act"). This Scheme has come into force with effect from 9th February, 2015 and shall remain in force up to 31st March, 2015. The highlights of the Scheme are:

- The scheme provides for waiver of penalty and interest to the extent of and on fulfillment of conditions as prescribed under clause 4 of the scheme.
- To avail the benefit of the scheme, the applicant (dealer/person) has to apply to assessing authority in Form AS-1, along with
  - (i) Detail of deposit of tax and/or penalty and/or interest and
  - (ii) Proof of withdrawal of cases from the concerned court, Tax Board or Appellate Authority, if any, upto 31-3-2015.

**Uttarakhand VAT Act amended:** Notification No. 96/2014/181/(120)/XXVII(8)/08, dated 20-1-2015 has been issued to amend Schedule II(B) of the Uttarakhand Value Added Tax Act, 2005 with effect from 20-1-2015. Entry 6 of Schedule II(B) of the Act has been amended

to read as *"All processed and preserved vegetables, mushrooms and fruits including fruit jams, jellies, fruit squash, paste, fruit drinks, fruit juices and achar but excluding all type of sauce and potato chips, banana chips and other fruit and vegetable chips. (whether above goods are in sealed containers or otherwise)*. Prior to the said amendment, the entry read as *"All processed and preserved vegetables, vegetable mushrooms and fruits including fruit jams, jellies, fruit squash, paste, fruit drinks, fruit juices and achar (whether in sealed containers or otherwise)"*.

Thus, after the said amendment, 'potato chips', 'banana chips' and 'other fruit and vegetable chips' have been specifically excluded from the said entry. The amendment has made it clear that the rate of VAT applicable on 'chips' would increase and it is possible that the price of such chips may increase.

## Ratio decidendi

**Constitutional validity of sales tax on goods component in photography service:** The Constitutional validity of Entry 25 of Schedule VI of the Karnataka Sales Tax Act, 1957 ('KST Act') which covers *"processing and supplying of photographs, photoprints and photo negatives"* was challenged in this case. The question before the Supreme Court was whether the photograph, photoprints and photo negatives supplied to customers was chargeable to tax under the KST Act. The respondents argued that processing of photographs was essentially a service, wherein the cost of paper, chemical or other material used in processing and developing photographs, photo prints, etc., was negligible and photography service would be exigible to sales tax only when the same was classifiable as works contract.

While determining whether the photography service rendered amounted to works contract in light of the fact that the dominant intention was provision of services and not the supply of goods, the Apex Court relied upon the judgment in the case of *Larsen & Toubro* v. *State of Karnataka* [(2014) 1 SCC 708] wherein it was held that it was not necessary to ascertain the dominant intention of the contract and even if the dominant intention was not to transfer the property in goods but rendering of service or the ultimate transaction was transfer of immovable property, then also it was open to the States to levy sales tax on the materials used in such contract if it had elements of works contract.

The Court noted that after insertion of Article 366(29A), a works contract is permitted to be bifurcated into two: one for "sale for goods" and other for "services", thereby making goods component of the contract exigible to sales tax. It held that while going into the exercise of indivisibility, the dominant intention behind such a contract, namely whether it was primarily for sale of goods or for services would be immaterial and State legislature was empowered to segregate the goods part of the works contract and impose sales tax thereupon by virtue of Article 366(29A). On the basis

of the discussion of various judgments, it was held that Entry 25 of Schedule VI of the KST Act was constitutionally valid and sales tax was leviable on the goods component of photography services. [*State of Karnataka* v. *PRO Lab & Ors.* - 2015-VIL-06-SC-LB]

**Rejected goods whether value thereof deductible from turnover:** The issue before the Maharashtra Sales Tax Tribunal was whether the deduction of sale price of rejected goods from the turnover of sales was allowed under the Bombay Sales Tax Act, 1959 ('BST Act') and Central Sales Tax Act, 1956 ('CST Act'). The appellant claimed deduction of sale price of rejected goods from the turnover of sales on the basis that as per the terms of the agreement which contained a clause stating that *"If further defects are noticed while assembling or processing, the company reserves right to reject such material even if it had been passed and/or paid for."*

The appellant relied on the decision of the Calcutta High Court in the case of *Metal Alloy Company.* v. *Commercial Tax Officer* [(1977) 39 STC 404] wherein it was held that return of goods was a bilateral transaction brought about by the consent of the seller and the purchaser, which consent may have been effected either prior to the delivery of the goods or subsequent to such delivery whereas rejection of the goods was a unilateral transaction governed by the provisions of the Contract Act or the Sale of Goods Act, open only to the purchaser.

The Tribunal analyzed Section 19 of the Sale of Goods Act, 1930 which provides that the property would pass or intend to pass or transferred to the buyer if all the conditions in the contract are fulfilled. The condition related to the return of goods was not a warranty but essential condition of the contract and therefore, it was held that since the goods were returned by way of rejection and not yet transferred to the purchaser, the agreement to sale stood repudiated as far as the rejected part of the goods were concerned. Since sale was not complete, the value of these rejected goods would not become part of turnover of sales under the BST Act and the CST Act. [*Paranjape Auto Cast Pvt. Ltd.* v. *The State of Maharashtra* - 2015-VIL-03-MSTT]

**Classification of composite goods to be based on product giving essential character:** The question before the Madras High Court was whether "Women's Horlicks" is a 'milk product' and can be covered under Sl. No. 82 of Part B of the First Schedule to the Tamil Nadu Value Added Tax Act, 2006 ("TNVAT Act") which covers *"Milk food and milk products (including Flavoured milk, skimmed milk powder, Tinned, bottled or packed) Baby milk food, paneer, milk powder and UHT milk."* The petitioner had argued that milk constituted 58.8% by weight in caramel flavor and 56.4% by weight in chocolate flavor in the Women's Horlicks. In this regard, it relied upon the decision of the Supreme Court in the case of H.M.M Limited wherein it was held that the goods are 'milk food' or 'milk product' because milk predominated by weight and value.

The High Court relied upon the essentiality

test applied by the Supreme Court in various decisions relating to classification of goods such as *Commissioner of Central Excise* v. *Champdany Industries Limited* [2009 (241) E.L.T. 481 (SC)] and *Bharat Forge and Press Industries* v. *Collector of Central Excise* [(1990) 1 SCC 532] and held that when the goods are composite in nature, consisting of various mixtures, the classification should be on the basis of material or component which gives to the product their essential character. The Court was of the view that though these decisions were rendered under other central laws, they could be applied to the case on hand as it concerns classification of the product in question. The impugned clarification issued by the department had classified the goods under the entry attracting 12.5% rate while the petitioner sought to pay @ 4%, was held by the Court as devoid of reasons and arbitrary and remanded the matter for reconsideration. [*Glaxosmithkline Consumer Healthcare Ltd.* v. *The Commercial Tax Officer* - 2015-VIL-27-MAD]