A2Z TAXCORP LLP
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Indirect Tax and Other Laws Communique
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This bulletin brings to you the highlights of recent updates and important judgments in the field of indirect taxation along with key inputs from other fields to keep you abreast of all the latest happenings.

CONTENTS

GOVERNMENT INVITES SUGGESTIONS FOR UNION BUDGET 2015

In the context of formulating the proposals for the Union Budget of 2015-16, the Ministry of Finance vide **MOF DOR TRU letter in F. No. 344/20/2014-TRU dated October 27, 2014** has invited suggestions and views of the Trade and Industry Associations for changes in the duty structure, rates and broadening of tax base on both direct and indirect taxes giving economic justification for the same.

Suggestions and views may be supplemented and justified by relevant statistical information about production, prices, revenue implication of the changes suggested and any other information to support the proposal.

The request for correction of inverted duty structure, if any, for a commodity, should necessarily be supported by value addition at each stage of manufacturing of the commodity.

As regards direct taxes, the Government policy is to phase out profit linked deductions and minimizes exemptions; this may be taken into consideration while forwarding proposals.

Your suggestions and views may be emailed, as word document in the form of separate attachments, in respect of Indirect Taxes (Customs, Central Excise and Service Tax) and Direct Taxes before November 7, 2014 so as the same may be compiled and send to the CBEC and CBDT.

SERVICE TAX

RECENT CASE LAWS

- **No demand can be made against the Assessee applying the principle of estoppel only because the Assessee had admitted the Service tax liability**

Commissioner, Customs and Central Excise, Meerut-I Vs. RS. Travels [2014 (10) TMI 817 - UTTARAKHAND HIGH COURT]

In the instant case, the Revenue has filed an appeal before the Hon'ble High Court of Uttarakhand raising the question of principle of estoppel in law relating to the taxability of RS. Travels (**"the Assessee"**) on the basis that services were being rendered under the rent-a-cab scheme (**"impugned activity"**) and the Assessee had admitted its Service tax liability. Whereas the Hon'ble High Court of Uttarakhand on August 6, 2014 has decided that impugned activity is not taxable in the case of ***Commissioner, Customs & Central Excise Vs. Sachin Malhotra, Raj Kumar Taneja, M/s. Shiva Travels [2014 (10) TMI 816 - UTTARAKHAND HIGH COURT]*** (**"Shiva Travels case"**).

The Revenue de-linked Shiva Travels case from the present case on the basis of the fact that the Assessee had effected payments and also filed affidavits to the effect that he will be paying the balance of the amount.

However, the Assessee relied upon the judgment of the Hon'ble Apex Court in the case of ***Dunlop India Ltd. Vs. Union of India and others [(1976) 2 SCC 241]*** and ***Mafatlal Industries Ltd. and others Vs. Union of India and others [(1997) 5 SCC 536]*** and submitted that the amounts were paid under compulsion.

At the outset, the Hon'ble High Court observed that when there is only a contract of hire and there is no renting of the cab, there is no question of the Assessee being assessed in respect of services rendered in connection with rent–a-cab service as there is no renting at all.

It was further held by the Hon'ble High Court that Article 265 of the Constitution of India mandates that no tax can be levied or collected except as provided by law. Accordingly, mere fact that the Assessee had made some payments and also made promise to make further payments cannot be used against our refusing to interfere with the impugned order.

- **Penalty not imposable when the Service tax liability was discharged along with interest before issuance of Show Cause Notice**

Bipco Industries (Tools) Pvt. Ltd. Vs. Commissioner of C. EX. & ST., Daman [2014 (10) TMI 768 - CESTAT AHMEDABAD]

Bipco Industries (Tools) Pvt. Ltd. (**"the Appellant"**) was informed about the short payment of Service tax by the Jurisdictional Range Officer on September 3, 2007. The Appellant duly complied with the same by discharging the said Service tax liability by cheque dated September 29, 2009. Further, the Appellant also informed the Jurisdictional Range Office about the payment of Service tax liability along with interest.

Thereafter, a Show Cause Notice (**"SCN"**) was issued to the Appellant on September 14, 2010 imposing penalty upon the Appellant under Section 76 of the Finance Act, 1994 (**"the Finance Act"**) which was further confirmed by the Commissioner (Appeals) by mentioning in its order that the SCN was issued to the Appellant on September 14, 2009 instead of September 14, 2010 (**"impugned order"**). Being aggrieved, the Appellant preferred an appeal before the Hon'ble CESTAT, Ahmedabad contesting the amount of penalty.

The Hon'ble CESTAT, Ahmedabad observed that the impugned order has factually recorded incorrect date of SCN as September 14, 2009 instead of September 14, 2010 and held that in terms of Section 73(3) of the Finance Act, when the Service tax liability was discharged along with interest before issuance of SCN, no penalty would be imposable on the Appellant.

- **Tribunal had to waive of pre-deposit if pre-deposit was waived of earlier on similar issue**

Bharat Sanchar Nigam Ltd. Vs. Union of India & 2 [(2014) 50 taxmann.com 260 (Gujarat)]

In the instant case, Bharat Sanchar Nigam Limited (**"the Petitioner"** or **"BSNL"**) has challenged the order dated February 29, 2012 passed by the Hon'ble CESTAT, Ahmedabad (**"impugned order"**) whereby the application for waiver of pre-deposit filed by the Petitioner was rejected and the Petitioner was directed to reverse entire Cenvat credit amounting to Rs. 2,20,01,699/- within a period of four weeks from the date of impugned order and the Petitioner was directed to report compliance on or before April 4, 2012.

Being aggrieved by the rejection of application of waiver of pre-deposit by the Hon'ble Tribunal, the Petitioner filed a writ petition before the Hon'ble High Court of Gujarat. The Petitioner submitted that in similar other matters, for filing appeal, waiver applications have been allowed and hence, the impugned order may be quashed and set aside. He placed reliance on the order dated March 14, 2012 passed by the Hon'ble High Court of Bombay in Central Excise Appeal (L) No.35 of 2012, order dated June 6, 2011 passed by the Hon'ble CESTAT, Ahmedabad in Application No. ST/S/884 of 2010, order dated February 4, 2011 passed by the Hon'ble High Court of Punjab & Haryana in C.W.P. No. 1507 of 2011.

It was further submitted that in the decision of the Hon'ble High Court of Punjab & Haryana in C.W.P. No. 1507 of 2011, Petitioner was BSNL, as in the present case and while disposing of the said petition, the Hon'ble High Court granted complete waiver to the Petitioner for the purpose of hearing of its appeal.

The Hon'ble High Court of Gujarat after observing that the Petitioner's claim that in similar other matters, pre-deposit had been waived, was not disputed by the Revenue and in fact the Revenue also conceded that, in view of peculiar fact situation, waiver application ought to have been allowed by the Tribunal, held that the impugned order is liable to be set aside.

Hence, Hon'ble Tribunal was directed to accept full waiver of the amount of pre-deposit allowed by this Court and was also directed to proceed to decide the main appeal on merits expeditiously.

CENTRAL EXCISE

RECENT CASELAWS

- **No need to reverse Cenvat credit availed of duty paid on HR coils/ sheets for discharging duty on HR slitted and pickled coils on dispute whether slitting and pickling is a manufacturing activity under Section 2(f) of the Central Excise Act, 1944**

Asian Colour Coated Ispat Ltd. Vs. Commissioner of Central Excise, Delhi-III [2014-TIOL-2111-CESTAT-DEL]

Asian Colour Coated Ispat Ltd. (**"the Appellant"**) was engaged in the process of slitting and pickling of HR coils/ sheets (**"the activity"**). They availed Cenvat credit of Rs. 37 crores of the duty paid on HR coils/sheets and discharged Excise duty amounting to Rs. 42 crores on the HR slitted and pickled coils.

The Commissioner of Central Excise, Delhi alleged that the activity undertaken does not amount to manufacture and hence the Appellant was not entitled to avail Cenvat credit on the alleged inputs. Accordingly, a demand of Rs. 37.04 crores was confirmed along with imposition of an equivalent amount of penalty. Being aggrieved, the Appellant preferred an appeal before the Hon'ble CESTAT, Delhi.

The Revenue adverted to the provisions of Section 5B of the Central Excise Act, 1944 (**"the Excise Act"**) and submitted that since notification has not been issued in respect of the activity, Cenvat credit cannot be allowed. Reliance was further placed upon the Circular No. 911/1/2010 - CX dated January 14, 2010, Circular No. 940/1/2011 - CX dated January 14, 2011.

In the CESTAT, there was conflict of views between the Hon'ble Members.

The Hon'ble Member (J), inter alia, observed that there is no quarrel about the proposition that the Delhi High Court in the case of ***Faridabad Iron & Steel Traders Association [2003-TIOL-79-HC-DEL-CX]*** (**"Steel Traders case"**) has held that the activities of cutting or slitting of steel sheet in coil is a non-manufacturing activity. However, adverting to the plethora of decisions wherein it is held that *"By utilization of credit for payment of duty which was not required to be paid, credit was effectively reversed and Revenue cannot once again ask for reversal of credit"*, the Member (J) allowed the appeal with consequential relief.

In the matter of the reference made to Section 5B of the Excise Act and various Circulars, the Hon'ble Member (J) observed that if the Appellant does not approach the Central Government, the same cannot stop him from pursuing the legal remedy before the Courts.

On the other hand, the Hon'ble Member (T), inter alia, held that the Appellants cannot be allowed to circumvent the legal position and presume an activity as manufacture and avail Cenvat credit on inputs forcibly and pay duty on finished goods not required to be paid under the law and then pass the credit to the buyer. Holding that there is no question of granting input credit against such manufacture, the Hon'ble Member (T) upheld and confirmed the demand but reduced the amount of penalty to Rs. 5 crore.

Consequently, the matter was referred to the Third Member for a Majority view.

The Hon'ble Third Member allowed the appeal and held as under:

- Decision given in Steel Traders case was only in respect of the process of cutting or slitting of steel coils to the required sizes as no new commodity and distinct article having distinct name, character and use has emerged and the excisability of pickling process has not been examined since it was not in dispute;

- The process of pickling involves treatment of the HR sheets/ coils by solution of acids and chemicals to remove surface defects and obtain a sheet with smooth surface;

- In Heading No. 7208 of the Central Excise Tariff Act, 1985, there is separate sub-heading for HR coils subjected to the process of pickling and probably because of this, the Appellant were under impression that this process amounts to manufacture, and paid duty in respect of this process;

- Since there is no judgment of any High Court or Apex Court on the specific issue as to whether the HR coils subjected to the process of slitting as well as pickling would amount to manufacture, the provisions of Section 5B of the Excise Act are not attracted.

- Even if it is accepted that the activity does not amount to manufacture, it amounts to saying that the Appellant have cleared the Cenvat credit availed inputs as such and this is something which is not prohibited, if at the time of removal of Cenvat credit availed inputs, in terms of the provisions of Rule 3(5) of the Cenvat Credit Rules, 2004, an amount equal to the Cenvat credit availed is paid under an invoice issued under Rule 9 of the Central Excise Rules, 2002;

- Since the amount paid on the clearance of pickled HR sheets is more than the Cenvat credit availed, the Cenvat credit availed stands more than reversed and there is no need to recover the same again.

Hence, the matter was decided in favour of the Appellant with majority view.

➢ **Cenvat credit allowable on Capital goods used initially in the manufacturing of exempted goods but, at time of receipt, the Assessee had intention to use said Capital goods for manufacturing of both dutiable as well as exempted goods**

Brindavan Beverages Pvt. Ltd. Vs. Commissioner of Central Excise, Meerut [2014-TIOL-2136-CESTAT-DEL]

Brindavan Beverages Pvt. Ltd. (**"the Appellant"**) was engaged in manufacturing of Aerated waters which are dutiable and also Maaza, a Fruit pulp based drink which is fully exempted from Excise duty. During the period from September 2004 to August 2005, the Appellant installed certain machinery (**"Capital goods"**) in one of their plants, which was being used exclusively for manufacturing of Maaza which was fully exempt from Excise duty. Thereafter, the Appellant took Cenvat credit on the Capital goods which was denied by the Department in terms of Rule 6(4) of Cenvat Credit Rules, 2004 on the ground that the capital goods were used exclusively in the manufacture of exempted goods.

The Hon’ble CESTAT, Delhi also upheld the contentions of the Department against which the Appellant filed an appeal before the Hon’ble High Court of Allahabad. The Hon’ble High Court set aside the Tribunal's order and remanded the matter back to the Tribunal for fresh consideration.

In remand proceedings, the Hon’ble Tribunal observed that according to the Appellant at time of availing Cenvat credit, they had intention to use the capital goods for the manufacture of fruit pulp based soft drink (exempted goods) as well as for the manufacture of aerated waters (dutiable goods) and for this reason only, they had availed Cenvat credit on the Capital goods. Accordingly, the Hon’ble Tribunal held that:

- This aspect has to be verified on the basis of records of the Appellant and if the Appellant at the time of receipt of the Capital goods, had filed any declaration to the Department or had sent some letter to the Department intimating that they would be using this machinery for manufacture of dutiable final products as well as exempted final products or there is any other evidence indicating that at the time of receipt, the Appellant had plans to use the capital goods, in question, for manufacture of dutiable as well as exempted final products, they would be eligible for Cenvat credit;

- In this regard, the Appellant's certificates certifying that the Capital goods can also manufacture aerated waters (Dutiable goods) after some minor adjustment and software change, may also be examined;

- If there is no such evidence, it would have to be presumed that at the time of receipt, they had plans to use the Capital goods only for manufacture of the fruit pulp based drinks i.e. exempted final products and it is only subsequently they decided to switch over to manufacture of dutiable final products (aerated waters) then, in that event, Cenvat credit would not be allowed.

Accordingly, the Tribunal remanded the matter to the Commissioner for de novo adjudication.

- **Cenvat credit taken on inputs cannot be denied merely because original manufacturer of inputs is not traceable**

Kirtida Silk Mills Vs. Commissioner of Central Excise & Customs, Surat-1 [(2014) 50 taxmann.com 264 (Gujarat)]

In the instant case, **Kirtida Silk Mills** (**“the Appellant”**) availed Cenvat credit of duty paid on inputs, which was denied by the Department and the proceedings were initiated for recovery of Cenvat credit wrongly taken. The Department invoked extended period of limitation to deny Cenvat credit taken by the Appellant on the ground that original manufacturer of the inputs could not be traced.

Being aggrieved, the Appellant preferred an appeal before the Hon’ble Tribunal, wherein the Hon’ble Tribunal relying upon its earlier order dated January 24, 2011, upheld denial of Cenvat credit. The Appellant argued that order January 24, 2011 of the Hon'ble Tribunal was reversed in ***Prayagraj Dyeing & Printing Mills (P.) Ltd Vs. Union of India [(2013) 30 taxmann.com 139/38 STT 525 (Guj.)]*** (**"Prayagraj case"**) holding that *"if document based on which credit is taken was issued even by practicing fraud, a holder in due course for valuable consideration unless shown to be a party to a fraud, cannot be proceeded against by invoking larger period of limitation".*

Being aggrieved, the Appellant preferred an appeal before the Hon'ble High Court of Gujarat.

The Hon'ble High Court of Gujarat also relied upon the decision in the Prayagraj case and held Cenvat credit cannot be denied merely because original manufacturer of inputs is not traceable.

CUSTOMS

NOTIFICATIONS/CIRCULARS

- **Amendment in Tariff Value of certain goods by the Central Board of Excise & Customs ("the CBEC")**

The CBEC vide **Notification No. 100/2014-Customs (N.T.) dated October 31, 2014** has amended the tariff Value of various goods Palm Oil, RBD Oil, Soya bean Oil, Gold and Silver etc. applicable with effect from October 31, 2014.

RECENT CASE LAWS

- **Doctrine of unjust enrichment would apply to the pre-deposit amount but same can be substantiated by support of CA certificate that incidence of duty has not been passed on**

Siddhi Vinayak Steel Vs. Commissioner of Customs, Mumbai [2014 (10) TMI 689 - CESTAT MUMBAI]

Certain goods belonging to Siddhi Vinayak Steel (**"the Appellant"**) and lying at Shreenath Warehouse were seized when the SIIB found that certain goods were illegally imported through Chennai port under DEEC license for local market in Mumbai. The Appellant challenged the seizure of the goods by filing a writ petition before the Hon'ble High Court of Bombay. The Hon'ble High Court directed the Appellant to pre-deposit Rs 12 Lakhs and further directed the Department to issue a Show Cause Notice. Accordingly Show Cause Notice was issued and the Commissioner (Import) while adjudicating the case, ordered confiscation of the goods under Section 111(d) of the Customs Act, 1962 (**"the Customs Act"**), imposed redemption fine of Rs. 2,15,000/- ,duty of Rs. 13,17,733/- along with penalty of Rs. 1 lakh.

The Appellant aggrieved by the order of the Commissioner (Import) filed an appeal before the Hon'ble CESTAT, Mumbai on ground of jurisdiction, which was allowed. Thereafter, the Department challenged the same, before the Hon'ble High Court of Bombay where also contentions of the Department were rejected.

Subsequently, the Appellant filed refund claim of pre-deposit amount, which was sanctioned by the lower Adjudicating Authority, but credited the same to Consumer Welfare Fund in terms of Section 27(2) of the Customs Act on the ground that the Appellant had failed to discharge the onus that incidence of duty has not been passed on.

Being aggrieved, the Appellant preferred an appeal before the Commissioner (Appeals) who upheld the order of lower Adjudicating Authority. Thereafter, the Appellant preferred an Appeal before the Hon'ble CESTAT, Mumbai.

The Hon'ble CESTAT, Mumbai relying upon the decisions made in case of ***UOI Vs. Jain Spinners Ltd [1992 (61) E.L.T. 321 (S.C.)]*** and ***Pride Foramer Vs. CC [2006 (200) E.L.T. 259 = 2008 (12) S.T.R. 657.]*** held that doctrine of unjust enrichment would be applicable in the case of pre-deposited amount. It was further held that since, in the instant case the amount of pre-deposit was shown as receivable in the balance sheet of the Appellant and the same has been substantiated by Chartered Accountant certificate dated November 24, 2006 which has not been challenged by the Department, unjust enrichment could not be alleged.

- **SAD refund cannot be denied merely because endorsement to the effect that 'No Cenvat credit of the SAD is admissible' was not made on Invoices**

Chowgule & Company Pvt. Ltd. Vs. CC & CCE, Goa [2014-TIOL-1191-CESTAT-MUM-LB]

Chowgule & Company Pvt. Ltd (**"the Appellant"**) are the traders who, imported goods by discharging Special Additional Duty of Customs (**"SAD"**) under Section 3(5) of the Customs Tariff Act, 1975 and subsequently domestically sold such goods on payment of CST/ VAT under commercial invoices. Thereafter, the Appellant filed refund of SAD under Notification No. 102/2007-Customs dated September 14, 2007 (**"the Notification"**) which was rejected by the Department on the ground that the endorsement to the effect that 'No Cenvat credit of the SAD is admissible' in respect of the goods covered therein, as required in terms of condition 2(b) of the Notification was not made on the invoices issued for sale of goods.

Being aggrieved, the Appellant preferred an appeal before the Hon'ble CESTAT, Mumbai wherein the Appellant contended that as no duty element is incorporated in commercial invoices, therefore, the question of taking benefit of SAD by the buyer does not arise. Further, relying upon the decisions of the Hon'ble Tribunal in the cases of ***Equinox Solution Ltd. [2010-TIOL-1907-CESTATMUM]*** (**"Equinox Case"**) **and Novo Nordisk India Pvt. Ltd *[2013-TIOL-1944-CESTAT-MUM]*** (**"Novo Case"**), the Appellant submitted that SAD is payable by the assessee to safeguard CST/ VAT and since the goods have been cleared on payment of CST/ VAT, therefore, they are entitled to get the benefit as per the Notification.

On the other hand, the Revenue contended that the condition of the Notification needs to be followed strictly and relied upon the Division Bench decision in the case of ***Astra Zeneca Pharma India Ltd. [2013-TIOL-1946-CESTAT-DEL]***.

Observing the contrary views, the matter was referred to the Larger Bench on the issue as to whether compliance of the condition 2(b) of the Notification is mandatory to avail the benefit of the Notification by a trader who cleared the goods on the strength of commercial invoices.

The Larger Bench relying on the decision in case of Equinox Case and Novo Case answered the reference in favour of the Appellant and held that:

- From the genesis of the levy of SAD attributable to the Finance Bill, 1998 and the Budget speech of the Finance Minister, it is observed that the object of the levy was to counter balance the levy of local taxes on imported goods. Thus, the purpose of the Notification is to grant relief from double levy;
- Non-declaration of the duty in the commercial invoices issued itself is an affirmation that no credit would be available on commercial invoices;
- Relying on the decision in case of ***Mangalore Chemicals and Fertilizers Ltd. [2002-TIOL-234-SC-CX]*** and ***New India Sugar Mills Ltd. [AIR 1963 SC 1207]***, the condition relating to endorsement on the invoice was merely a procedural one and the purpose and object of such an endorsement could be achieved when the duty element itself was not specified in the invoice.

Hence, the reference as answered above was returned to the referring bench for further action as necessary.

- **Royalty and Licence Fees to be included in the assessable value only when its payment is a condition pre-requisite for supply of imported goods by the foreign supplier**

Emitec Emission Control Tech. (I) P. Ltd. Vs. CC. (Import), Mumbai-I [2014 (10) TMI 754 - CESTAT Mumbai]

Emitec Emission Control Tech. (I) Pvt. Ltd. (**"the Appellant"**) imported certain goods from Emitec Gesellschaft Fur Emissions technologie GmBH (**"EGM Germany"**) which is the parent company of the Appellant. The Appellant also manufactured the same goods in India for which EGM Germany charged royalty for providing technical know-how and remuneration on account of training. The Adjudicating Authority while determining the assessable value of the imported goods, added the element of royalty as well as the remuneration on account of the training to the assessable value in terms of Rule 10(1)(c) of Customs Valuation (Determination of Price of imported Goods) Rules, 2007 (**"the Valuation Rules"**).

Being aggrieved, the Appellant preferred an appeal before the Commissioner (Appeals), who upheld the order passed by the Adjudicating Authority. Aggrieved by the order of the Commissioner (Appeals), the Appellant preferred an appeal before the Hon'ble CESTAT, Mumbai.

The Hon'ble CESTAT, Mumbai relying upon the decision of the Hon'ble Supreme Court in case of ***Commissioner of Customs Vs. Frodo India Pvt. Ltd.[2008 (224) E.L.T. 23 (S.C.)]*** allowed the Appeal and held that the provisions of Rule 10(1)(c) of the Valuation Rules is pari material to erstwhile Rule 9(1)(c) of Customs (Valuation) Rules, 1988 as per which royalty and license fees can be included in the assessable value of the imported goods only if the payment constitutes a condition pre-requisite for the supply of the imported goods by the foreign supplier.

- **Manufacturer or Exporter is not barred from seeking determination of the Brand Rate of drawback merely because, at the time of export, he had applied for and granted drawback at All Industry Rate**

Alfa Laval (India) Ltd. Vs. Union of India [(2014) 49 taxmann.com 592 (Bombay)]

In the instant case, Alfa Laval (India) Ltd. (**"the Petitioner"**) was exporting excisable goods under claim for duty drawback available under Section 75 of the Customs Act, 1962 (**"the Customs Act"**) read with the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (**"the Drawback Rules"**). At the time of export of the finished goods, the Petitioner filed the shipping bill under claim of drawback in terms of Rule 3 of the Drawback Rules. Thereafter, within the stipulated time and with the requisite documents, the Petitioner filed an application for determination of drawback under Rule 7 of the Drawback Rules (**"the application"**).

Vide the orders/ letters dated April 19, 2012, June 11, 2012 and July 24, 2012 issued by the Additional Commissioner (BRU) of Central Excise, Pune – I (**"the orders"**), the application was rejected on the ground that the Petitioner is barred from seeking a determination of Special Brand Rate under Rule 7 the Drawback Rules because, at time of export, he had already applied for and was granted drawback at All Industry Rate under Rule 3 thereof. Further, in terms of Para 2(d) of Central Board of Excise and Customs' Circular F. No. 606/04/2011-DBK dated December 30, 2011 (**"CBEC Circular"**), an exporter once having availed the All Industry Rate of drawback at the time of export, cannot file an application for determination of the Brand Rate of drawback under Rule 7 of the Drawback Rules.

Being aggrieved, the Petitioner preferred an appeal before the Hon'ble Commissioner of Central Excise (Appeals) wherein again the application was rejected relying upon the CBEC Circular. Thereafter, the Petitioner filed a writ petition before the Hon'ble High Court of Bombay.

The Hon'ble High Court of Bombay after detailed analyses of the Drawback Rules directed the Department to accept the application of the Petitioner and process the same subject to compliance of the provisions of Rule 7 of the Drawback Rules.

The Hon'ble High Court further held that the CBEC Circular is liable to be struck down and on the basis of following observations:

- On a careful and conjoint reading of the Drawback Rules, it is found that there is no prohibition set out in the Drawback Rules, which debars an exporter from seeking determination of the Brand Rate of drawback under Rule 7 of the Drawback Rules, merely because at the time of export, he had already claimed the All Industry Rate of drawback under Rule 3 thereof. In fact, the Drawback Rules seem to suggest otherwise.
- Rule 7 of the Drawback Rules categorically provides that where in respect of any goods, the manufacturer or exporter finds that the amount or rate of drawback determined under Rule 3 of the Drawback Rules is less than 4/5th of the duties or taxes paid on the inputs/input services used in the production or manufacture of said goods, he may make an application within sixty days for determination of the amount or rate of drawback thereof under Rule 7 of the Drawback Rules, disclosing all the relevant facts and subject to the other conditions stipulated therein;
- Under the garb of clarifying the Rules, the CBEC cannot incorporate a restriction/ limitation, which does not find place in the Drawback Rules. Further, clause (d) of the Circular cannot be reconciled with clauses (b) and (c) thereof.

Hence, the matter was decided in favour of the Petitioner.

VALUE ADDED TAX

RECENT CASE LAWS

➢ **Activity of imparting computer education in schools along with providing computers/ accessories is a Works contract and computers/ accessories so installed are liable to Sales tax**

NIIT Limited Vs. Deputy Commissioner (CT), Abids Division, Hyderabad and others [2014 (10) TMI 765 - Andhra Pradesh High Court]

NIIT Limited (**"the Petitioner"**) executed a contract dated June 29, 2002 (**"the Contract"**) with the Government of Andhra Pradesh for imparting computer education in High Schools in the State of Andhra Pradesh, including leasing of computer hardware, software and connected accessories on Build Own Operate Transfer (BOOT) basis.

The Department contended that the work executed by the Petitioner under the Contract is a 'Works contract' and therefore the turnover of property involved in the execution of the said Works contract is liable to be taxed at 8% under Section 5F of the A.P. General Sales Act, 1957 (**"A.P. Sales Act"**). Accordingly, proceedings were initiated against the Petitioner.

Being aggrieved, the Petitioner filed a writ petition before the Hon'ble High Court of Andhra Pradesh on the basis of following submissions:

- The Contract is a simple contract for imparting computer education in the schools and it does not involve the element of 'sale' as defined in Section 2(1)(n) of the A.P. Sales Act;
- Though the Petitioner had provided computers and software for teaching purpose, it is purely incidental to rendering of computer education and involves no sale of goods and there is no sale consideration;
- The contract is purely a service contract;
- Even assuming that the said transfer would amount to sale, the same would come into operation only at the end of the Contract and for the purpose of the Assessment Years 2002-03 to 2004-05, the Petitioner continues to be the owner of all those assets.

The Hon'ble High Court of Andhra Pradesh after detailed discussion on the provisions of the A.P. Sales Act and Article 366(29A)(b) of the Constitution of India held the following:

- On a careful analysis of the recitals and terms and conditions of the Contract, there cannot be any doubt that it involves certain goods in execution of the Contract and that the same would be transferred to the schools in which the equipment is installed for imparting the computer education;
- The mere fact that the ownership of the computers and the accessories passed on to the schools at the end of the Contract does not alter the nature of the Contract. Passing of ownership at a later point of time is permissible as held in ***Larsen and Toubro Limited's case [2013 (9) TMI 853 - SUPREME COURT]*** (**"L&T case"**);
- On a combined reading of the terms and conditions of the Contact with reference to the object sought to be achieved, it is observed that the Contract involves both a contract of Service and a contract of Sale of Goods. It is a composite contract and by legal fiction provided under Article 366(29A)(b) of the Constitution, it is permissible to separate the transfer of property in goods (as goods or in some other form) from the contract of service;
- As held in L&T case, the traditional decisions which hold that the substance of the contract must be seen, have lost their significance and

what was viewed traditionally has to be now understood in the light of the philosophy of Article 366(29A) of the Constitution of India;

- It is also explained in L&T case that the term 'Works contract' cannot be confined to a particular form and it encompasses a wide range of many varieties of contract. It is also laid down in the said decision that for sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract three conditions must be fulfilled namely:

  (i) there must be a Works contract,

  (ii) the goods should have been involved in the execution of a Works contract; and

  (iii) the property in those goods must be transferred to a third party either as goods or in some other form. In the instant case, all the said three conditions are satisfied.

- Hence, the Contract is a Works contract and consequently levy of Sales tax under Section 5F of the A.P. Sales Act on transfer of property in goods/ equipment installed in the schools for the purpose of imparting computer education is permissible under law.

<u>Our Comments:</u> The five Judges Constitution Bench of the Hon'ble Supreme Court in the case of ***Kone Elevator India Private Limited Vs. State of Andhra Pradesh [2014-TIOL-57-SC-CT-CB]***, while explaining the distinction between 'Contract for sale of goods' and 'Works contract', overruled the judgment of three Judge Bench and changed the classification of contracts for supply, erection, installation and commissioning of elevators from 'Contract of sale of goods' to 'Works contract'.

It is held by the five Judges Constitution Bench of the Hon'ble Supreme Court of India that four concepts have emerged from various SC judgments, which are:

- The Works contract is an indivisible contract but, by legal fiction, is divided into two parts, one for sale of goods, and the other for supply of labour and services;

- The concept of 'Dominant nature test' or for that matter, the 'Degree of intention test' or 'Overwhelming component test' for treating a contract as a Works contract is not applicable;

- The term 'Works contract' as used in Clause (29A) of Article 366 of the Constitution takes in its sweep all genre of Works contract and is not to be narrowly construed to cover one species of contract to provide for labour and service alone; and

- Once the characteristics of Works contract are met within a contract entered into between the parties, any additional obligation incorporated in the contract would not change the nature of the contract.

'Dominant nature test' or 'overwhelming component test' or 'the degrees of labour and service test' are really not applicable.

COMPANY LAW

NOTIFICATIONS/CIRCULARS

- **Contribution to Swach Bharat Kosh and Clean Ganga activities includable in CSR Policies**

The Ministry of Corporate Affairs vide **Notification F. No. 1/18/2013-CL-Vdated October 24, 2014** has made following amendments in Schedule VII of the Companies Act, 2013 to widen the scope of activities which may be included by Companies in their Corporate Social Responsibility (**"CSR"**) Policies:-

"(i) in item (i), after the words "and sanitation", the words "including contribution to the Swach Bharat Kosh set-up by the Central Government for the promotion of sanitation" shall be inserted;

(ii) In item (iv), after the words "and water", the words "including contribution to the Clean Ganga Fund set-up by the Central Government for rejuvenation of river Ganga;" shall be inserted."

NEWS FLASH

- **GST must to boost manufacturing, growth in India, says World Bank**

Implementation of the Goods and Service tax (GST) is the most critical reform needed for Indian manufacturing, the World Bank has said weeks after Prime Minister Narendra Modi invited global firms to 'Make in India' to spur manufacturing in the country. According to Denis Medvedev, senior country economist of the World Bank-India, implementing the GST will transform India into a common market, eliminate inefficient tax cascading and go a long way in boosting the manufacturing sector.

"The transformational impact of reform, particularly if enhanced by a systematic dismantling of inter-state check posts, can dramatically boost competitiveness and help offset both domestic and external risks to the outlook," said Medvedev.

The World Bank has pegged India's economic growth at 5.6% for the current fiscal.

- **After Home Ministry, Customs now plans passenger risk-profiling**

Starting November, the Customs Department is set to commence risk-profiling of passengers coming into India in a bid to tighten the noose around tax evaders, including smugglers and perpetrators of commercial frauds. The system will run parallel to a similar mechanism under the Home Ministry for internal security.

The Customs Department will prepare electronic profiles of passengers on international flights to see who are suspicious frequent fliers, those coming from risk-prone areas that are on radar of the investigating agencies like Directorate of Revenue Intelligence (DRI), those who have a past offence record and those against which alert circulars have been issued by law enforcing agencies.

Currently, while the Department has a system of risk assessment checks in place for sea and air cargo, there is no such mechanism for passengers. The mapping and profiling of passengers, who are short-term visitors or frequent visitors, or against whom offence cases have been registered in the past, is not prepared for monitoring and apprehending the targets.

- **SEBI to caution investors against PACL – Regulator received complaints that the ponzi scheme operator continues to collect deposits**

The Securities and Exchange Board of India (SEBI) has received complaints that PACL (Pearl Agrotech Corporation Limited) continues to collect money from investors, defying the market regulator's ban. The market regulator, also entrusted with the responsibility of cracking down on illicit money collection schemes, plans to issue advisory, cautioning investors against investing in schemes offered by the Delhi-based company. Earlier SEBI had passed an order against PACL, asking the firm to refund around Rs 50,000 crore raised from 58.5 million customers.

A SEBI official said the regulator plans to caution investors by issuing advertisements against PACL. "After the investigation, we will come out with an advisory notice warning investors against the company and not to invest in the schemes launched by it," said a senior SEBI official.

SEBI, while issuing the order against PACL, had also referred the matter to the State Government and local police, asking them to register a civil or criminal case against PACL "for offences of fraud, cheating, and criminal breach of trust and misappropriation of public funds". The Economic Offenses Wing (EOW), Mumbai, had earlier initiated an inquiry against the company, which it has now transferred to the Central Bureau of Investigation (CBI) considering the quantum of money involved. The regulator has also referred the matter to the Ministry of Corporate Affairs (MCA) to initiate the process of winding up of PACL.

- **India ranks 142 in latest "Ease of Doing Business" report: World Bank**

India has slipped further on the World Bank's 'Ease of Doing Business' index, at 142 among 189 countries as on June 1 from 134 last year, but the global lender has taken care to distance from this slide the Narendra Modi led NDA government which took charge barely a week earlier and soon set about improving the country's business environment and perception among overseas investors.

"We do not want to send the impression that the drop in India's ranking is connected in any way with the current political situation (government)," Augusto Lopez-Claros, director, Global Indicators Group, Development Economics, World

Bank Group said about the latest ranking released on Wednesday.

Singapore retained the top spot in the ranking, followed by New Zealand, Hong Kong, Denmark and South Korea. The NDA government has announced a series of measures to fast-track decision making, reduce regulatory compliance burden and bring down cost of doing business, setting itself the goal of improving India's rank to within top 50 on this widely followed index. "World Bank has used the data till May 2014, whereas most measures to improve doing business were undertaken subsequent to that, from June end," a senior government official said.

"Among 189 economies worldwide, India follows the largest share of the good practices measured by the new indices," the reported noted, putting India at the seventh place. Joshi of Crisil said India should figure higher in the rankings next year as attempts are being made to improve the business environment in the country.

INDIRECT TAX CALENDER FOR THE MONTH OF NOVEMBER, 2014

Due Date	Period	EVENT	FORM
Payment of Service Tax/ Excise Duty			
6th November	October	Online Payment of Service Tax/ Excise duty by All Assessee other than Individual/ Firm	GAR-7
Return under the Finance Act, 1994/ the Central Excise Act, 1944			
10th November	October	Filing of Excise Return (except SSIs and EOUs)	ER–1
10th November	October	Filing of Excise Return by EOUs	ER-2
10th November	October	Filing of Excise Return by units paying duty more than Rs. 1 crores (Cenvat + PLA) in October	ER-6
14th November	Half yearly (April-September)	Filing of Service Tax Return (Due date i.e. 25th October, 2014 extended up to 14th November)	ST-3
30th November	Year ending March 31, 2014	Filing of Annual Return under Central Excise by units paying total duty of more than Rs. 1 crores (Cenvat + PLA)	ER-4

ABOUT US

A2Z TAXCORP LLP having professionals from Multi disciplines which provides services under the Indirect Tax Laws, DGFT, Foreign Trade Policy, SEZ, EOU, Export – Import Laws, Free Trade Policy, Accounting, Auditing, Law, Company Laws, etc.

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