

Part I : Statutory Update – Indirect Tax Laws

Significant Notifications and Circulars issued between 1st May, 2014 and 31st October, 2014

Study Material for Indirect Tax Laws [November, 2014 edition] contains all the relevant amendments made by the Finance (No.2) Act, 2014 and circulars/notifications issued up to 30.04.2014 as also the budget notifications. However, for students appearing in May, 2015 examination, amendments made by notifications, circulars and other legislations made between 01.05.2014 and 31.10.2014 are also relevant. Such amendments are given hereunder:-

A. CENTRAL EXCISE

I. AMENDMENTS IN THE CENVAT CREDIT RULES, 2004

1. Provider of taxable service now included in Rule 12AAA

Rule 12AAA empowers the Central Government to provide for certain measures to prevent the misuse of the provisions of CENVAT credit including restrictions and to specify, by a notification in the Official Gazette, the nature of restrictions to be imposed, types of facilities to be withdrawn and procedure for issuance of such order.

Earlier, such restrictions could be imposed and facilities could be withdrawn with respect to a manufacturer, first stage dealer, second stage dealer and an exporter.

Now, Central Government has been empowered to impose restrictions and withdraw facilities with respect to **provider of taxable service** also.

[Notification No. 25/2014 CE (NT) dated 25.08.2014]

2. STTG certificate issued by the Indian Railways along with the photocopies of the railway receipts to be the eligible documents for availing CENVAT credit

Rule 9 of the CENVAT Credit Rules, 2004 has been amended to include **Service Tax Certificate for Transportation of Goods** (hereinafter referred to as STTG Certificate) issued by the Indian Railways, along with the photocopies of the railway receipts mentioned in the STTG certificate as a document eligible for taking CENVAT credit. Thus, in case of transport of goods by rail, credit of service tax paid on the said service can be availed on the basis of the STTG certificate.

[Notification No. 26/2014 CE (NT) dated 27.08.2014]

II. CLARIFICATIONS

1. Determination of place of removal

CBEC has clarified that since the definition of place of removal is now provided in the CENVAT Credit Rules, 2004, wherever CENVAT credit is available upto the place of removal, this definition of place of removal would apply, irrespective of the nature of assessment of duty *[Notification No. 21/2014 CE (NT) dated 11.07.2014* has inserted the definition of place

of removal in the CENVAT Credit Rules, 2004]. The payment of transport, inclusion of transport charges in value, payment of insurance or who bears the risk are not the relevant considerations to ascertain the place of removal.

The place of removal is place where sale takes place. The place where sale takes place is the place where the transfer in property of goods takes place from the seller to the buyer. Determination of place of removal without ascertaining the place where transfer of property in goods has taken place is a deviation from the legal position on the subject.

Place of removal needs to be ascertained in term of provisions of the Central Excise Act, 1944 read with provisions of the Sale of Goods Act, 1930. There are very well laid rules in the Sale of Goods Act, 1930, regarding the time when property in goods is transferred from the seller to the buyer.

(i) **Transfer of property in goods in case of sale of specific or ascertained goods:** Section 19 of the Sale of Goods Act, 1930 provides that where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Intention of the parties is to be ascertained with reference to the terms of the contract, the conduct of the parties and the circumstances of the case.

(ii) **Transfer of property in goods in case of sale of unascertained or future goods:** Section 23 provides that where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied and may be given either before or after the appropriation is made.

Delivery to carrier: Sub-section (2) of section 23 further provides that where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purposes of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

[Circular No. 988/12/2014-CX dated 20.10.2014]

2. Fertilizer subsidy given by the Government to benefit the farmers cannot be considered an additional consideration

Issue: Whether the fertilizer subsidy given by the Government to benefit the farmers can be considered an additional consideration?

Clarification: In case of price-controlled fertilizers, the manufacturers are mandated to sell the goods at the prices notified by the Government. The Government reimburses the differential between the cost of production and the notified price to the manufacturers in the form of subsidy. However, for some specific fertilizer, the price is deregulated and

companies are free to fix the price. They do so after taking into account the subsidy component which is fixed on the basis of nutrient content (i.e per kg subsidy is fixed by the Government for phosphate, potash, nitrogen and sulphur). In both these types of fertilizers, the subsidy is given by the Government to benefit the farmers, as subsidy would reduce the price paid by farmers.

CBEC has clarified that the manufacturers of fertilizers do not gain any extra commercial advantage vis-a-vis other manufacturers because of the subsidy received from the Government. The subsidy paid by the Government to the manufacturer is in larger public interest and not for benefitting any individual manufacturer-seller and it is also not paid on behalf of any individual buyer or entity. In view of the above, it can be concluded that the subsidy component is not an additional consideration and hence, the price at which the fertilizer is sold to buyers by the manufacturers is the sole consideration for its sale. Even though the subsidy component has money value, it cannot be considered as an additional extra-commercial consideration flowing from the buyer to the seller.

Therefore, in respect of fertilizers for which subsidy is provided by the Government, the excise duty will be chargeable on the price charged and subsidy component provided by the Government will not be included in the assessable value.

[Circular No.983/7/2014-CX dated 10.07.2014]

3. Central Excise officer is empowered to conduct audit in Central Excise

Issue: Whether a Central Excise officer is empowered to conduct audit under Central Excise?

Clarification: CBEC has clarified that in Central Excise, there is adequate statutory backing for audit by the Central Excise Officers. The statutory provisions relevant for audit are clause (x) of section 37(2) and rule 22 of the Central Excise Rules, 2002 (CER).

Rule 22 of CER provides that the Commissioner may empower an Officer or depute an audit party for carrying out scrutiny or verification of records of the assessee. The rule also obliges an assessee to make available records for such scrutiny. The statutory backing for rule 22 thus, flows from clause (x) of section 37(2) and the general rule making powers under section 37(1) of the Central Excise Act, 1944. Clause (x) of section 37(2) empowers the Central Government to make rules for verification of records and returns to check the correctness of levy and collection of duty which in the present regime of self-assessment would mean verification of correctness of self-assessment and payment of duty by the assessee. It may be noted that the expression "verification" used in the section is of wide import and would include within its scope, audit by the Departmental officers, as the procedure prescribed for audit is essentially a procedure for verification mandated in the statute.

[Circular No. 986/ 10/ 2014-CX dated 09.10.2014]

B. SERVICE TAX

1. Service provided with respect to Kailash Mansarovar and Haj pilgrimage exempted from service tax

Mega exemption *Notification No. 25/2012 ST dated 20.06.2012* has been amended to exempt the services provided by a specified organisation in respect of a religious pilgrimage facilitated by the Ministry of External Affairs of the Government of India, under bilateral arrangement, from service tax.

Specified organisation shall mean:

- (a) Kumaon Mandal Vikas Nigam Limited, a Government of Uttarakhand Undertaking; or
- (b) Haj Committee of India and State Haj Committees constituted under the Haj Committee Act, 2002, for making arrangements for the pilgrimage of Muslims of India for Haj.

Thus, the religious pilgrimage organized by the Haj Committee and Kumaon Mandal Vikas Nigam Ltd. will not be liable to service tax.

[Notification No. 17/2014 ST dated 20.08.2014]

2. Board/Chief Commissioner empowered to issue supplementary instructions [New rule 12 inserted in the Service Tax Rules, 1994]

With effect from 01.10.2014, Board or the Chief Commissioners of Central Excise may issue instructions for any incidental or supplemental matters for the implementation of the provisions of the Finance Act, 1994.

[Notification No. 19/2014 ST dated 25.08.2014]

3. Clarification regarding levy of service tax on joint venture

CBEC has issued following clarification regarding levy of service tax on joint venture:

- (i) **Services provided by the members of the Joint Venture (JV) to the JV and vice versa or between the members of the JV:** In accordance with Explanation 3(a) of the definition of service under section 65B(44) of the Finance Act, 1994, JV (an unincorporated temporary association constituted for the limited purpose of carrying out a specified project) and the members of the JV are treated as distinct persons and therefore, taxable services provided for consideration, by the JV to its members or vice versa and between the members of the JV are taxable.
- (ii) **Cash calls (capital contributions) made by the members to the JV:** If cash calls are merely a transaction in money, they are excluded from the definition of service provided in section 65B(44) of the Finance Act, 1994. Whether a 'cash call' is 'merely.... a transaction in money' [in terms of section 65B(44) of the Finance Act, 1994] and hence

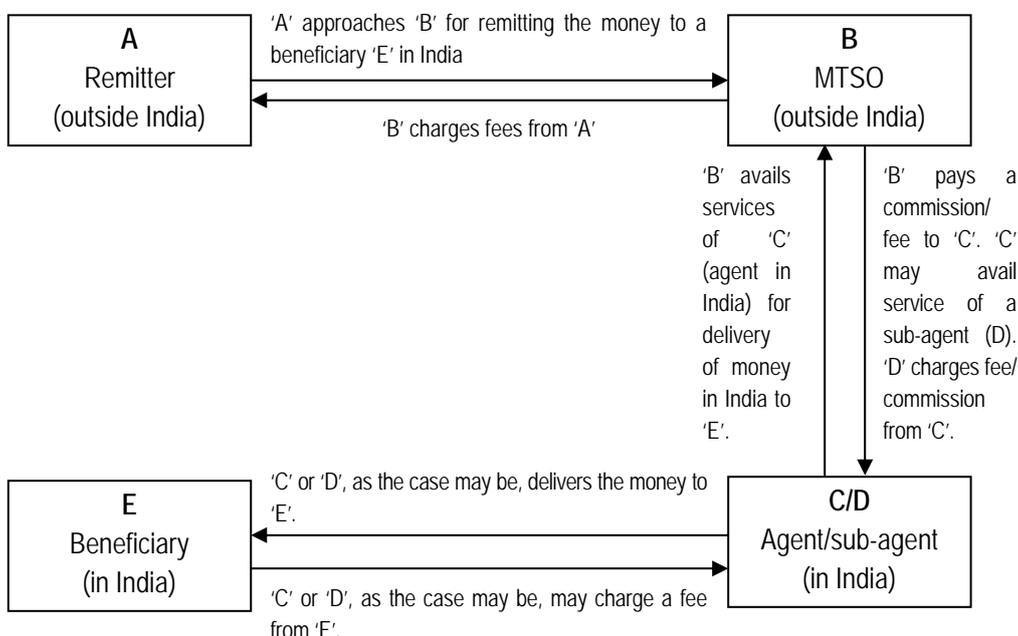
not in the nature of consideration for taxable service, would depend on the comprehensive examination of the Joint Venture Agreement, which may vary from case to case. Detailed and close scrutiny of the terms of JV agreement may be required in each case, to determine the service tax treatment of cash calls.

[Circular No. 179/5/2014 ST dated 24.09.2014]

4. Clarification regarding levy of service tax on activities involved in relation to inward remittances from abroad to beneficiaries in India through MTSOs

The remittances of money from overseas through the Money Transfer Service Operator (MTSO) route involves the following sequence of transactions:

- Step 1:** Remitter located outside India (say 'A') approaches a MTSO/bank (say B) located outside India for remitting the money to a beneficiary in India; 'B' charges a fee from 'A'.
- Step 2:** 'B' avails the services of an Indian entity (agent) (say 'C') for delivery of money to the ultimate recipient of money in India (say 'E'); 'C' is paid a commission/fee by 'B'.
- Step 3:** 'C' may avail service of a sub-agent (D). 'D' charges fee/commission from 'C'.
- Step 4:** 'C' or 'D', as the case may be, delivers the money to 'E' and may charge a fee from 'E'.



Circular No. 180/06/2014 ST dated 14.10.2014 has clarified the following issues in this regard:

S. No.	Issues	Clarification
1.	Whether service tax is payable on remittance received in India from abroad?	No service tax is payable per se on the amount of foreign currency remitted to India from overseas. As the remittance comprises money, it does not in itself constitute any service in terms of the definition of 'service' [Section 65B(44)].
2.	Whether the service of an agent or the representation service provided by an Indian entity/bank to a foreign MTSO in relation to money transfer falls in the category of intermediary service?	Yes. The Indian bank or other entity acting as an agent to MTSO in relation to money transfer, facilitates in the delivery of the remittance to the beneficiary in India. In performing this service, the Indian Bank/entity facilitates the provision of money transfer service by the MTSO to a beneficiary in India. For their service, agent receives commission or fee. Hence, the agent falls in the category of intermediary as defined in rule 2(f) of the Place of Provision of Service Rules, 2012.
3.	Whether service tax is leviable on the service provided, as mentioned in point 2 above, by an intermediary/ agent located in India (in taxable territory) to MTSOs located outside India?	Service provided by an intermediary is covered by rule 9(c) of the Place of Provision of Service Rules, 2012. As per this rule, the place of provision of service is the location of service provider. Hence, service provided by an agent, located in India (in taxable territory), to MTSO is liable to service tax. The value of intermediary service provided by the agent to MTSO is the commission or fee or any similar amount, by whatever name called, received by it from MTSO and service tax is payable on such commission or fee.
4.	Whether service tax would apply on the amount charged separately, if any, by the Indian bank/entity/agent/sub-agent from the person who receives remittance in the taxable territory, for the service provided by such Indian bank/entity/agent/sub-agent	Yes. As the service is provided by Indian bank/entity/agent/sub-agent to a person located in taxable territory, the place of provision is in the taxable territory. Therefore, service tax is payable on amount charged separately, if any.

5.	Whether service tax would apply on the services provided by way of currency conversion by a bank /entity located in India (in the taxable territory) to the recipient of remittance in India?	Any activity of money changing comprises an independent taxable activity. Therefore, service tax applies on currency conversion in such cases in terms of the Service Tax (Determination of Value) Rules. Service provider has an option to pay service tax at prescribed rates in terms of Rule 6(7B) of the Service Tax Rules 1994.
6.	Whether services provided by sub-agents to such Indian Bank/entity located in the taxable territory in relation to money transfer is leviable to service tax?	Sub-agents also fall in the category of intermediary. Therefore, service tax is payable on commission received by sub-agents from Indian bank/entity.

Note: Circular No. 163/14/2012-ST dated 10.07.2012, issued earlier on the aforesaid subject, stands suspended.

Part II : Judicial Update – Indirect Tax Laws

Significant Recent Legal Decisions

“Select Cases in Direct and Indirect Tax Laws – An Essential Reading for the Final Course” is a compilation of the significant decisions of Supreme Court, High Court and Larger Bench of Tribunal. October, 2014 edition of the said publication is relevant for May, 2015 examination. Students may note that in addition to the cases reported in the said publication, following significant recent legal decisions are also relevant for May, 2015 examination:-

SECTION A. CENTRAL EXCISE

Basic concepts of excise

1. Whether contaminated, under or over filled bottles or badly crowned bottles amount to manufactured finished goods which are required to be entered under R.G.-1 register, and which are exigible to payment of excise duty?

Amrit Bottlers Private Limited v. CCE 2014 (306) E.L.T. 207 (All.)

Facts of the Case: The appellant was engaged in manufacturer of aerated water. Revenue alleged that the appellant was draining out manufactured aerated water on account of contaminated, under filled, over filled, badly crowned bottles, without entering them in R.G.1 register [daily stock account] and without payment of excise duty on the same. It issued a demand-cum show cause notice on the appellant for the recovery of said duty. Revenue was of the view that contaminated, under filled, over filled, badly crowned bottles were excisable goods. Further, if such goods were defective/non-marketable, the appellant should have sought remission of duty paid on such goods.

The appellant contended that such aerated water was drained out as certain bottles were found to be defective on account of contamination, under/over filling of the aerated water in bottles or such bottles were badly crowned. Under and over filling of the bottles make them unusable under the erstwhile Weights and Measures Act [now Legal Meteorology Act, 2009] as well as under the Prevention of Food Adulteration Act. Consequently, the aerated water which was drained out was not marketable. Thus, it was not required to be entered in R.G.-1 register. The appellant further submitted that excise duty could not levied on the goods which had not been manufactured and which were not marketable.

Observations of the Court: The Court observed that only a finished product can be entered in RG 1 register. A finished product is a product which is manufactured as well as which is marketable. The law required the appellant to provide a screening test before it could declare the manufactured product as a finished product, which was marketable. In other words, a finished product was required to be accounted for in R.G. 1 register only after undergoing the screening test and having found that they were fit for sale.

Under filled or over filled or badly crowned caps bottles could not be treated as being fully manufactured nor could they be treated as finished goods. Moreover, bottles filled

with less or more aerated water were not marketable under the erstwhile Weights and Measures Act [now Legal Metrology Act, 2009]. Consequently, such goods could not be entered in R.G. 1 register.

Decision: The Court held that in the instant case, contaminated, under filled, over filled and badly crowned bottles found at the stage of production were not marketable goods. Thus, they were not required to be entered under R.G.-1 register and consequently, no excise duty was payable on them.

Note: RG-1 register is a daily stock account required to be maintained under rule 10 of the Central Excise Rules, 2002. Rule 10 provides that every assessee shall maintain proper records, on a daily basis, in a legible manner indicating the particulars regarding:

- a. description of the goods produced or manufactured,
- b. opening balance, quantity produced or manufactured,
- c. inventory of goods,
- d. quantity removed,
- e. assessable value,
- f. the amount of duty payable; and
- g. particulars regarding amount of duty actually paid.

Valuation of excisable goods

2. Should a part of sales tax retained by the manufacturer from its customers under a tax concession granted to it, be included in the transaction value of such goods under section 4(3)(d) of the Central Excise Act, 1944?

CCE v. Maruti Suzuki India Limited 2014 (307) E.L.T. 625 (S.C.)

Facts of the Case: The assessee was a prestigious unit manufacturing and selling vehicles in the State of Haryana. Being a prestigious unit, a tax concession was granted to the assessee considered by the High Powered Committee (HPC) under the erstwhile Haryana General Sales Tax Rules, 1975. Therefore, an entitlement certificate was issued to the assessee for implementation of the decision of HPC.

A show cause notice was issued by the Department on the ground that on the sale of its vehicles during the period in question, the assessee had deposited only 50% of the sales tax collected by it from its customers and retained balance 50% availing the tax concession granted to it. The retained sales tax was neither actually paid nor actually payable to the State Government. Therefore, the sales tax retained by the assessee constituted a part of the "transaction value" of the vehicles sold by the assessee to the customers in terms of its definition in section 4(3)(d) of the Central Excise Act, 1944 and excise duty was payable on the same.

The assessee contended that it was not actually exempted from payment of sales tax to the extent of 50% collected from the customers, but that the payment of sales tax was deferred. The 50% sales tax retained for a period of 14 years had to be adjusted against the capital subsidy due to the assessee by the State Government. However, Revenue contended that decision of the HPC did not support the case of the assessee as the entitlement certificate did not mention anything to the effect that it was for the deferment of payment of any sales tax. Thus, the assessee was not supposed to return any amount of sales tax concession to the State Government nor this amount was to be adjusted towards any capital subsidy granted by the State Government.

Observations of the Court: The Supreme Court concurred with the Revenue's contention that there was no mention in the decision of the HPC about adjustment of this amount of sales tax concession against any scheme or any capital subsidy. The entitlement certificate also did not give any indication of deferment of tax or capital subsidy.

Further, referring to CBEC *Circular dated 30th June, 2000*, the Apex Court opined that the assessee retained 50% of the sales tax collected from its customers and it was neither actually paid nor actually payable to the Government. Therefore, the transaction value under section 4(3)(d) shall be calculated by including the amount of sales tax retained by the assessee and they were liable to pay excise duty on such amount.

Decision: The Apex Court, overruling the Tribunal's decision, held that since assessee retained 50% of the sales tax collected from customers which was neither actually paid to the exchequer nor actually payable to the exchequer, transaction value under section 4(3)(d) of the Central Excise Act, 1944, would include the amount of such sales tax.

Notes:

(i) *The definition of "transaction value" in Section 4(3)(d) of the Excise Act reads as follows:-*

"transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.

(ii) *The relevant paragraphs of the CBEC Circular No. 354/81/2000 TRU dated 30th June, 2000 read as follows:-*

"As regards exclusion of taxes while working out assessable value, the definition of transaction value itself mentions that whatever amount is actually paid or actually payable to the Government or the relevant statutory authority by way of excise, sale

tax and other taxes, such amount shall be excluded from the transaction value. In other words, if any excise duty or other tax is paid at a concessional rate for a particular transaction, the amount of excise duty or tax actually paid at the concessional rate shall only be allowed to be deducted from price. The assessee cannot claim that the excise duty or tax payable at the "normal rate" should be allowed to be deducted. The words "actually paid" have, therefore, been used to (in) the definition of transaction value to reflect the legislative intention as explained above.

The words "actually payable" in the context of the amount of duty of excise, sales tax and other taxes would normally come into play only in those situations where the amount of excise, sales tax or other taxes is not paid at the time of transaction but paid subsequently, for example, sales tax payable under a deferment scheme."

CENVAT credit

3. Whether CENVAT credit can be availed of service tax paid on customs house agents' (CHA) services, shipping agents' and container services and services of overseas commission agents used by the manufacturer of final product for the purpose of export, when the export is on FOB basis?

Commissioner v. Dynamic Industries Limited 2014 (35) S.T.R. 674 (Guj.)

Facts of the Case: The assessee availed CENVAT credit of service tax paid by it on CHA services, shipping agent and container service and commission paid to overseas agents in respect of finished goods which were exported. The Revenue objected to the CENVAT credit claimed on these services.

Point of Dispute: The Revenue alleged that the CHA services, shipping agent's services, container services and services of overseas commission agent had been availed after the goods were cleared from the place of removal and they were not in relation to the manufacturing activities undertaken by the assessee nor these were pertaining to the activities of clearance of goods from the place of removal. These services, according to the Revenue, did not fall under the definition of the term "input service" and the related CENVAT credit availed was inadmissible.

The assessee contended that the issue was no more *res integra* and in a host of decisions the Tribunal had taken a view that where exports are FOB basis, the place of removal has to be taken as port and, therefore, the service availed by it till the goods reach the port would be admissible; that without the assistance of overseas agents, manufactured goods cannot be sold and, therefore, the services of overseas agents have to be treated as one relating to manufacture.

Observations of the High Court: The High Court referred to definition of 'input service' as also placed reliance on various cases dealing with subject and made the following observations:

- (i) In case of all three services in relation to which substantial question of law has been framed there is no specific inclusion of such services in the definition of input service.
- (ii) Any service used by the manufacturer directly or indirectly in relation to manufacture of final products and clearing of final products upto the place of removal would certainly be covered within the definition of input service. In the present case, the place of removal would be the port.
- (iii) Revenue has not disputed the fact that the services in relation to which the CENVAT credit is claimed by the assessee were availed for the purpose of clearing the goods for the purpose of export.
- (iv) As regards customs house agent service and shipping agents and container services, the decision of this Court in *Cadila Healthcare Ltd. 2013 (30) STR 3 (Guj.)* would apply and the definition of input service would cover both these services, considering the nature of services and the place of removal being the 'port' in this case.
- (v) With regard to the services of overseas commission agent also, the decision of this Court in *Cadila Healthcare Ltd. 2013 (30) STR 3 (Guj.)* would apply wherein it was held that the CENVAT credit on a service could be availed if that service is used directly or indirectly in the manufacture or clearance of final product. As the services of overseas commission agent have not been used for these purposes, the denial in the referred case shall apply to the present case also. *Consequently, CENVAT credit would not be admissible in respect of the commission paid to foreign agents.*

Decision: The High Court held that CENVAT credit in respect of (i) customs house agents services, (ii) shipping agents and container services and (iii) cargo handling services is admissible, but the CENVAT credit availed for the services of overseas commission agent is not allowed.

Note: 'Place of removal' is a significant concept in the CENVAT Credit Rules, 2004. The services relating to clearance upto place of removal are covered in the definition of input service and services beyond the place of removal are not so covered. The above judgment deals with this concept, and takes a view that in the present case since the property in the goods was passed at port, the port would be considered as place of removal and services of CHA etc. used till port are therefore covered in the definition of input service. Another position taken in this case by the Gujarat High Court is that the services of 'overseas commission agents' are not covered in the definition of input service. This is highly disputable position and there are judgments where a different view has been taken e.g. the judgment of Punjab & Haryana High Court in the case of *Ambika Overseas 2012 (25) STR 348* says that the services of commission agent are covered in the definition of input service.

4. Will rule 6 of the CENVAT Credit Rules, 2004 apply, if the assessee clears an exempted by-product and a dutiable final product?

UOI v Hindustan Zinc Limited. 2014 (303) E.L.T. 321 (S.C.)

Facts of the Case: The respondent assessee was engaged in the manufacture of a dutiable product. During the manufacturing process, a by-product was also being produced which was exempted from the excise duty.

The Department denied CENVAT credit to the assessee saying that since the output products of the assessee were both dutiable and exempted, they were either required to maintain separate records for inputs used in taxable and exempted output or were to pay 8% [now 6%] of the sale price of by-product in terms of rule 6 of the CENVAT Credit Rules, 2004. It was submitted that language of the CENVAT Credit Rules, 2004 needs to be interpreted literally. Since, rule 6 does not provide any distinction between exempted final product and exempted by-product, its provisions would also be applicable to the by-product manufactured and therefore, the assessee was obliged to pay excise duty @ 8% [now 6%] in respect of clearance of exempted by-product.

Decision: The Supreme Court held that since in rule 57CC of the erstwhile Central Excise Rules, 1944 [now rule 6 of the CENVAT Credit Rules, 2004], the term used is 'final product' and not 'by-product', said rule cannot be applied in case of 'by-product' when such by-product emerged as a technological necessity. If the Revenue's argument is accepted, it would amount to equating by-product with final product thereby obliterating the difference, though recognised by the legislation itself.

Note: The principle enunciated in the above case by the Supreme Court is that rule 6 of CCR would not apply when manufacture of dutiable final product results in emergence of exempt by-product on account of technological necessity.

5. Can CENVAT credit availed on inputs (contained in the work-in-progress destroyed on account of fire) be ordered to be reversed under rule 3(5C) of the CENVAT Credit Rules, 2004?

CCE v. Fenner India Limited 2014 (307) E.L.T.516 (Mad.)

Facts of the Case: The respondent assessee was engaged in manufacturing of Oil Seals. On account of fire accident in the factory, the work in progress stocks were burnt and rendered unfit for usage. The assessee had availed CENVAT credit on the raw materials, which were to be used for production of Oil Seals.

A show cause notice was issued to the assessee demanding the CENVAT credit availed on raw materials destroyed along with the interest and penalty though Department did not dispute the fact that inputs on which CENVAT credit had been taken were destroyed by fire when work was in progress. The assessee contended that since inputs were put in use for the manufacture of final products, question of reversing the credit did not arise. However, Revenue, by relying upon rule 3(5C) of the CENVAT Credit Rules, 2004 submitted that the assessee was bound to reverse the credit taken on the inputs.

Observations of the Court: The High Court observed that, it was not in dispute that the inputs on which the CENVAT credit had been availed were destroyed in a fire accident when the work was in progress. Once the fact was not disputed, then the assessee could not be called upon to reverse the credit.

The High Court placed reliance upon the view taken by the Gujarat High Court in the case of *CCE v. Biopac India Corporation Limited 2010 (258) E.L.T.56 (Gujarat H.C.)*, wherein it was held that the goods destroyed in fire after being used for many years cannot be said as not used in the manufacture of final product and the assessee need not reverse the credit availed on such inputs.

The High Court further noted that rule 3(5C) can be invoked where on any goods manufactured or produced by an assessee, the payment of duty is ordered to be remitted under rule 21 of the Central Excise Rules, 2002. Thus, only in such case, the CENVAT credit taken on the inputs used in the manufacture of production of said goods shall be reversed.

Decision: The High Court held that CENVAT credit would need to be reversed only when the payment of excise duty on final product is ordered to be remitted under rule 21 of the Central Excise Rules, 2002, which deals with the remission of duty. In the present case, the assessee has not claimed any remission and no final product has been removed, hence, assessee need not reverse the CENVAT credit taken on inputs (contained in the work-in-progress) destroyed in fire.

Appeals

6. Can an appeal be filed before the Supreme Court against an order of the CESTAT relating to clandestine removal of manufactured goods and clandestine manufacture of goods?

CCE v. Fact Paper Mills Private Limited 2014 (308) E.L.T. 442 (SC)

Decision: The Supreme Court held that the appeals relating to clandestine removal of manufactured goods and clandestine manufacture of goods are not maintainable before the Apex Court under section 35L of the Central Excise Act, 1944.

SECTION B. SERVICE TAX

Basic concepts of service tax

7. Whether supply of food, edibles and beverages provided to the customers, employees and guests using canteen or guesthouse of the other person, results in outdoor caterer service?

Indian Coffee Workers' Co-operative Society Limited v. CCE & ST 2014 (34) STR 546 (All.)

Facts of the Case. The assessee entered into agreements with National Thermal Power Corporation Limited (NTPC) for running and maintenance of a guest house and with

Lanco Infratech Limited (LANCO) for running and maintenance of catering services for its Township. The assessee charged amounts in cash from individual customers for food, eatables and beverages supplied according to rates stipulated in the menu card. The assessee did not pay any service tax as it was of the view that it did not provide any service to NTPC or LANCO but only sold goods in their canteens to individual customers (not to NTPC and LANCO). NTPC and LANCO just provided a place for running the canteen on rent and reimbursed certain expenses for maintenance and running. Thus, there should not be any service tax liability on this activity.

However, the Revenue demanded service tax from the assessee by treating the activity of the assessee as outdoor catering services since he was engaged in providing services in connection with catering at a place other than his own. The Revenue was of the opinion that the fact that food, beverages or edibles were consumed by employees of NTPC and LANCO or by those who use the guest house or facility, made no difference to the position that the service was provided by the assessee to NTPC or LANCO, and attracted service tax.

Observations of the Court: The High Court opined that the assessee is a caterer. The assessee is a person who supplies food, edibles and beverages for a purpose. The purpose is to cater to persons who use the facility of a canteen which is provided by NTPC or by LANCO within their own establishments. NTPC and LANCO have engaged the services of the assessee as a caterer. Further, since the assessee provides the services as a caterer at a place other than his own, he is an outdoor caterer.

The High Court clarified that taxable catering service could not be confused with who had actually consumed the food, edibles and beverages which were supplied by the assessee. Taxability or the charge of tax does not depend on whether and to what extent the person engaging the service consumes the edibles and beverages supplied, wholly or in part. What is material is whether the service of an outdoor caterer is provided to another person and once it is, as in the present case, the charge of tax is attracted.

Further the High Court elaborated that the charge of tax in the cases of VAT is distinct from the charge of tax for service tax. The charge of service tax is not on the sale of goods but on a taxable service provided. Hence, the fact that the assessee had paid VAT on the sale of goods on the supply of food and beverages to those who consume them at the canteen, would not exclude the liability of the assessee for the payment of service tax in respect of the taxable service provided by the assessee as an outdoor caterer.

Decision: Based on the observation made above, the High Court held that the assessee was liable for payment of service tax as an outdoor caterer.

Note: Though the above judgment is based on the definition of 'outdoor caterer' and taxable outdoor catering services as existing prior to 1st July 2012, the principle in the judgment will hold true even for the period beginning from 1st July 2012. Under the current position of law, service portion in an activity wherein goods, being food or any

other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as part of the activity, is liable to service tax as declared service.

8. Whether the course completion certificate/training offered by approved Flying Training Institute and Aircraft Engineering Institutes is recognized by law (for being eligible for exemption from service tax) if the course completion certificate/training/ is only for the purpose of eligibility for obtaining ultimate licence/approval for certifying repair/maintenance/airworthiness of aircrafts?

CCE & ST v. Garg Aviations Limited 2014 (35) STR 441 (All.)

Facts of the Case: The assessee was running a Flying Training Institute and Aircraft Maintenance Engineering Institute. It was engaged in providing training and coaching to individuals in the field of flying of aircraft for obtaining Commercial Pilot License from the Director Civil Aviation (DGCA), New Delhi. It also provided training for obtaining Basic Aircraft Maintenance Engineering Licence.

Point of Dispute: The Department demanded service tax on this training activity. However, the assessee contended that since the services were leading to the grant of diploma/certificate recognised by the law, the services were exempt and thus, were not chargeable to service tax. The assessee cited the case of *Indian Institute of Aircraft Engineering v. Union of India 2013 (30) STR 689*, in which the Delhi High Court, in the similar matter held that such services were not chargeable to service tax being exempt.

Observations of the Court: The High Court referred to the judgment of the Delhi High Court in *Indian Institute of Aircraft Engineering v. Union of India*, wherein the Delhi High Court made the following observations:

- (i) The expression 'recognized by law' is a very wide one. The legislature has not used the expression "conferred by law" or "conferred by statute". Thus, even if the certificate/degree/diploma/qualification is not the product of a statute but has approval of some kind in 'law', it would be exempt.
- (ii) The Aircraft Act, 1934 (the Act) and the Aircraft Rules, 1937 (the Rules) and the Civil Aviation Requirements (CAR) issued by the DGCA under Rule 133B of the Rules, having provided for grant of approval to such institutes and having laid down conditions for grant of such approval and having further provided for relaxation of one year in the minimum practical training required for taking the DGCA examination, have recognized the course completion certificate and the qualification offered by such Institutes.
- (iii) The certificate/training/qualification offered by Institutes which are without approval of DGCA would not confer the benefit of such relaxation. Thus, the certificate/training/qualification offered by approved Institutes, has by the Act, Rules and the CAR been conferred some value in the eyes of law, even if it be only for the purpose of eligibility for obtaining ultimate licence/approval for certifying repair/maintenance/airworthiness of aircrafts.

- (iv) The Act, Rules and CAR distinguish an approved Institute from an unapproved one and a successful candidate from an approved institute would be entitled to enforce the right, conferred on him by the Act, Rules and CAR, to one year relaxation against the DGCA in a Court of law. The inference can only be one, that the course completion certificate/training offered by such Institutes is recognized by law.
- (v) An educational qualification recognized by law will not cease to be recognized by law merely because for practicing in the field to which the qualification relates, a further examination held by a body regulating that field of practice is to be taken.

The Delhi High Court held that the recognition accorded by the Act, Rules and CAR supra to the course completion certificate issued by the institutes as the petitioner cannot be withered away or ignored merely because the same does not automatically allow the holder of such qualification to certify the repair, maintenance or airworthiness of an aircraft and for which authorization a further examination to be conducted by the DGCA has to be passed/cleared.

Decision: The High Court upheld the decision of the Tribunal and held that the Revenue had not been able to persuade the Court to take a contrary view as taken by the Delhi High Court in *Indian Institute of Aircraft Engineering*. The appeal filed by the Revenue would not give rise to any substantial question of law. Hence, the appeal filed was dismissed and the assessee was held not to be liable to pay service tax.

Note: The above case is in context of the taxable service category of 'commercial coaching or training services' and the related exemption as they stood prior to 1st July 2012. However, as the broad position of the taxable service and the related exemption (which is now covered under the negative list) remains the same, the principle in the judgment may hold true in the present position of law also.

9. Whether deputation of some staff to subsidiaries/group of companies for stipulated work or for limited period results in supply of manpower service liable to service tax, even though the direction/control/supervision remained continuously with the provider of the staff and the actual cost incurred was reimbursed by the subsidiaries/group companies?

Commissioner of Service Tax v. Arvind Mills Limited 2014 (35) S.T.R. 496 (Guj.)

Facts of the Case: The assessee was engaged in manufacturing of fabrics and ready-made garments. In order to reduce its cost, they deputed some of their employees to their group company. The employees deputed did not work exclusively under the direction or supervision of the subsidiary company and upon completion of the work they were repatriated to the assessee company. The Revenue sought to recover service tax from the assessee for the reimbursement recovered by it from its group/subsidiary companies for the cost of such employees on deputation under the service category of 'manpower supply'.

Observations of the Court: The High Court observed that 'manpower supply services' would not cover the activity of the assessee. The assessee, in order to reduce its cost of

manufacturing, deputed some of its staff to its subsidiaries or group companies for stipulated work or for limited period. All throughout, the control and supervision remained with the assessee. The assessee was not in the business of providing recruitment or supply of manpower. Actual cost incurred by the assessee in terms of salary, remuneration and perquisites was only reimbursed by the group companies. There was no element of profit or finance benefit. The subsidiary companies could not be said to be their clients. The High Court noted that the employee deputed did not exclusively work under the direction or supervision or control of subsidiary company.

Decision: The High Court rejected the contention of the Revenue and held that deputation of the employees by the respondent to its group companies was only for and in the interest of the assessee. There is no relation of agency and client. The assessee company was not engaged in providing any services directly or indirectly in any manner for recruitment or supply of manpower temporarily or otherwise to a client. Therefore, they were not liable to pay service tax.

Note: Though this judgment is rendered in the context of position of law as it stood prior to 01.07.2012 (pre-negative list regime), the principle enunciated in the above judgement will hold good under the current negative list regime as well.

10. Whether section 66E(i) of the Finance Act, 1994 which levies service tax on the service portion of activity wherein goods being food or any other article for human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of activity, is *ultra vires* the Article 366(29A)(f) of the Constitution?

Hotel East Park v. UOI 2014 (35) STR 433 (Chhatisgarh)

Questions of Law: The substantial questions of law which arose before the High Court were:

- (a) Whether any service tax can be charged on sale of an item or *vice versa*?
- (b) Whether in view of Article 366(2A)(f) service is subsumed in sale of foods and drinks and whether such Article is violated by section 66E(i) of the Finance Act, 1994?

Observations of the Court: The High Court observed as under:

- (i) With reference to question (a) above, the High Court observed that a tax on the sale and purchase of food and drinks within a State is in exclusive domain of the State. The Parliament cannot impose a tax upon the same. Similarly, there is no entry in List II or List III of the Seventh Schedule to the Constitution under which service tax can be imposed. There is no legislative competence with the States to impose a tax on any service.
- (ii) With reference to question (b) above, the High Court observed that Article 366(29A)(f) of the Constitution does not indicate that the service part is subsumed in the sale of the food; it rather separates sale of food and drinks from service. Section 65B(44) as well as section 66E(i) of the Finance Act, 1994, charge service

tax only on the service part and not on the sales part. It indicates that the sale of the food has been taken out from the service part.

- (iii) The quantum of services to be taxed is explained under rule 2C of the Service Tax (Determination of Value) Rules, 2006 read with *Notification No. 25/2012 ST* notified by the Central Government. Rule 2C presumes a fixed percentage of bill value as the value of taxable service on which service tax should be charged. However, there is no provision in VAT Act to bifurcate the amount of bill into sale and service.

Decision: The High court held that section 66E (i) of the Finance Act, 1994 is *intra vires* the Article 366(29A)(f) of the Constitution of India.

Further, the High Court held that no VAT can be charged over the amount meant for service and that the amount over which service tax has been charged should not be subject to VAT. The High Court directed the State Government to frame such rules and issue clarifications to this effect to ensure that the customers are not doubly taxed over the same amount. The rules may be in conformity with the bifurcation as provided under the Finance Act, 1994 or ensure that the Commercial Tax authorities do not charge VAT on that part of the value of the food and drink on which service tax is being assessed.

Notes:

- (i) *Clause 19 of the notification No. 25/2012-ST exempts the service tax in serving food or beverages by the restaurants other than the air-conditioned restaurant or having licence to serve alcoholic beverages i.e. service tax is levied only in those restaurants that have air-conditioning or licence to serve alcoholic beverages.*
- (ii) *Rule 2C of the Service Tax (Determination of Value) Rules, 2006 clarifies that in case of a restaurant, service is presumed to be 40% of the bill value and in case of outdoor catering, it is presumed to be 60% of the bill value. It shows that the value of the food is taken to be 60% of the bill in the case of restaurant and 40% of the bill in case of catering service.*
- (iii) *Article 366 (29A)(f) of the Constitution provides that "tax on the sale or purchase of goods" includes a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration.*

Valuation of taxable service

11. Is rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 *ultra vires* the Finance Act, 1994? Can the expression 'suppression of facts' be interpreted to include in its ambit, mere failure to disclose certain facts unintentionally?

Naresh Kumar & Co. Pvt. Ltd v. UOI 2014 (35) STR 506 (Cal.)

Facts of the Case: The petitioner assessee was awarded a contract for carrying out loading, shifting and feeding of coal and gypsum by roads, for which High Speed Diesel (HSD) would be provided free of cost by service recipient. The assessee paid service tax

on the amount charged from the service recipient for the services provided which did not include the cost of the HSD supplied by the service recipient.

A show cause notice was issued to the assessee on the ground that cost of such HSD supplied free of cost by the service recipient should be included in the value of taxable services as the same was used for providing taxable services. The show cause notice invoked extended period of limitation by alleging willful suppression of fact of free supply of HSD.

Point of Dispute: The Revenue contended that the value of free HSD was to be included in the transaction value of service provided by the assessee under rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 (Valuation Rules). The petitioner's major contention was that the value of HSD supplied free by the service recipient does not form part of the gross value of the service provided by them. Also, the petitioner contended that the demand raised by the Revenue under rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 was not sustainable as the said rule has been held *ultra vires* by the Delhi High Court in the case of *Intercontinental Consultants and Technocrats Pvt. Ltd. v. Union of India 2013 (29) STR 9 (Del.)*.

Observations of the Court: The High Court observed that in view of the clear exposition of law that the value of the diesel supplied free of cost by the service recipient cannot constitute taxable event (value), the authorities cannot place a contrary stand by placing reliance upon the provision which has been declared *ultra vires* (i.e. rule 5(1) of the Valuation Rules).

The High Court observed that willful suppression cannot be assumed and/or presumed merely on failure to declare certain facts unless it is preceded by deliberate non-disclosure to evade the payment of tax. The High Court elaborated that the extended period of limitation can be invoked on clear exposition that there has been a conscious act on the part of the assessee to evade the tax by non-disclosing the fact which, if disclosed, would attract service tax under sections 66 (now section 66B) & 67 of the Finance Act. The non-disclosure of the fact which, even if, disclosed would not have attracted the charging section cannot be brought within the ambit of suppression of fact for the purpose of extension of limitation period.

Decision: The High Court held that in view of the clear exposition of law that the value of the diesel supplied free of cost by the service recipient cannot constitute taxable event, the authorities cannot place a contrary stand by placing reliance upon the provision which has been declared *ultra vires* (i.e. rule 5(1) of the Valuation Rules).

The High Court held that non-disclosure of free supply of HSD did not constitute willful suppression as same was not a taxable event and thus, the invocation of extended period of limitation by the Revenue is unsustainable.

Exemptions and Abatements

12. Is exemption in relation to service provided to the developer of SEZ or units in SEZ available for a period prior to actual manufacture (which is the authorized operation) of final products considering these services as the services used in authorised operations of SEZ?

Commissioner of Service Tax v. Zydus Technologies Limited 2014 (35) S.T.R. 515 (Guj.)

Facts of the Case: The assessee had manufacturing operations in the SEZ. The Development Commissioner of SEZ granted an extension of one year to the assessee to start manufacturing operations (which were authorised operations of the SEZ). The assessee procured certain services (scientific and technical consultancy) during this period (before beginning of the manufacture) in order to enable it to undertake manufacturing activity.

Later, when the assessee applied for refund of service tax paid on such input services under *Notification No. 9/2009 ST dated 03.03.2009*, the refund was denied on the ground that since the services were received before the authorised operations (i.e., manufacturing) started, the said input services would not be considered to have been used in authorised operations of SEZ unit, and thus, would not get qualified for refund.

Point of Dispute: The Revenue submitted that as per sub-section (2) of section 4 and sub-section (9) of section 15 of the Special Economic Zones Act, 2005 meaning of "authorized operations" can be concluded as "such operation so authorized shall be mentioned in the letter of approval". Thus, since the manufacturing of the goods mentioned in the letter of approval had not started, it could not be said that the authorized operation of SEZ had started.

The assessee contended that it is necessary for SEZ to procure taxable services right from the budding stage and it is only after having obtained such support service of business that the unit would start functioning for production.

When the CESTAT held that the assessee shall be entitled to refund as claimed, the matter was brought before the High Court by the Department.

Observations of the Court: The High Court relied on its decision passed in the case of *Cadila Healthcare Ltd 2013 (30) STR 3 (Guj.)* and held that no error has been committed by the CESTAT in holding that the assessee shall be entitled to refund; as though the operations of the assessee did not reach to the commercial production stage, the input services of scientific and technical consultancy procured by them were in relation to the manufacture which would take place at a later date.

Decision: In the instant case, the High Court referring to their previous decision in case of *CCEx. v. Cadila Healthcare Ltd.* held that the services rendered for a period prior to actual manufacture of final product is commercial activity/production and assessee is entitled to exemption by way of refund claimed.

Note: Though the above judgment is with reference to SEZ Exemption Notification No. 9/2009 ST, the principle discussed appears to be relevant in context of the present SEZ Exemption Notification No. 12/2013 ST also.

Demand, adjudication and offences

13. Whether the recipient of taxable service having borne the incidence of service tax is entitled to claim refund of excess service tax paid consequent upon the downward revision of charges already paid, and whether the question of unjust enrichment arises in such situation?

CCus CEx & ST v. Indian Farmers Fertilizers Coop. Limited 2014 (35) STR 492 (All)

The CESTAT answered the above question against the Revenue so this appeal was filed with the High Court by the Revenue. It was the contention of the Revenue that the respondent being recipient of service was not entitled to file a refund claim under section 11B as the expression "any person" in section 11B of the Central Excise Act, 1944 does not include the recipient of the service. The Revenue submitted before the High Court that the principles of unjust enrichment as provided in section 11B were not considered by the CESTAT while allowing the refund claim and that the refund claim filed was not within the period of limitation of one year under section 11B.

Observations of the Court: The High Court relied on the case of *Mafatlal Industries Ltd. v. Union of India 1997 (89) ELT 247* wherein the Supreme Court held that "Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund."

The High Court observed that since the respondent, being the recipient of taxable service, had borne the incidence of service tax themselves; there was no question of unjust enrichment. Hence, the respondent was entitled to claim refund of excess service tax paid consequent upon the downward revision of the charges payable by it.

Further, the High Court pointed out that the fact that respondent had not filed the refund claim with the period of limitation was not challenged by the Revenue in the grounds of appeal before the first appellate authority [Commissioner (Appeals)] or in the form of cross objections before the Tribunal. The High Court relied on the Supreme Court's decision in the case of *Commissioner of Customs v. Toyo Engineering India Limited 2006 (201) ELT 513 (SC)* wherein it was held that the Revenue could not be allowed to raise submissions for the first time in a second appeal before the Tribunal.

Decision: The High Court upheld the decision of the CESTAT that since the burden of tax has been borne by the respondent as a service recipient, question of unjust enrichment will not arise as per section 11B of the Central Excise Act 1944 (as applicable to service tax under section 83 of Finance Act, 1994).

Further, the High Court held that once the finding of the adjudicating authority that the claim for refund was filed within the period of limitation was not challenged by the Revenue before the first appellate authority and CESTAT, Revenue could not assert to contrary and first time urge a point in an appeal before this Court which was not raised in grounds of appeal before authorities below.

Other provisions under service tax

14. Whether sales commission services are eligible input services for availment of CENVAT credit? If there is any conflict between the decision of the jurisdictional High Court and the CBEC circular, then which decision would be binding on the Department? Also, if there is a contradiction between the decision passed by jurisdiction High Court and another High Court, which decision will prevail?

Astik Dyestuff Private Limited v. CCEx. & Cus. 2014 (34) S.T.R. 814 (Guj.)

Facts of the Case: In the present case, the assessee availed CENVAT credit on sales commission services obtained by them. The Revenue, however, denied such credit on the contention that 'sales commission services' do not fit into the definition of 'input services' under rule 2(l) of CENVAT Credit Rules, 2004 in view of the Gujarat High Court decision in the case of *Commissioner v. M/s. Cadila Healthcare Ltd in 2013 (4) STR 3*.

Point of Dispute: The assessee submitted that in view of CBEC Circular dated 29-04-2011, they were entitled to CENVAT credit on sales commission services obtained by them and that the Department, bounded by the CBEC Circular, could not take a contrary decision. They further submitted that since the decision of the Gujarat High Court in case of *Cadila Healthcare Limited* referred by the Revenue is contrary to that of the Punjab & Haryana High court in the case of *Commissioner v. Ambika Overseas 2012 (25) STR 348 (P&H)*, wherein the CENVAT credit on such input services was allowed to the assessee, hence the matter should be referred to the Larger bench.

Observations of the High Court: The High Court observed that it is required to be noted that issue involved in the present appeal i.e. whether the appellant would be entitled to CENVAT credit on sales commission services obtained by them is now not *res integra* in view of the decision of this Court in the case of *Cadila Healthcare Limited*. It was elaborated by the High Court that in the case of *Cadila Healthcare Limited*, the jurisdictional High Court did not allow CENVAT credit on sales commission services after interpreting the relevant provisions of law. The High Court clarified that the decision of the jurisdictional High Court is binding to the Department rather than the Circular issued by the C.B.E. & C.

In regard to the request made by the assessee to refer the issue to the Larger Bench, the High Court rejected the same by saying that the appeal against the decision of the jurisdictional High Court (Gujarat H.C) in the case of *Cadila Healthcare Limited* was filed before the Hon'ble Supreme Court and the Apex Court had seized the matter and no stay order was granted in that case. Therefore, the High Court opined that it will not be proper on its part to refer the matter to the Larger Bench in the present case. Even

otherwise, the High Court did not find any reason to take a contrary view than its decision in the case of *Cadila Healthcare Limited*.

Decision: The High Court held that –

(i) if there is any conflict between the decision of the jurisdictional High Court and the CBEC Circular, then decision of the jurisdictional High Court will be binding to the Department rather than CBEC Circular. Therefore, the assessee would not be entitled to CENVAT credit on sales commission services obtained by them.

(ii) merely because there might be a contrary decision of another High Court is no ground to refer the matter to the Larger Bench.

(iii) when there are two contrary decisions, one of jurisdictional High Court and another of the other High Court, then the decision of the jurisdictional High Court would be binding to the Department and not the decision of another High Court.

SECTION C. CUSTOMS

Valuation under the Customs Act, 1962

15. Can the value of imported goods be increased if Department fails to provide to the importer, evidence of import of identical goods at higher prices?

Gira Enterprises v. CCus. 2014 (307) E.L.T.209 (SC)

Facts of the Case: The appellant imported some goods from China. On the basis of certain information obtained through a computer printout from the Customs House, Department alleged that during the period in question, large number of such goods were imported at a much higher price than the price declared by the appellant. Therefore, Department valued such goods on the basis of transaction value of identical goods as per erstwhile rule 5 [now rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007] and demanded the differential duty alongwith penalty and interest from the appellant. However, Department did not provide these printouts to the appellant.

The appellant contended that Department's demand was without any basis in law, without any legally admissible evidence and opposed to the principles of natural justice as the computer printout which formed the basis of such demand had not been supplied to them. Resultantly, the appellant had no means of knowing as to whether any imports of comparable nature were made at the relevant point of time.

Observations of the Court: Supreme Court observed that since Revenue did not supply the copy of computer printout, which formed the basis of the conclusion that the appellants under-valued the imported goods, the appellants obviously could not and did not have any opportunity to demonstrate that the transactions relied upon by the Revenue were not comparable transactions.

Decision: The Supreme Court held that mere existence of alleged computer printout was not proof of existence of comparable imports. Even if assumed that such printout did exist and content thereof were true, such printout must have been supplied to the appellant and it should have been given reasonable opportunity to establish that the import transactions were not comparable.

Thus, in the given case, the value of imported goods could not be enhanced on the basis of value of identical goods as Department was not able to provide evidence of import of identical goods at higher prices.

Note: This case establishes the principle that the onus to prove that identical goods have been imported at a price higher than the value of the goods declared by the importer, lies with the Department.

Demand and Appeals

16. Can a writ petition be filed before a High Court which does not have territorial jurisdiction over the matter?

Neeraj Jhanji v. CCE & Cus. 2014 (308) E.L.T. 3 (S.C.)

Facts of the Case: In this case, the assessee filed a writ petition before the Delhi High Court *against the* order in original passed by the Commissioner of Customs of Kanpur. However, the jurisdictional High Court for the petitioner would have been Allahabad High Court. When the Revenue raised objection over the territorial jurisdiction of the High Court, the assessee withdrew the appeal from the Delhi High Court and filed the appeal with the Allahabad High Court with the application for condonation of delay. The Allahabad High Court, however, dismissed the application for condonation of delay and also dismissed the appeal as time barred. Then, the assessee filed a special leave petition with the Supreme Court.

Decision: The Supreme Court observed that the very filing of writ petition by the petitioner in Delhi High Court against the order in original passed by the Commissioner of Customs, Kanpur indicated that the petitioner had taken chance in approaching the High Court at Delhi which had no territorial jurisdiction in the matter. The filing of the writ petition before Delhi High Court was not at all bona fide.

Note: In the aforementioned case, the Apex Court has disapproved the practice of Forum Shopping as adopted by the petitioner. Forum Shopping is the practice adopted by the litigants to have their legal case heard in the Court which would provide most favourable decision.

Provisions relating to illegal import, illegal export, confiscation, penalty & allied provisions

17. Whether mere dispatch of a notice under section 124(a) would imply that the notice was "given" within the meaning of section 124(a) and section 110(2) of the said Customs Act, 1962?

Purushottam Jajodia v. Director of Revenue Intelligence 2014 (307) E.L.T. 837 (Del.)

Facts of the Case: As per section 110(2) of the Customs Act, 1962, a notice under section 124(a) is required to be “given” to the person from whose possession they were seized informing him the grounds on which goods are proposed to be confiscated, within 6 months (extendable upto one year) of seizure of the goods. Otherwise, goods need be returned to such person.

However, in the present case, the notice under section 124(a) was dispatched by registered post on the date of expiry of stipulated period under section 110(2) and received by the petitioner after the expiry of such period.

The petitioner contended that since said notice had not been received before the expiry of the said period of six months (extendable upto one year), goods should be returned to him. Relying on Supreme Court's decision in case of *K. Narsimhiah v. H.C. Singri Gowda AIR 1966 SC 330* and Gujarat High Court's decision in case of *Ambalal Morarji Soni v. Union of India AIR 1972 GUJ 126*, it submitted that by the use of the word “given” used in section 110(2), the legislative intent was clear that the notice had to be received by the person concerned or the notice had to be offered/tendered and refused by the person concerned. Mere dispatch by post would not be covered by the word “given” as appearing in the above mentioned provisions of the said Act. Further the expression “given” was distinct and different from the word “issued” or “served”.

Revenue, referring to section 153(a), submitted that the moment a notice is tendered or sent by registered post or by an approved courier, that amounts to service of the notice and the actual receipt by the noticee is not a relevant consideration. Since the notice had been sent by registered post within the stipulated period as prescribed under section 110(2) of the said Act, the goods were not liable to be released. They primarily placed reliance on decision of Calcutta High Court in case of *Kanti Tarafdar 1997 (91) ELT 51 (Cal.)* and Madhya Pradesh High Court in case of *Ram Kumar Aggarwal 2012 (280) ELT 13 (M.P.)*.

Observations of the Court: The Delhi High Court observed that section 124(a) clearly stipulates that no order confiscating any goods or imposing any penalty on any person shall be made unless the owner of the goods or person from whom goods have been seized is “given a notice” in writing, “informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty”. In case such notice is not given within the stipulated period of six months or the extended period of a further six months, seized goods have to be released.

The object of section 124(a) is that the person from whom the goods have been seized had to be informed of the grounds on which the confiscation of the goods is to be founded. This can happen only when such person receives the notice and is capable of reading and understanding the grounds of the proposed confiscation. On a conjoint reading of section 110(2) and section 124(a) of the said Act, the Court opined that the notice contemplated in these provisions can only be regarded as having been “given”

when it is actually received or deemed to be received by the person from whom the goods have been seized.

The Delhi High Court was in complete agreement with the Supreme Court's decision in case of *K. Narsimhiah* as followed by Gujarat High Court in case of *Ambalal Morarji Soni*. However, it disagreed with the decision of Calcutta High Court in case of *Kanti Tarafdar*. The Delhi High Court pointed out that the decision in the said case was arrived at on the (wrong) premise that section 124 requires that a notice be "issued" as against a notice being "given" when the body of the provision of section 124 nowhere uses the expression "issue of show cause notice". The Delhi Court elaborated that it is only the heading of that section which uses that expression (issue of show notice) and the body of section 124(a), on the contrary, uses the exact same expression "given" as used in section 110(2) of the said Act. Therefore, the Delhi High Court was of the view that very basis of the Calcutta High Court's decision in *Kanti Tarafdar* is incorrect. The Delhi High Court also disagreed with the Calcutta High Court's observation that the word "given" used in section 110(2) and section 124(a) is in any manner controlled by section 153. The Delhi High Court opined that in the context of the present cases, section 153 would only define the mode and manner of service and not the time of service or when a notice can be said to have been "given".

Further, Delhi High Court was of the view that Madhya Pradesh High Court, in case of *Ram Kumar Aggarwal*, wrongly concluded that when the legislature had used the words "notice is given" it would "obviously mean that the notice must be issued within six months of the date of seizure". The Delhi High Court, on the other hand, opined that expression "notice is given" does not logically translate to the conclusion that "notice must be issued within the stipulated period".

Decision: The High Court held that since the petitioners did not receive the notice under section 124(a) within the time stipulated in section 110(2) of the Act, such notice will not considered to be "given" by the Department within the stipulated time, i.e. before the terminal date. Consequently, the Department was directed to release the goods seized.

Note: Section 124(a) of the Customs Act, 1962, inter alia, stipulates that no order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person is **given** a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty.

Further, section 110(2) of the Act stipulates that where no such notice is **given** within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized.