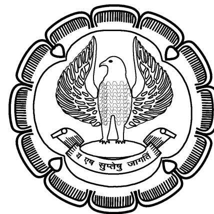
Background Material

Certificate Course on

Service Tax

Volume-II

General & Allied Laws



The Institute of Chartered Accountants of India
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New Delhi

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Foreword

The dynamism in the taxation area has interested many Chartered Accountants who are excelling professionally in the domain. The paradigm shift in policies and focus in tax laws both at micro and macro level has made it imperative for the professionals to update themselves with the latest developments. Members need to be remain updated and align with the evolving knowledge.

It is indeed a pleasure that Chartered Accountants have carved a niche for themselves in the field of Indirect Taxes in the last decade especially in service tax and CST/ VAT. The GST implementation in near future would also require professionals with up-to-date knowledge for a hassle free transition.

Of various Indirect Taxes levied, Service Tax has become the largest revenue earner for the central government. In order to enhance the knowledge, it has become mandatory for the professionals to study, analyse, update and discuss the changes taking place in service tax law from time to time. In order to provide an enhanced learning opportunity to its members the Indirect Taxes Committee of ICAI has launched "Certificate Course on Service Tax".

This Background Material has been specifically designed to support the members attending the course which provides in depth knowledge of service tax and allied subjects in a very practical and simplified manner.

At this juncture, we would heartily appreciate CA. Madhukar N. Hiregange, Chairman, CA. Sushil Kumar Goyal, Vice-Chairman and other members of the Indirect Taxes Committee for launching the "Certificate Course on Service Tax" and bringing out this well aligned and updated material. We are sure this Certificate Course would facilitate our members in practice as well as in industry to acquire specialized knowledge and cope-up with the challenges and complexities relating to the Service Tax.

We welcome the members to a fruitful and enriching experience.

CA. Nilesh S Vikamsey
Vice-President
ICAI

CA. M Devaraja Reddy
President
ICAI

Date: 03.06.2016

Place: New Delhi

Preface

Service Tax was introduced in India in 1994 on 3 services with an objective of broadening of the tax base, augmentation of revenue and larger participation of citizens in the economic development of the nation. We have come a long way since then with all the services being made liable to service tax except the ones cover by the Negative List or Mega Exemption Notification. Union Budget 2016-17 estimates service tax collection ₹2, 31,000 crore *viz-a-viz* Budget estimates of ₹600 crores in 1994. The increase in collections of service tax revenue over 20 years further indicate the potential professional opportunities in the field service tax for our members. Taking these facts into account, the Indirect Taxes Committee of ICAI has decided to organise Certificate Course on Service Tax in lieu of earlier certificate course on Indirect Taxes.

Certificate Course on Service Tax aims to provide a detailed and thorough study of service tax along with its relevance to other areas like value added tax, central excise duty, customs duty, Foreign Trade Policy and GST. The Background Material of the Course has been divided into two volumes i.e. Service Tax and General & Other allied laws relevant to Service Tax which have been duly updated with all the amendments made by the Finance Act, 2016 and notification issued till date. In addition to above, the Technical guide on CENVAT Credit Rules and Background Material on GST would also be provided to the delegates.

We would like to express our sincere gratitude and thanks to CA M. Devaraja Reddy, President, ICAI, as well as other members of the Committee for their suggestions and support in this initiative. We must also thank indirect tax experts' viz. CA. S. Venkataramani, CA. A Jatin Christopher, CA. M.P. Tony, CA. V. Raghuraman and CA. Nehal Banthiya for revising and adding value to this material.

We encourage you to make full use of this learning opportunity. We request you to share your feedback at idtc@icai.in to enable us to make this course/ material more value additive and useful.

Welcome to a professionalized learning experience in Indirect Taxation.

CA. Sushil Kumar Goyal
Vice Chairman
Indirect Taxes Committee

CA. Madhukar Narayan Hiregange
Chairman
Indirect Taxes Committee

Date: 03.06.2016

Place: New Delhi

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Professional Opportunities in Service Tax

Introduction

Indian economy, being a savings economy, as compared to the economies of the western world is well on course to show direction to the rest of the globe. On the one hand, when the global economy is expected to grow at a rate of about 3.4%, India is marching confidently towards 7 - 8% GDP growth, though it has suffered a few hiccups in past few years. In order to maintain its growth, the government is making sweeping changes in the tax laws, wherein the role of Indirect taxes is not far behind. The significance of indirect taxes in the national economy can be understood from the fact that the total indirect tax revenue across India (both Central and State) is about two times the total direct tax revenue.

Multiplicity of taxes and high rates of taxation have made the indirect tax structure quite complicated in India, and adversely affected competitiveness of trade and industry and the growth of the economy. India's most awaited tax reform of the introduction of Goods and Services Tax is hailed as a *panacea for all the ills* plaguing the indirect tax structure of the country. It (GST) is to be a comprehensive tax levy on the manufacture, sale and consumption of goods as well as services at the national level. Integration of goods and services tax would give India a world class tax system, which will also improve tax collection. Presently, there are parallel systems of indirect taxation at the Centre and States. Each of the systems needs to be reformed and eventually harmonized. The GST will subsume several indirect taxes and eliminate the cascading effects of multiple layers of taxation, which is currently in the range of about 25-30%, and make imports cheaper and exports more competitive. The GST will also facilitate seamless credit across the entire supply chain and across all States under a common tax regime; though, it is expected that there would still be restriction on the set off of CGST to SGST and *vice versa.* All this would create many new professional opportunities for our members, but for this, they need to update their knowledge of the current tax laws. It would be of relevance to note the increasing contribution of service tax to the revenue particularly after the advent of negative list based tax regime from 2012. Almost all services are now within the ambit of ST Law; only a few are in the negative list or are exempted.

The Chartered Accountants (CAs) possess the following advantages over those who have been traditionally practicing Indirect Taxation:

A. Better knowledge of Global/ Indian Economy.

B. Knowledge of Business gained in his/ her Articleship and Practice/ Employment.

C. In-depth Knowledge of Accountancy.

D. Advance knowledge of the subject.

E. Only professional course with Mandatory Continued Professional Education (CPE) i.e., regularly updating the members through Seminars/ Conferences/ Workshops.

F. Regulated by a code of ethics, which is enforced strictly.

Emerging Opportunities in Service Tax

A Chartered Accountant (CA) as a professional [either in employment or having an independent practice] can provide various services, which can be grouped under four main heads, as per the study of the IFAC. These are:

A. Creator of Value: Strategic advisory services and policy making.

B. Enabler of Value: Supporting management in decision-making, analyzing and evaluating performance.

C. Preserver of Value: Mitigating risk, implementing internal controls and MIS.

D. Reporter of Value: Ensuring relevant and useful internal and external reporting. More details on www.ifac.org – exposure draft – competent and versatile.

Professional Opportunities

A chartered accountant is a versatile professional, who has unparalleled practical exposure and has the distinction of clearing a tough examination. The CA community certainly counts among top 1-2 % of the population in terms of education and knowledge. The area of service tax practice may not be much different from the practice in direct taxes, which is much more familiar to this community. The younger members have studied this subject as a part of their curriculum, and may enjoy a slight advantage. The respect for the practitioner in this area is generally much higher due to the dearth of professionals and also due to lack of awareness among the tax payers.

Some of the areas where services are already being provided in metros as well as tier 2 cities are discussed under the following broad headings:

A. Advisory/Review Services.

B. Compliances - Reviews.

C. Audit.

D. Litigation Support.

E. Refunds.

F. Other areas, such as outsourcing payments/ filing, etc.

A. ADVISORY/ REVIEW SERVICES

A.1 Transaction Structuring: Chartered Accountants play a vital role in the area of transaction structuring with regard to tax planning, credit availing and utilization, input service distribution, centralized registration, etc., the impact of which would be felt in the form of litigation free business, due compliance with the law and also in getting over problems encountered due to uncertain tax laws.

A.2. Organization Structuring: A CA can advise on creating a precise model of business according to the requirements of the assessee. These models should be thought of by keeping in mind the benefits which accrue to the organizational structure like SEZ, STP, EOU, etc. Tax structures and their implications have to be considered in relation to the organizational structure of the assesse. Chartered Accountants can look for professional opportunities in this area.

A.3. Tax planning in government or commercial sphere: Indirect tax costs which could be up to 25% of value, (Excise 12% + VAT 13%/ Service Tax 12% + Misc. taxes 2%) could be reduced by structuring the transaction in such a way that it gives maximum tax benefit to the assesse and also ensures competitive pricing. Professional accountants can guide clients in structuring their transactions by examining them and ascertaining whether the customers could avail credit, obtain dealer registration order to pass on the credit, etc. Thus, a professional plays a vital role in reducing tax burdens and making the price of the product competitive.

A.4. Erection Procurement and Commissioning (EPC), Construction, Works Contracts: These contracts require extensive knowledge of taxes as they involve both goods and services and the interplay of taxes like VAT/ CST, **Service tax**, etc. The professionals can assist in analyzing the various methodologies for computation of taxes under different State VAT legislations and the flow of credits under each of the schemes and other tax optimization measures.

A.5. Opinions/ Clarifications: Wherever Chartered Accountants provide consultation on indirect taxes, to clients, they are able to structure their availment of credits and payments towards liability of service tax optimally. This ensures smooth cash flow to other aspects of

their business. Though Chartered Accountants are ideally suited for the purpose, they need to exercise caution by drawing attention of their clients to the relevant statutory provisions and explaining them interpretation based on established rules etc.

A.6. Service Tax Review and Quarterly Audit: Chartered Accountants pro*vide* a value addition review audit, wherein they examine that the eligible tax credits are duly availed, documentation for availing credits has been made, goods and services have been properly classified, returns have been filed in time, availing the benefits of exemptions, disclosures have been made to the department, the opportunity of job work transactions has been fully explored, and whether the client is making payments under protest when the levy is being contested as unconstitutional etc.

B. COMPLIANCES

B.1. Initial Procedures: Chartered accountants can provide service initially as a hand holding exercise, wherein for the initial few months of operations, they can assist/ guide the assesse in maintaining accounts, raising bills, drafting quotations, filing returns, paying service tax, and calculating interest standard operating procedures, and instituting controls etc.

B.2. Initial Registration: Registration is one of the services that could be of help to the client and it does not take too many days. Professionals can ensure that the right information is disclosed to the department during registration. They can also ensure that all the required information is provided in the registration process, so that there is no delay in obtaining registration.

B.3. Monthly/ Quarterly payment of Tax/ Duties: Since assessees have to deal with too much of routine work and comply with different laws, they would prefer outsourcing their tax computation and tax remittance activity to CA's.

B.4. Return Verification/ Filing of Returns/ Filing of Bill of Entry: Where clients keep records and pass entries but are not abreast of latest amendments, professionals could help them by reviewing their returns and ensuring that the tax returns contain true and correct information, and thus avoiding litigation hassles. A basic understanding of law and Information technology would help to provide this service.

B.5. Rectification of Past Errors: More compliance with least difficulty considering the various exemptions, date of applicability, availment of credits, voluntarily to avoid penalties.

B.6. Initial Disclosures to Department: Most of the assesses tend to overlook Initial disclosures made to the department, such as books of accounts maintained, procedures followed, copies of documents including copies of important contracts and tax treatment with respect to the same etc. Though these are very important, professional help from CA's could help assesses to attend to them and thus save them from being assessed to tax from

extended period of limitation [5 years] and imposition of penalties u/s 78 of the Finance Act, 1994, as amended.

C. AUDIT

C.1. Review just before Departmental Audit: A professional could take up reviews prior to the departmental audit as pre-audit. This can provide the assesse an opportunity to ascertain the grey areas and possible risks associated with them. It can also provide assesses an opportunity to take immediate action to rectify the grey areas and mitigate the risk of hefty demand notices along with interest and penalty. It helps the tax payer to ponder upon issues related to Cenvat credit, tax propositions, incentives available to the assessee, exemptions, payments, simplifying various processes under the service tax law, etc.

C.2. Assistance during departmental IAP or CAG audit: These audits are dreaded by the tax payer who normally has a very limited knowledge of the provisions and rules related to them. Therefore a Chartered Accountant is needed who can interface with the department. Such assistance can really provide a great value addition to the clients, for it would save them from departmental officers exposing their unwarranted issues, recording of statements by force, making them reverse credits on oral instructions etc., which could create problems at the higher forums during litigation.

C.3. Departmental Letter Reply: Almost every departmental audit has 6-20 or more objections. A reasoned reply provided to the audits by professionals with extracts of the law/ circulars or Tribunal Judgments may eliminate 90% of the points, which in turn would result in low probability of litigation.

D. LITIGATION SUPPORT

D.1. Show Cause Notice (SCN) Reply: The best learning (as also the earnings) generally come to the professional when he/ she handles the SCN reply as the result would also determine where he is perceived to be. At this point the professional should let the client know the chances in writing / mail so that there is no scope for disappointment. The law is changing and at times is neither equitable nor reasonable and therefore false assurances are to be avoided.

D.2. Representation before Adjudicating Authority: This normally follows the Show Cause Notice (SCN) reply. All the important evidences and defenses and factual aspects/issues should be put forward at this point to the extent possible to get all the necessary details.

D.3. Reply/ Representation at Appellate Forums: Since large stakes are involved in reply and representation at the Commissioner (Appeal) stage and Tribunal stage, the assistance of an experienced pleader whether a chartered accountant or an advocate would be beneficial.

D.4. Assistance to Advocate at High Court/ Supreme Court: As the CAs cannot represent before the High Court or Supreme Court they can instruct and assist the advocates.

E. REFUNDS

These days assisting clients with information, documentation and collation of data for the purpose of applying for refund of Service tax, CENVAT credit, provides a challenging opportunity. However, this area of practice requires that high ethical standards should be followed by professionals.

REVIEW SERVICES

Service Tax Review and Quarterly Audit: Chartered Accountants could provide a value addition review audit, wherein they could examine whether the eligible tax credits are duly availed, documentation for availing credits, classification of services, filing of returns in time, availing the benefits of exemptions, disclosures made to department, exploring the opportunity of job work transaction, making payments under protest when the levy was unconstitutional etc., are properly being made by their clients or not. In a nutshell, review of Service Tax transactions as a separate service or a part of internal audit would not only create value addition to the clients, but also provide better remuneration to the chartered accountants than (mere attesting functions

G. OTHER AREAS

G.1. Outsourcing of the Function: Many MNCs would be keen to outsource work relating to uncertain laws to professionals who would account for, file returns and litigate, if necessary. In other words, the professional would take responsibility and own this function for the client.

G.2. Training/Teaching: Training/ teaching, writing articles, assisting in drafting notifications or authoring are also some other areas which provide lot of opportunities. Training could be in the form of weekly training sessions to clients in the area of altering transaction structures necessitated by changes in laws.

G.3. Effect of Budget/ Recent Changes on Activity: Updating and getting abreast of the budget changes and its implications for the existing business practices and planning for introducing changes to mitigate the negative impact of official amendments to the existing laws are some of the key areas in which the CA's could play an important role.

G.4. Professional avenues under the new GST regime: It is expected that the GST will be implemented in next few years. The new GST regime is designed to broaden the tax base covering more assessees under its umbrella and at the same time to simplify compliances pertaining to indirect taxes. This will create huge professional opportunities for the CA's in

such diverse areas as advising, impact analysis, transition support, compliances, litigation, etc.

The formula for the success of the practitioners is that they should pro*vide* quality service at reasonably appropriate price and act with grace and integrity.

Other Requirement for Practice Ethical Standards

The adoption of high ethical values and principles in their personal and professional life is a must for all professionals. .

For a Starter in Employment or Practice

A. Attend as many study circles/ seminars/ conferences/ workshops in the chosen areas as possible.

B. Create a small study circle of subject experts in your geographical vicinity on a set day/ time and invite the legal fraternity who practice in the field of ST for a healthy interaction with them.

C. Take the following actions:

   (i) Buy books on Service Tax by reputed specialists

   (ii) Use the website of the ICAI - www.idtc.icai.org, www.pdicai.org etc.

   (iii) Subscribe to the online Portals on Indirect Taxes

   (iv) Use www.cbec.gov.in

   (v) Use www.aces.gov.in

   (vi) Establish links with the known CA Yahoo/ Google groups

   (vii) Create access to the sites of leaders in your chosen area (articles/ insights).

Constitutional Concepts – Service Tax

Introduction

The Constitution of India is the supreme law of India, which lays down the framework for defining the fundamental political principles, procedures, powers, and duties of government institutions, and sets out fundamental rights, directive principles, and duties of citizens. It contains a preamble, 25 parts containing about 448 Articles, and 12 schedules.

The Articles of the Constitution are grouped together into the following Parts:

Part I – Union and its Territory

Part II – Citizenship.

Part III – Fundamental Rights.

Part IV – Directive Principles of State Policy.

Part IVA – Fundamental Duties.

Part V – The Union.

Part VI – The States.

Part VII – States in Part B of the First schedule (Repealed).

Part VIII – The Union Territories

Part IX – The Panchayats.

Part IXA – The Municipalities.

Part X – The Scheduled and Tribal Areas

Part XI – Relations between the Union and the States.

Part XII – Finance, Property, Contracts and Suits

Part XIII – Trade and Commerce within the territory of India

Part XIV – Services under the Union and the States.

Part XIVA – Tribunals.

Part XV – Elections

Part XVI – Special Provisions Relating to certain Classes

Part XVII – Languages

Part XVIII – Emergency Provisions

Part XIX – Miscellaneous

Part XX – Amendment of the Constitution

Part XXI – Temporary, Transitional and Special Provisions

Part XXII – Short title, date of commencement, Authoritative text in Hindi and Repeals

Schedules are lists in the Constitution that categorize and tabulate bureaucratic activity and policy of the Government.

- **First Schedule** - It includes the list of the states and territories of India.
- **Second Schedule** - It lists the salaries of officials holding public office, judges etc.
- **Third Schedule** - It lists Forms of Oaths.
- **Fourth Schedule** - It contains the allocation of seats in the Rajya Sabha per State or Union Territory.
- **Fifth Schedule** - This provides for the administration and control of Scheduled Areas and Scheduled Tribes.
- **Sixth Schedule** - This contains provisions for the administration of tribal areas in Assam, Meghalaya, Tripura, and Mizoram.
- **Seventh Schedule** - The union (central government), state, and concurrent lists of responsibilities.
- **Eighth Schedule** - It lists the official languages of the country.
- **Ninth Schedule** - It contains Articles that were supposed to be immune from judicial review. However, In the case of I.R. Coelho v. State of Tamil Nadu the Hon'ble Supreme Court held that the laws included in the 9th schedule can be subject to judicial review if they violated the fundamental rights guaranteed under Articles 14, 15, 19, 21 or the basic structure of the Constitution

- **Tenth Schedule** - "Anti-defection" provisions for the Members of Parliament and Members of the State Legislatures.
- **Eleventh Schedule** - This contains provisions related to the Panchayat Raj (rural local government).
- **Twelfth Schedule** - This deals with Municipalities (urban and local government).

Part XI of the Constitution deals with the relationship between the Union and States. The power for enacting laws is conferred on the Parliament and on the legislatures of the States by Article 245 of the Constitution. The said Article states:

(i) Subject to the provisions of this Constitution, the Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of the State.

(ii) No law made by the Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

Article 246 of the Constitution of India gives authority to the Union and State Governments to levy taxes. The Seventh Schedule to the Constitution contains three lists, setting out matters under which the Union and the States have the authority to make laws.

The seventh schedule is classified into three lists as follows:

List I [referred to as the Union List]
• This list enumerates the matters in respect of which the Parliament has the exclusive right to make laws.
List II [referred to as the State List]
• This list enumerates the matters in respect of which the State legislatures have the exclusive right to make laws.
List III [referred to as the Concurrent List]
• This list enumerates the matters in respect of which both the Parliament and, subject to list I, legislature of any State, have powers to make laws.

The Parliament has also the power to make any law for any part of India not comprised in a State, notwithstanding that such matter is included in the State list.

Part XII of the Constitution of India contains matters related to *"Finance, Property, Contracts and Suits"* in Articles 264 to Article 300A. Article 265 states that *"no tax shall be levied or collected except by authority of law"*.

It has been held by the Supreme Court in *Kunnathat v. State of Kerala AIR 1961 SC 552* that the term *"authority of law"* means that tax proposed to be levied must be within the legislative competence of the legislature imposing the tax.

The law must not be a colorable use of or a fraud upon the legislative power to tax. It must not also violate the fundamental rights such as Article 14, 19 etc.

The Supreme Court in the case of *Vijaylakshmi Rice Mills 2006 (201) ELT 329* has distinguished the words 'tax' and 'fee' and has held that tax is a compulsory exaction of money for public purposes by the State whereas the fee is a charge for service rendered by a governmental agency. Some Articles of the Constitution relevant to the taxation are discussed below.

Article 12: Defines "the State'' to include the Government and Parliament of India and the Government and legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

Article 13: Laws Inconsistent with or in Derogation of Fundamental Right

(i) All the laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of the Constitution, shall be void.

(ii) The States shall not make any law which takes away or abridges the fundamental rights as mentioned in the Constitution. Any contravention thereof would make such laws void

(iii) In this Article unless the context otherwise requires-

  (a) "law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law in the territory of India.

  (b) "laws in force" include laws passed or made by legislature or other competent authority in the territory of India before the commencement of the Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(iv) Nothing in this Article shall apply to any amendment to this Constitution made under Article 368.

Article 14: Equality before Law

No State can deny any person equality before the law or equal protection of laws within the territory of India. The protection provided is not limited only to citizens but applies to all people. It embodies the principles contained in the universal Declaration of Human Rights that "All are equal before the law and are entitled without discrimination to equal protection of the law".

Rule of Law: "The 'Rule of law" is the basic rule of governance of any civilized policy. The scheme of the Constitution of India is based upon the concept of the rule of law. Everyone, whether individually or collectively, is unquestionably under the Supremacy of Law. The maintenance of dignity of courts is one of the cardinal principles of the rule of law in a democratic set-up.

Natural Justice as an ingredient of Article 14: The right of being heard, i.e., ***audi alteram partem,*** is a valuable right recognised under the Constitution, wherein it is held that the principle of natural justice mandates that no one should be condemned unheard. The right of hearing conferred by a statute cannot be taken away even by courts.

Article 15: Prohibition of Discrimination on the Grounds of Religion, Race, Caste, Sex or Place of Birth

The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them. Every person shall have equal access to public places like public parks, museums, wells, bathing ghats and temples, etc. However, the State could make special provisions for women and children. Special provisions can also be made for advancement of any socially or educationally backward class or scheduled castes or scheduled tribes. Making reservations for backward classes will not be affected by this Article.

Article 19: Right to Freedom

This article inter-alia guarantees freedom of speech and expression, freedom to form associations or unions or co-operative societies, freedom to move freely throughout the territory of India, freedom to reside and settle in any part of Indian Territory and to practice profession or to carry on any occupation, trade or business. However, reasonable restrictions can be imposed considering certain factors like the sovereignty of India, public order, friendly relations with other countries, etc.

Article 20: Protection in respect of conviction for offences

(i) No person shall be convicted of any offence except for violation of a law in force at the

time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(ii) No person can be prosecuted twice for the same offence whether he is convicted or acquitted. This is also signified by the legal maxim **"nemo debet bis vexari"**, which signifies that a man must not be put twice in peril for the same offence. **[Also known as Double Jeopardy].**

(iii) No person accused of any offence shall be compelled to be a witness against himself.

"Law in force"

This expression refers to the law factually in operation at the time when the offence was committed and does not relate to law "deemed to be in force" by the retrospective operation of law subsequently made.

Article 32 and Article 226: Writ Jurisdiction

Writ has been defined as a written command or formal order issued by courts directing person(s) to do or refrain from doing some act specified therein. The Constitution of India provides writ jurisdiction under Article 32 and Article 226 for the enforcement of fundamental rights and other legal remedies. A petitioner can approach the Supreme Court under Article 32 and the High Court under Articles 226/227 of the Constitution.

Article 32: Remedies for the enforcement of right conferred by Part III, i.e., Fundamental Rights

The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of the following:

Habeas Corpus: Habeas Corpus is a Latin term which means "you may have the body". The writ is issued to produce a person who has been detained, whether in prison or in private custody, before a court and to release him if such detention is illegal. The writ provides a prompt and effective remedy against illegal detention. The principal aim of the writ is to ensure swift judicial review of alleged unlawful detention on liberty or freedom of a prisoner or a detune.

Mandamus: Mandamus is a Latin word, which means "We Command". Mandamus is an order from the Supreme Court or the High Court to a Lower Court or Tribunal or public authority to perform a public or statutory duty. The writ of mandamus would be issued to cancel an order

of an administrative or statutory public authority or the Government itself if it violates a fundamental right.

Prohibition: The writ of prohibition means to forbid or to stop and it is popularly known as a 'Stay order'. The writ of prohibition is issued to prevent or prohibit a quasi-judicial authority from the proceeding to act in contravention of a fundamental right such as ex-jurisdiction, violation of natural justice, unconstitutional, etc. After the issue of this writ, proceedings in the lower court, etc. come to a stop.

Certiorari: Certiorari means "to be certified". The writ of certiorari can be issued by the Supreme Court or any High court for quashing the order already passed by a lower court, tribunal or quasi- judicial authority.

Quo Warranto: The expression Quo Warranto means "what is your authority". It is a writ issued with a view to restraining a person from holding a public office to which he is not entitled. The writ requires the concerned person to explain to the court by what authority he holds the office.

Article 226: Power of High Courts to issue writs

Article 226 empowers High Courts to issue the aforementioned writs for the enforcement of fundamental rights or for other legal rights/ remedies.

(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on or in any proceedings relating to, a petition under clause (1), without

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated.

(4) The power conferred on the High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.

Territorial jurisdiction

Article 32 does not prescribe any territorial limitation for invoking the writ jurisdiction. Any person residing in any part of the territory of India can approach the Supreme Court to file a writ under this article. However, for filing a writ under Article 226, the subject matter or residence/business or the location of government/authority against which relief is sought should come under the territorial jurisdiction of the High Court. Under the writ jurisdiction, orders can be issued throughout the territory of India and to Government officials posted outside India.

Invoking Writ Jurisdiction of the Supreme Court and High Court

In addition to the specific writs for the enforcement of fundamental rights and other constitutional rights, a petition can also be filed in cases where the *vires* of the law has been challenged or where the principles of natural justice have not been followed or against the validity/enforceability of circular/rule/notification or against any order/notice issued without jurisdiction or where the alternate remedy is inadequate. The writs are subject to rejection when any efficacious alternate remedy is available or if it involves a disputed question of fact.

Limitation

There is no prescribed time limit for filing writ petitions in the Supreme Court or High Court. However, writs can be dismissed on the grounds of unreasonable delay.

Locus-standi

Only the person aggrieved can file a writ in the Supreme Court or Jurisdictional High Court. However public interest litigation, or enforcement of habeas corpus or *quo warranto* are some exceptions where writs can be filed by a person other than the aggrieved person.

Article 109: Special procedure in respect of Money bills

A money bill can be introduced only in the Lok Sabha (the House of People). After passing from the Lok Sabha money bill shall be sent to the Rajya Sabha (the Council of States) for its recommendations and the Rajya Sabha shall within a period of 14 days from the date of receipt of the Bill return it to the Lok Sabha. Lok Sabha may thereupon either accept or reject all or any of the recommendations of the Rajya Sabha.

If a money bill transmitted to Rajya Sabha for its recommendations is not returned to the Lok Sabha within 14 days, it shall be deemed to have been passed by both Houses of Parliament at the expiration of the said 14 days' period.

Article 133: Appellate jurisdiction of the Supreme Court in appeals from High Courts in regards to civil matters

Any appeal shall lie to the Supreme Court from any judgment, decree or final order in civil proceeding of a High Court in the territory of India, if the High Court certifies under Article 134A:

(a) That the case involves a substantial question of law of general importance, and

(b) That in the opinion of the High Court the said question needs to be decided by the Supreme Court.

Article 136: Special leave to appeal by the Supreme Court

Notwithstanding anything contained in Articles 124 to 147, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

Article 137: Review of judgments or orders by the Supreme Court

Subject to the provisions of any law made by the Parliament or any rules of court made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

Article 141: Law declared by the Supreme Court to be binding on all courts

The law declared by the Supreme Court shall be binding on all courts within the territory of India.

Article 246: Subject-matter of laws made by the Parliament and by the Legislatures of States

(1) Notwithstanding anything in clauses (2) and (3), the Parliament has exclusive power to make laws with respect to any of the matters enumerated in **'List-I'** in the "**Seventh Schedule"** (referred as the **Union List**)

(2) Notwithstanding anything in clause (3), the Parliament, and, subject to clause (1), the legislature of any State also, have the power to make laws with respect to any of the matters enumerated in '**List-III**' in the "**Seventh Schedule"** (referred to as the **Concurrent List**)

(3) Subject to clauses (1) and (2), the legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in '**List-II**' in the "**Seventh Schedule"** (referred to as the **State List**)

(4) The Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List.

Article 246A: The Constitution (122nd Amendment) (GST) Bill, 2014

(1) Notwithstanding anything contained in Articles 246 and 254, the Parliament and, subject to clause (2), the legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) The Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods or of services, or both takes place in the course of inter-State trade or commerce.

Explanation.— The provisions of this article, shall, in respect of goods and services tax referred to in clause (5), of article 279A, take effect from the date recommended by the Goods & Service Tax Council"

Article 265: No Taxes shall be Levied or Collected except by the Authority of Law

No taxes shall be levied or collected except by the authority of law. Imposition of taxes by a mere administrative order without any statutory provision is invalid.

Article 38 and 39

As Article 265 prohibits imposition of tax without the authority of law, the "Authority of law" needs to be construed in the light of goals and ideals set out in the preamble to the

Constitution and Articles 38 and 39. The concept of economic justice demands that in case of indirect tax, like the Central Excise or Customs or Service Tax, the tax collected without the authority of law shall not be refunded unless the claimant establishes that he has not passed on the burden to the third party.

Article 268: Duties levied by the Union but Collected and Appropriated by the States

Duties as mentioned in the union list shall be levied by the Government (GOI) but shall be collected by:

(a) The GOI in case where the duties are leviable within the union territory; and

(b) In other cases by the States within which such duties are respectively leviable.

The proceeds in any financial year of such duties within any state shall not form part of the consolidated fund of India, but shall be assigned to that State.

Article 269: Taxes Levied and Collected by Union but assigned to the State

Taxes on sales or purchase of goods and taxes on consignment of goods, except as provided in Article 269A, shall be levied and collected by the GOI, but shall be assigned and deemed to have been assigned to the States on or after 01.04.1996, in accordance with the principles of distribution as formulated by the law.

Article 269A: The Constitution (122nd Amendment) (GST) Bill, 2014

(1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by the Parliament by law on the recommendations of the Goods and Services Tax Council.

Explanation: For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

(2) The Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Article 270: Taxes Levied and Collected by Union and distributed between Union and State

Tax on income other than agricultural income shall be levied and collected by the GOI and the same shall be distributed between the union and the state governments in the manner

prescribed by the President by order after considering the recommendations of the Finance Commission.

Article 271: Surcharge on Certain Duties and Taxes for the purpose of the Union

Notwithstanding anything contained in Article 269 and Article 270, the Parliament can increase any duties or taxes referred to those in the Articles, except the goods or service tax, by the surcharge for the purpose of the union. The levy of surcharge is often intended to be temporary and to meet certain exigencies or extraordinary situations.

Article 272: Taxes which are Levied and Collected by the Union and may be distributed between the Union and the State

Union duties of excise other than such duties of excise on medicinal and toilet preparation as are mentioned in the union list shall be levied and collected by the GOI.

Article 274: Prior Recommendation of President required to Bills affecting Taxation in which States are interested

Here the expression 'tax or duty in which states are interested' means

(a) Tax or duty where whole or part of the net proceeds are assigned to any State,

(b) Tax or duty by reference to the net proceeds for the time being payable out of the consolidated fund of India to any State.

Article 276: Taxes on Professions, Trade, Calling and Employments

The State's power to tax professions and trades is provided in entry 60 of the State List. The purpose of this Article is to provide that such tax would not be invalid on the ground that it relates to taxes on income.

A tax on profession can be imposed if a person carries on a profession, irrespective of whether such a person earns income or not from this profession.

Article 279A: The Constitution (122nd Amendment) (GST) Bill, 2014

279A. (1) The President shall, within sixty days from the date of commencement of the Constitution (One Hundred Twenty Second Amendment) Act, 2014, by order, constitute a Council to be called the Goods and Services Tax Council.

(2) The Goods and Services Tax Council shall consist of the following members:

(a) the Union Finance Minister........................ Chairperson;

(b) the Union Minister of State in charge of Revenue or Finance................. Member;

(c) the Minister in charge of Finance or Taxation or any other Minister nominated by each State Government....................Members.

(3) The Members of the Goods and Services Tax Council referred to in sub-clause (c) of clause (2) shall, as soon as may be, choose one amongst themselves to be the Vice-Chairperson of the Council for such period as they may decide.

(4) The Goods and Services Tax Council shall make recommendations to the Union and the States on—

(a) the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;

(b) the goods and services that may be subjected to or exempted from the goods and services tax;

(c) model Goods and Services Tax Laws, principles of levy, apportionment of Integrated Goods and Services Tax and the principles that govern the place of supply;

(d) the threshold limit of turnover below which goods and services may be exempted from goods and services tax;

(e) the rates including floor rates with bands of goods and services tax;

(f) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;

(g) special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and

(h) any other matter relating to the goods and services tax, as the Council may decide.

(5) The Goods and Services Tax Council shall recommend the date on which the goods and services tax be levied on petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel.

(6) While discharging the functions conferred by this Article, the Goods and Services Tax Council shall be guided by the need for a harmonised structure of goods and services tax and for the development of a harmonised national market for goods and services.

(7) One half of the total number of members of the Goods and Services Tax Council shall constitute the quorum at its meetings.

(8) The Goods and Services Tax Council shall determine the procedure in the performance of its functions.

(9) Every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting, in accordance with the following principles, namely:—

(a) the vote of the Central Government shall have a weightage of one third of the total votes cast, and

(b) the votes of all the State Governments taken together shall have a weightage of two-thirds of the total votes cast, in that meeting.

(10) No act or proceedings of the Goods and Services Tax Council shall be invalid merely by reason of

(a) any vacancy in, or any defect in, the constitution of the Council; or

(b) any defect in the appointment of a person as a member of the Council; or

(c) any procedural irregularity of the Council not affecting the merits of the case.

(11) The Goods and Services Tax Council may decide about the modalities to resolve disputes arising out of its recommendations.

Article 285: Exemption of Property of the Union from State Taxation

The property of the union shall save insofar as the Parliament by law provides be exempted from all taxes imposed by the state or by any authority within a state.

Article 286: Restriction as to the Imposition of tax on the Sale or Purchase of Goods

State laws shall not impose tax on supply of goods or service or both where such supply takes place:

(a) Outside the state

(b) In course of import of goods or services or both into India or export of goods or service or both outside India

Further, State's power to legislate inter-state transaction of goods declared by the Parliament to be of special importance shall be subjected to restrictions and conditions as imposed by the Parliament.

Entry 92A in the union list, by virtue of SEVENTH SCHEDULE empowers the union alone to tax inter- state trade or commerce.

Article 286(3) empowers the Parliament to specify law, restriction and condition in regard to levy, rate and other incidence of tax on the transfer of goods involved in the execution of works contract, on delivery of goods on hire purchase or any system of payment by installment and on the right to use any goods.

Article 287: Exemption from Taxes on Electricity

States have no power to impose taxes on the consumption or sale of electricity

Article 289: Exemption of Property and Income of a State from Union Taxation

However, the above referred exemption pertains only to direct taxes and not indirect taxes (like Customs, Excise, ST).

Article 297: Things of Value within Territorial Waters or Continental Shelfs and Resource of the Exclusive Economic Zone to vest in the Union

All the lands, minerals and other things of value underlying the ocean within the territorial waters or continental shelf or the exclusive economic zone of India shall vest in the union.

Article 304: Restriction on Trade, Commerce and Inter course among States

Notwithstanding anything contained in Article 301 and Article 303, the legislature of the State:

(a) can impose such taxes on those goods which are imported from other States or Union territories, to which similar goods manufactured or produced in that State would be subjected to.

(b) Further the State legislature shall impose reasonable restriction on freedom of trade, commerce or intercourse with or within that State as may be required in public interest.

Provided no bill or amendment for the purpose of this clause shall be introduced or moved in the legislature of a State without the sanction of the President of India.

Article 366: Definitions

Unless the context otherwise requires, the following expressions have the meanings assigned to them:

(1) "agricultural income" means agricultural income as defined for the purposes of the enactments relating to Indian income tax;

(6) "corporation tax" means any tax on income, so far as that tax is payable by companies and is a tax in the case of which the following conditions are fulfilled:

(a) that it is not chargeable in respect of agricultural income;

(b) that no deduction in respect of the tax paid by companies is, by any enactments which may apply to the tax, authorised to be made from dividends payable by the companies to individuals;

that no provision exists for taking the tax so paid into account in computing for the purposes of Indian income tax the total income of individuals receiving such dividends, or in computing the Indian income tax payable by, or refundable to, such individuals;

(12) "Goods"[1] to include all materials, commodities and articles.

(12A) Goods and Service Tax[2] means any tax on supply of goods or service or both except taxes on supply of following namely:

(i) Petroleum crude

(ii) High speed diesel

(iii) Motor spirit

(iv) Natural gas

(v) Aviation turbine fuel

(vi) Alcoholic liquor for human consumption

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[1] Goods are defined in an inclusive manner. The definition of goods under various legislatures defines goods to include all kinds of movable properties with the exclusion as to actionable claims. Under the customs act goods have been defined to include any property, whether tangible or intangible, that has the specified characteristics. The definition could be wide ranging from one statute to the other.

[2] Introduced by the 115th Constitutional Amendment Bill.

Can software be regarded as goods?

The Supreme Court in the case of *Tata Consultancy Services Vs State of Andhra Pradesh (2004 (178) ELT 22 (SC)*, has observed that since software was capable of abstraction, consumption, use, transmission, transfer, delivery, storage, possession, ,etc., it was included as 'material, articles and commodities' in the definition of 'goods'. Goods include both tangible and intangible movable properties, materials, commodities and articles and also corporeal and incorporeal materials. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software whether customized or non-customized satisfies these attributes, the same would be goods. Once software is goods, the transfer of right to use the same for consideration should be the subject matter of sales tax / VAT going by Article 366(29A) of the Constitution of India.

Can the transfer of right to use software be regarded as service?

We understand that the substance of the agreement here involves transfer of right to use software. Presently, taxation of transfer of such right is an issue under both VAT as well as service tax. While the category of ITSS introduced under service tax specifically talks about taxing of transfer of right to use software supplied electronically and software supplied for commercial exploitation, the transfer of right to use goods is generally regarded as amounting to the deemed sale of goods and liable to VAT, going by Article 366(29A) of the Constitution of India.

Further, it is interesting to note the decision of the Division Bench of the Madras High Court in the case of InfoTech Software Dealers Association. In the said case, while holding that software (packaged or customized) is goods, the Court has also upheld the validity of levy of service tax on IT software services. The Court has however left open the much debated issue as to whether a transaction in software between the re-seller and end user is a sale or service.

Copyright in software is protected and always remains the property of the creator and what is transferred is the right to use the software with copyright protection. The sale is coupled with a condition for exclusive use of the software by the customer at the exclusion of others and it gives absolute possession and control to the user of the right to use the software. When the developer does not sell the software (be it packaged or customized) as such, the transaction between the end users cannot be a sale of software as such but only the contents of the data stored in the software, which would only amount to a service. When the goods as such are not transferred, the question of deeming it as sale of goods (transfer of right to use goods) does not arise and the transaction would only be a service and not a sale. On the other hand, if the software is sold through the medium of internet in a downloadable form, it does not fit into the ambit of "IT software on any media". When an access control is given through an internet

medium with a user name and password and when there is no CD or other storage media for the software, it is possible to hold that it does not satisfy the requirement of being "goods" under the entry used in the Statute.

The question whether a transaction amounts to sale or service depends on the individual transaction. The terms and conditions of the end user license agreement can determine whether there is an element of sale involved when software is delivered to the customer. The dominant nature test as prescribed in the case of Bharat Sanchar Nigam Ltd (Supreme Court) should be applied to determine the intent of the parties and the substance of the contract.

(28) "Taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" is construed accordingly;

(29) "Tax on income" includes a tax in the nature of an excess profits tax;

(29A) 'Tax on the sale or purchase of goods' includes

(a) a tax on the transfer, otherwise than in pursuance of a contact, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) invoked in the execution of a works contract;

(c) a tax on the delivery of goods on hire purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) 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, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

What are goods in a sales transaction therefore remains primarily a matter of contract and intention. The courts would have to arrive at a conclusion as to what the parties had intended when they entered into a particular transaction. In arriving at a conclusion the court would

have to approach the matter from the point of view of a reasonable person of average intelligence.

The taxability of works contract especially was a controversial issue, which elicited varying judgments by the courts. In **Gannon Dunkerly** case relating to works contracts that the expression sale of goods as used in the legislative list would have the same meaning as used in the Sale of Goods Act 1930. It was further held that the State could not enlarge its power to levy sales tax by amending an ordinary law and giving an artificial definition to the word sale. Eventually, the 46th amendment was made to insert clause 29A enabling government to levy of sales tax on works contract and other items. In a works contract, there is neither a contract to sell the materials used in the construction nor passing of property as movables.

The 46th amendment was made precisely with a view to empowering the State to bifurcate the contract and to levy sales tax on the value of the material involved in the execution of works contract, irrespective of the fact that the value may represent a small percentage of the amount paid for the execution of the works contract. The sub-clauses of Article 366(29A) serve to bring the transactions, where one or more of the essential ingredients of sale as defined in the Sale of Goods Act 1930 are absent, within the ambit of purchase and sale for the purpose of levy of sales tax. The amendment permits six specific contracts enumerated in Article 366 (29A) that did not come within the full operation of the definition of 'sale' as stated in the Sale of Goods Act, 1930.

Scope of the Right to Use Goods

Clause (d) of Article 366(29A) refers only to cases where there is a **transfer of the right to use** goods delivered to the person concerned. It does not cover transactions which merely license a person to use goods without securing possession. Thus if effective control and possession is transferred then it indicates that there is transfer of right to use.

Retrospective Operation of Laws

The legislature of a State has the plenary power to pass laws retrospectively. The legislature can interfere with the vested rights of persons in a retrospective legislation but this does not mean that it is adjudicating between the parties. Every retrospective amendment or change will affect vested rights. But the legislative power can be challenged only if the retrospective law is violative of Article 14 or Article 20(1).

Clarificatory Amendments – Retrospective

An amendment which is clarificatory in nature will generally be retrospective. The Legislature can make a declarative enactment to set aside what is a judicial error in an interpretation of a

statute and can make the meaning of a provision clear; it can also make explicit what was already implicit.

Case Laws

Observations made by the Supreme Court in the case of Bharat Sanchar Nigam Limited vs Union of India [2006(2) STR 161 (SC)]

Aspect theory would not apply to enable the value of services to be included in the sale of goods or price of goods in the value of service.

As regards transfer of right to use goods, actual delivery of goods is not necessary for effecting such a transfer. But it is assumed, at the time of execution of agreement, that the goods must be available at the time of transfer and be deliverable/delivered at stage when the right is sought to be transferred. If goods, or what is claimed to be goods, are not deliverable at all, the question of right to use those goods, would not arise. This is irrespective of goods being incorporeal or corporeal, tangible or intangible.

By introducing separate categories of 'deemed sales', meaning of the word 'goods' is not altered. It does not give a licence for assumption that a transaction is a sale and then to look around for what could be the goods. Definitions of composite elements of a sale such as intention of parties, goods, delivery etc. continue to be defined according to known legal connotations.

Application of Article 366(29A) is limited to mutant sales transactions specified therein. All other composite transactions not covered by this Article have to qualify as sales within meaning of Sale of Goods Act, 1930 for the purpose of levy of sales tax, and dominant nature test is applicable to them - In this sense, State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. [AIR 1958 SC 560] found to have survived introduction of above Article 366(29A/0

Test for determining whether the transaction in truth represents two discernible, distinct and separate contracts giving the State power to separate agreement to sell from agreement to render service, and impose tax on the sale. It is whether the parties have in mind or intend separate rights arising out of the sale of goods. If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other (is to as what is the substance of the contract, in other words the dominant nature-test.

Article 366(12) has defined the word "goods" for the purpose of the Constitution as including "all materials, commodities, and articles". The word "goods" has also been defined in Section

2(7) of the Sales of Goods Act, 1930 as meaning "every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." The U.P. Trade Tax defines "goods" as "every kind or class of movable property and includes all material commodities and articles involved in the execution of a works contract, and growing crops, grass, trees and things attached to or fastened to anything permanently attached to the earth which under the contract of sale are agreed to be severed but does not include actionable claims, stocks, shares, securities or postal stationery sold by the Postal Department." The State Sales Tax legislations have, subject to minor variations, adopted substantially a similar definition of "goods" for the purpose of their Sales Tax Acts. **Observations made by the Supreme Court in the case of TN Kalyana Mandapam Association**

A tax on services rendered by mandap-keepers and outdoor caterers is in pith and substance a tax on services and not a tax on sale of goods or on hire purchase activities. Section 65 clause (41) sub-clause (p) of the Finance Act, 1994, defines the taxable service (which is the subject matter of levy of service tax) as any service provided to a customer by a mandap-keeper in relation to the use of a mandap in any manner including the facilities provided to a customer in relation to such use also the services, if any, rendered as a caterer. The nature and character of this service tax is evident from the fact that the transaction between a mandap-keeper and his customer is definitely not in the nature of a sale of hire purchase of goods. It is essentially that of providing a service. In fact, as pointed out earlier, the manner of service provided assumes predominance over the providing of food in such situations which is a definite indicator of the supremacy of the service aspect. The legislature in its wisdom noticed the said supremacy and identified the same as a potential region to collect indirect taxes. Moreover, it has been a well-established judicial principle that so long as the legislation is in substance, on a matter assigned to a legislature enacting that statute, it must be held valid in its entirety even though it may trench upon matters beyond its competence. Incidental encroachment does not invalidate such a statute on the grounds that it is beyond the competence of the legislature (*Prafulla Kumar* v. *Bank of Commerce*). Article 246(1) of the Constitution specifies that the Parliament has exclusive powers to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to the Constitution. As per Article 246(3), the State Government has exclusive powers to make laws with respect to matters enumerated in List II (State List). In respect of matters enumerated in List III (Concurrent List) both the Parliament and State Government have powers to make laws. The service tax is made by the Parliament under the above residuary powers.

As no entry is found in List 2 and List 3 of the Schedule, which could cover the tax levied, the question of the Parliament lacking legislative competence to do so would not arise.

Observations of the Supreme Court in the case of All India Federation of Tax Practitioners

Entry 60 of List II refers to taxes on professions and is on individual person/firm or company. A Chartered Accountant or cost accountant obtains a license or privilege from a competent body to practice. On that privilege the State is competent to levy a tax under Entry 60. It cannot be read to include every activity undertaken by Chartered Accountants/ Cost accountants/ Architects for consideration. Service tax is on each activity undertaken by chartered accountant/cost accountant/architect. For each transaction or contract, Chartered Accountant renders professional based services and for each contract tax is levied under the Finance Act, 1994. Tax cannot be levied without service being provided whereas professional tax is a tax on status. Professional tax has nothing to do with commercial activities undertaken. A Chartered Accountant has to pay professional tax till he remains in the profession. Tax on services is a different subject as compared to taxes on professions, trades, callings, etc. Entry 60 of List II and Entry 92C/97 of List I operate in different spheres.

The distinction between the group of general entries and the group of taxing entries to the Lists in the Seventh Schedule has also been highlighted in the case of *Southern Pharmaceuticals & Chemicals* v. *State of Kerala* reported in (1981) 4 SCC 391 in which the Court took the view that enactment of the Medicinal Act, 1955 by the Parliament under Entry 84 List I does not prevent the State Legislature from making a law under Entry 8 List II as Entry 8 was a general entry whereas Entry 84 List I was a taxing entry.

As stated above, every Entry in the Lists has to be given a schematic interpretation. As stated above, Constitutional law is about concepts and principles. Some of these principles have evolved out of judicial decisions. The said test is also applicable to taxation laws. That is the reason why the entries in the Lists have been divided into two Groups, one dealing with general subjects and the other dealing with taxation. The entries dealing with taxation are distinct entries vis-a-vis the general entries. It is for this reason that the doctrine of pith and substance has an important role to play while deciding the scope of each of the entries in the three Lists in the Seventh Schedule to the Constitution. This doctrine of pith and substance flows from the words in Article 246(1), quoted above, namely, "*with respect to* any of the matters enumerated in List I". The bottom line of the said doctrine is to look at the legislation as a whole and if it has a substantial connection with the entry, the matter may be taken to be legislation on the topic. That is why due weightage should be given to the words "with respect to" in Article 246 as it brings in the doctrine of "pith and substance" for understanding the scope of legislative powers. Competence to legislate flows from Articles 245, 246 and the other Articles in Part XI. Legislation like the Finance Act can be supported on the basis of the number of entries. The nomenclature of a levy is not conclusive for deciding its true character and nature. For deciding the true character and nature of a

particular levy, with reference to the legislative competence, the court has to look into the pith and substance of the legislation. The powers of the Parliament and State legislatures are subject to constitutional limitations. Tax laws are governed by Part XII and Part XIII. Article 265 takes in Article 245 when it says that the tax shall be levied by the authority of law. To repeat, various entries in the Seventh Schedule show that the power to levy tax is treated as a distinct matter for the purpose of legislative competence. This is the underlying principle to differentiate between the two groups of entries, namely, general entries and taxing entries. Taxes on services are a different subject as compared to taxes on professions, trades, callings etc. Therefore, Entry 60 of List II and Entry 92C/97 of List I operate in different spheres.

Relevant Allied Laws *vis-a-vis* Service Tax

Many laws have been passed by the Parliament or State Legislatures that serve some specific purpose. In the context of Service Tax Law, the provisions of specific legislations and general legislations are referable for getting clarity when references have been made.

A snapshot of various legislations that are relevant to the study of the Service Tax Law are given below:

1. Economic Offences (Inapplicability of Limitation) Act, 1974.
2. New Companies Act, 2013.
3. General Clauses Act, 1897.
4. Limitation Act, 1963.
5. Indian Evidence Act, 1872.
6. Sale of Goods Act, 1930.
7. Indian Contracts Act, 1872.
8. Indian Penal Code, 1860.
9. Central Excise Act, 1944;
10. CST/VAT laws.
11. Customs & FTP
12. SEZ Act, 2005

Economic Offences (Inapplicability of Limitation) Act, 1974

This legislation provides for inapplicability of the provisions of chapter XXXVI of the code of criminal procedure to economic offences. The provisions of this legislation would apply / extend to the territories to which the code of criminal procedure applies.

Section 2 of the said enactment provides that the code of criminal procedure shall not apply for any offence punishable under the Central Sales Tax, Central Excise Act, Customs Act and Chapter V of the Finance Act (Service Tax). Further, for every offence, cognizance by the court may be taken as if the provisions of that chapter were not enacted.

Liabilities under New Companies Act, 2013 with reference to Audit and Certification

As per Section 147, if auditors of a company contravene any of the provisions of Section 139 (Appointment of Auditors), Section 143 (Powers and duties of Auditors), Section 144 (Auditor prohibited services) or Section 145 (Signing of Audit Report), they shall be punishable with fine which shall not be less than Rs. 25,000/- but may extend to Rs. 5,00,000/-

If an auditor has contravened such provisions knowingly or willfully with the intention to deceive the company or its shareholders or creditors or tax authorities, he shall be punishable with imprisonment for a term which may extend to 1 year and with fine which shall not be less than Rs.1,00,000/- but which may extend to Rs. 25,00,000/-.

If the auditor is convicted under any of these sections, he shall be liable to refund the remuneration received by him from the company and pay damages to the company, bodies, or authorities or to any other persons for loss arising out of incorrect or misleading statements of particulars made in his audit report.

As per Section 143(12), if an auditor in the course of the performance of his duties as auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, he shall immediately report the matter to the Central Government.

In case of any failure on his part to comply with this duty, he shall be punishable with fine which shall not be less than Rs.1, 00,000/- but may extend to Rs. 25,00,000/-.

General Clauses Act, 1897

In all the central acts and regulations made after the commencement of this Act, the provisions of this Act can be relied, unless there is anything repugnant in the context. The provisions of this Act are considered only when the specific tax statute is silent. The definitions of this Act which are relied upon for interpreting the tax laws are as follows:

(i) *Affidavit*: It shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing.

(ii) *Document*: It shall include any matter written, expressed or described upon any substance by means of letters, or figures or marks or by more than one of those means which is intended to be used or which may be used for the purpose of recording that matter.

(iii) *Father*: In the case of any one whose personal law permits adoption, shall include an adoptive father.

(iv) *Financial Year*: It shall mean the year commencing on the first day of April.

(v) A thing shall be deemed to be done in good faith where it is in fact done honestly whether it is done negligently or not

(vi) *Government*: It shall include both the Central Government and State Government.

(vii) *Immovable Property*: It shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

(viii) *Month*: It shall mean a month reckoned according to the British calendar.

(ix) *Movable Property*: It shall mean property of every description, except immovable property.

(x) *Oath*: It shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing.

(xi) *Offense*: It shall mean any act or omission made punishable by any law for the time being in force.

(xii) *Person*: It shall include any company or association or body of individuals, whether incorporated or not.

Given below are the general rules of construction:

Section 5 of the said Act provides that when the central Act has not expressly provided for the commencement of operation, then it shall come into operation on the day on which it receives Presidents assent:

(a) In the case of a Central act made before the commencement of the Constitution, of the governor general and

(b) In the case of an Act of Parliament, of the President.

Unless the contrary is expressed, a central Act or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement.

Where any of the provisions enacted after the commencement of this Act is cancelled, then unless a different intention appears, the repeal shall not:

(i) Revive anything not in force or existing at the time at which the repeal takes effect; or

(ii) Affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(iii) Affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(iv) Affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(v) Affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment.

And any such investigation, legal proceeding or remedy in respect of any such right, privilege, penalty, forfeiture or punishment may be imposed as if the repealing act or regulation had not been passed.

In a scenario, where any Central Act made after the commencement of this Act repeals any enactment by which the text of any Central Act or regulation was amended by the express omission, insertion or substitution of any matter, then unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal. Further, when the repealed provision is re-enacted with or without modification, any provision of a former enactment, then references

in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

Computation of time: When any act or proceeding is directed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the court or office is closed on that day or the last day of the prescribed period, then the proceedings shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the court or office is open. This provision is applicable provided the act or proceeding is not covered under the Indian Limitation Act.

Gender and number: In all the Central Acts, unless there is anything specific, words importing the masculine gender shall be taken to include females and words in the singular shall include plural and vice versa.

Provisions as to orders and rules made under enactments:

(i) *Construction:* Where any notification, order, scheme, rule, form or bye-law is issued, then the expression used in the notification, order, scheme, rule, form or bye-law should be construed to have the respective meanings as in the Act or Regulation conferring the power.

(ii) *Powers:* The powers to issue any notification, order, scheme, rule, form or bye-law under the respective statutes should be construed to include the power to add, amend, vary or rescind any notification, order, scheme, rule, form or bye-law.

(iii) *Issue of orders:* where any provision or rule is not to come into force immediately on passing, then a power is conferred on Government to issue orders with respect to the application of the provision or rule i.e. the power to issue order may be exercised at any time after the passing of the Act or regulation but rules, bye laws or orders so made shall not take effect till the commencement of the Act.

(iv) *Drafting of rules or bye-laws after previous publications:* A power to make rules or bye-laws is expressed to be given subject to the condition of the rules or bye-laws being made after previous publication, then the following provision shall apply namely:

  (a) The authority having power to make the rules or bye-laws shall, before making them, publish a draft of the proposed rules or bye-laws for the information of persons likely to be affected thereby;

  (b) The publication shall be made in such a manner as that authority deems to be sufficient or if the condition with respect to previous publication so requires in such manner as the government concerned prescribes;

(c) A notice shall be published with the draft specifying a date on or after which the draft will be taken into consideration;

(d) The authority having power to make rules and where the rules are to be made with the approval or concurrence of another authority, the rule-making authority shall consider any objection or suggestion received by the approval authority.

Miscellaneous Provisions

(i) Provision as to offences: Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either of these enactments, but shall not be liable to be punished twice for the same offence.

(ii) Service by post: Where any provision of the Act authorizes or requires any document to be served by post, whether the expression 'serve' or either of the expression 'give' or 'send' or any other expression is used, then service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Certain important case laws relating to this law and relevant for indirect taxes are:

- Limitation being a matter of procedure, the law at the time of filing the appeal is applicable - Thirumalai Chemicals Ltd. v Union of India 2011 (268) E.L.T. 296 (S.C.).
- Section 6 of General Clauses Act applies only in respect of a Central Act or Regulation and not to repeal of a Rule - Kolhapur Canesugar Works Ltd. v Union of India 2000 (119) E.L.T. 257 (S.C.)

Limitation Act, 1963

This Act provides for the provisions with respect to the limitation of suits and other proceedings and for purposes connected therewith. This law is applicable to the whole of India, except the State of Jammu and Kashmir.

Section 3 of the Act provides that every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed although limitation has not been set up as a defense. For the purpose of this act a suit is instituted:

(i) In an ordinary case, when the plaint is presented to the proper officer;

(ii) In the case of a pauper, when his application for leave to sue as a pauper is made; and

(iii) In the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator.

Any claim by way of a set off or a counter claim shall be treated as a separate suit and shall be deemed to have been instituted:

(i) In the case of a set off, on the date on which the counter claim is made in court;

(ii) In the case of a counter claim, on the date on which the counterclaim is made in court.

Expiry of the prescribed period when the court in closed: Where the prescribed period for any suit, appeal or application expires on a day when the court in closed, then the suit or appeal may be preferred on the day when the court re-opens. A court shall be deemed to be closed on any day if during any part of its normal working hours it remains closed on that day.

Computation of period of limitation:

Section 12 provides for the manner of computing the period of limitation and for the said purpose any suit, appeal or application, the day from which such period is to be reckoned shall be excluded:

(i) The day on which the judgment on the complaint was pronounced and the time requisite for obtaining the copy of the order appealed from or sought to be revised shall be excluded.

(ii) Where a decree or order is appealed from or sought to be revised or reviewed or where an application is made for leave to appeal from a decree or order, the time requisite for obtaining a copy of the judgment shall be excluded.

(iii) In computing the period of limitation for an application to set aside an award, the time required for obtaining a copy of the award shall be excluded.

Any time taken by the court to prepare the decree or order before an application for a copy thereof, shall not be excluded.
Exclusion of time in certain other cases:

(i) If the institution or execution has been stayed by injunction or order then the day on which it was issued or made and the day on which it was withdrawn shall be excluded.

(ii) In computing the period of limitation for any suit, the time during which the defendant has been absent from India and from the territories outside India under the administration of the Central Government shall be excluded.

Certain important case laws relating to this law and relevant for indirect taxes is as under:

- Law of Limitation is applicable only to courts and not to tribunals, unless empowered by the statute - Om Prakash v Ashwini Kumar [2010 (258) E.L.T. 5 (S.C.)], Nityanand M Joshi v. LIC [AIR 1970 SC 209], Sakura v. Tanaji [AIR 1985 SC 1279], Birla Cement Works v. G M Western Railway [(1995) 2 JT 59 (SC)]

- The words 'sufficient cause' in Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant. - Perumon Bhagvathy Devaswom v. Bhargavi Amma [(2008) 8 SCC 321]

- However, in the absence of any satisfactory or reasonable explanation rendered for the condonation of delay, condonation should not be granted - Collector of Central Excise, Madras v. A.MD. Bilal & Co., 1999 [(108) ELT 331 (SC)], Balwant Singh v Jagjit Singh 2010 (262) E.L.T. 50 (S.C.)

- However, in the case of CCE v Hongo India [2009 (236) E.L.T. 417 (S.C.)], the Apex Court held that the time limit prescribed in Section 35H of the Central Excise Act, 1944 is absolute and not extendable by the court under Section 5 of the Limitation Act, 1963

Indian Evidence Act, 1872

In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:

(i) *Court*: It includes all judges and magistrates and all persons except arbitrators, legally authorized to take evidence.

(ii) *Fact*: It means and includes

A. Anything, state of things, or relation of things capable of being perceived by the senses;

B. Any mental condition of which any person is conscious.

Illustration:

(i) That there are certain objects arranged in a certain order in a certain place, is a fact.

(ii) That a man heard or saw something, is a fact.

(iii) That a man said certain words, is a fact.

(iii) *Relevant*: One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

(iv) *Facts in issue*: The expression "Facts in issue" means and includes any fact from which, either by itself or in connection with other facts, the existence, non-existence nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows.

(v) *Document*: it means any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

(vi) *Evidence*: it means and includes

All statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry. Such statements are called oral evidence. All

documents including electronic records produced for the inspection of the court are called documentary evidence.

(vii) *Proved*: A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that is exists.

(viii) *Disproved*: A fact is said to be disproved when after considering the matters before it the ccourt either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist

(ix) *Not proved*: A fact is said not to be proved when it is neither provided nor disproved.

Provisions relating to Admissions

A. Admission: Section 17 of the Act defines the term admission as any statement that is either oral, documentary, or recorded in electronic media. These statements should suggest inference as to the fact in issue or relevant fact. Further, section 18 provides that the statements made by a party to the proceeding or by an agent of such party are also considered as admissions provided the court regards them authorized (expressly or impliedly).

B. Oral admission: This type of admission as to the content of documents would not be relevant until the party proposing to prove them shows that the person is entitled to give secondary evidence of the contents. Further oral admissions as to the contents of electronic records are not relevant unless the genuineness of the electronic record produced is in question.

C. The confession made by a person in the custody of police officer would be relevant only when it is made in the presence of a magistrate.

D. Section 34 provides that entries in the books of account including those maintained in electronic form regularly kept in the course of business are relevant. But these statements alone shall not be sufficient evidence to charge any person with liability.

E. Section 35 provides that the entries in any public or official book, register, or record stating a fact in issue would be relevant provided they are made by a public servant or by a person in performance of a duty specially enjoined by the law.

Opinion of the third party: The court under section 45 would consider the views of the expert when the court is expected to form an opinion upon a point on foreign law or of science or art or as to the identity of handwriting. Further, facts not otherwise relevant would be relevant if they support or are inconsistent with the opinion of experts, when such opinions are relevant.

Admissibility of document or contents thereof may not necessarily lead to any inference unless contents thereof have some probative value – H. Siddiqui v A. Ramalingam [2011 (268) ELT 436 (SC)].

Admissibility of electronic records: In terms of section 65B, any information contained in an electronic record which is printed on paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be also a document, if the below-mentioned conditions are satisfied in relation to the information and computer in question. This shall be admissible in any proceedings, without further proof or production:

(a) The computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purpose of any activities regularly carried on over that period by the person having lawful control over the use of the computer.

(b) During the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities.

(c) Throughout the material part of the said period, the computer was operating properly or if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) The information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

Presumption of electronic agreements: Under section 85A, the court shall presume that every electronic record purporting to be an agreement containing the digital signatures of the parties was so concluded by affixing the digital signature of the parties.

Presumption as to electronic messages: Under section 88A, the court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into the computer for transmission; but the court shall not make any presumption as to the person by whom such message was sent.

Provisions as to production of evidence:

Burden of proof: Section 101 provides that the burden of proof lies on the person when such a person is bound to prove the existence of any fact. Further section 102 provides that the burden of proof in a suit or proceedings lies on that person who would fail if no evidence is produced.

Burden of proof as to particular fact: Section 104 provides that the burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Sale of Goods Act, 1930

This law is enacted to define and amend the law relating to the sale of goods. The provisions of this Act are applicable to the entire country except the state of Jammu and Kashmir. The relevant definitions are as under:

(a) *Buyer:* means a person who buys or agrees to buy goods.

(b) *Delivery:* means voluntary transfer of possession from one person to another.

(c) *Deliverable state:* Goods are said to be in a deliverable state when they are in such state that the buyer,under the contract, would be bound to take their delivery.

(d) *Document of title to goods:* It includes a bill of lading, dock warrant, warehouse keeper's certificate, wharfingers certificate, railway receipt, multimodal transport documents, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

(e) *Future goods:* It means goods to be manufactured or produced or acquired by the seller after making the contract of sale.

(f) *Goods:* It means every kind of movable property other than actionable claim and money; and includes stocks and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

(g) *Price:* It means the money consideration for the sale of goods.

Contract of sale: In terms of section 4, a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There must be a contract between one person and another and the contract may either be absolute or conditional.

Agreement to contract and contract of sale: In terms of section 4(3) read with section 6(3), if future goods are involved, it is not a contract of sale but only an agreement to contract. And when the future goods come into existence (or any condition precedent is fulfilled) then the agreement to contract becomes a contract of sale.

Goods sent on approval: In terms of section 24, when the goods are delivered to the buyer on approval or on sale or return, the property passes to the buyer

(i) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(ii) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of reasonable time.

Certain important case laws relating to this law and relevant for indirect taxes are as under:

- Increase in price because of increase in duty to be borne by the purchaser when such enhancement is made prior to the date of delivery of goods – Ravinder Raj v Competent Motors [2011 (266) ELT 157 (SC)]
- The fact that Sales tax, Local and Central, has been paid at the factory gate and crucial documents of transport, showing the buyers as consignee which in terms of Section 39 of the Sale of Goods Act, 1930 would be sufficient to construe sale on delivery to the buyer, on handing over the goods on the transport vehicle. - Welspun Gujarat Stahl Rohren Ltd v CCE [2006 (194) E.L.T. 430 (Tri. - Mumbai)]
- Identification of goods by a buyer's representative would construe possession – Commissioner v Ravi Cables [2003 (152) ELT A266 (SC)]

Indian Contracts Act, 1872

The provisions of this Act are applicable to the whole of India except the state of Jammu & Kashmir. These provisions shall not affect the provisions of any statute, act or regulation when they are inconsistent with the provisions of this Act. Provisions of sale were contained in Chapter VII of the Indian Contract Act, 1872 until they were amended and provided in the Sale of Goods Act, 1930.

Provisions relating to agency

Definition of agent and principal: Section 182 defines the agent as a person employed to do any act for another or to represent another in dealing with the third person. Whereas the principal is defined as any person for whom such act is done or who is so represented.

Who can employ an agent: Section 183 provides that any person who has attained the age of majority and who is of sound mind, may appoint an agent.

Who can be appointed as agent: Section 184 provides that any person who has attained the age of majority and is of sound mind can be appointed as agent.

No consideration is required for creating an agency and the authority can either be express or implied.

Extent of agent's authority: Section 188 provides that the agent having authority to do an act has authority to do every lawful activity which is necessary in order to do such act. An agent having an authority to carry on a business has authority to do every lawful activity necessary for the purpose or usually undertaken in the course of conducting business.

Further, the agent under section 189 has authority to do such acts or undertake such activities in the interests of the principal or for protecting the principal in an emergency.

Indian Penal Code

Omission to produce documents: Section 175 provides for a simple imprisonment for a term which may extend up to one month or with fine which may extend up to INR 500 when any person intentionally fails to produce or deliver any document to the public servant he is legally bound to.

False information: Section 177 provides for simple imprisonment of around six months and/or with a fine of INR 1000 when any person furnishes false or incorrect information.

Refusing to answer public servant: Sec 178 provides for simple imprisonment of around six months and/or with a fine of INR 1000 when any person refuses to answer any question demanded by the public servant.

Obstructing public servant: Section 186 provides for simple imprisonment of around three months and/or with a fine of INR 500 when any person voluntarily obstructs any public servant in discharge of his public functions.

Punishment for false evidence: Section 193 provides for an imprisonment extendable up to seven years with a fine when any person intentionally provides false evidence at any stage of judicial proceeding or fabricates evidence for the purpose of being used in proceedings.

Destruction of documents: Section 204 provides for an imprisonment which may extend up two years and/or fine when any person hides or destroys any document or electronic record which he may lawfully be compelled to produce as evidence in a court of justice or in any proceedings. This provision is also applicable when any person obliterates or renders illegible the whole or any part of the document or electronic record with the intention of preventing the same from being produced or used as evidence before the court.

Insult: Section 228 provides for an imprisonment extendable up to six months and/or fine extendable upto INR 1000 when any person intentionally insults or causes any interruption to any public servant when such public servant is sitting in any stage of a judicial proceeding.

Central Excise Act, 1944

Basic Concepts

The word "excise" is derived from the Latin word ***"Excisum / Excidere"*** which means to cut out. 'Duty of excise' has been renamed as Central Value Added Tax (CENVAT). CENVAT includes 'duty', 'duties' 'duty of excise' or 'duties of excise'. The duty of excise is usually levied on a manufacturer or producer in respect of the commodities produced or manufactured by him. It is a tax upon the manufacture of goods and not upon sales or proceeds of sale of goods.

Although excise started as a pure duty on manufacturing activity, over a period of time it has included deemed manufacture and is tending towards a value added tax and the changed nomenclature indicates the same. In future, it would be subsumed into the GST.

Note :

Central Excise is a tax attracted by the event of manufacture but collected at some convenient stage which may be after the said event, which is only for administrative convenience.

Constitutional Provisions

The Indian Parliament has exclusive powers to make laws with respect to any matter enumerated in List I in the Seventh Schedule to the Constitution of India (Called 'Union List'). Entry No. 84 of List I of Seventh Schedule to the Constitution reads as follows:

"84. Duties of excise on tobacco and other goods manufactured or produced in India except

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics,

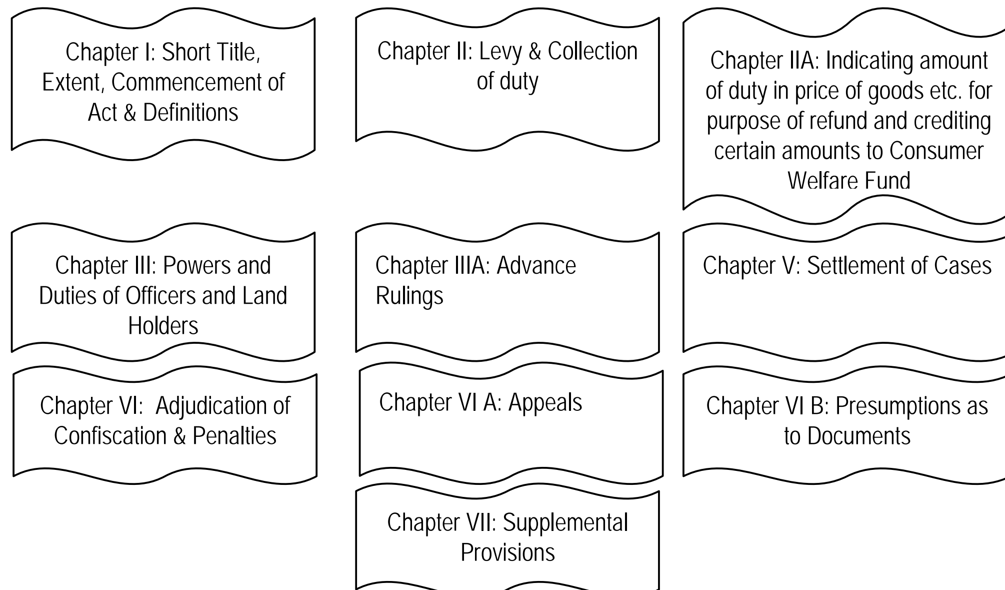
but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

Products like opium, narcotic drugs, and alcoholic liquors for human consumption are outside the scope of the Central Excise [coverage is by the states]. Medicinal and toilet items which contain alcohol are covered by the central excise and subject to the duty of excise.

Central Excise Law

Sources of Central Excise Laws
• Central Excise Act, 1944 • Central Excise Rules, 2002 • CENVAT Credit Rules, 2004 • Central Excise (Appeals) Rules, 2001 • Central Excise (Advance Ruling) Rules, 2002 • Central Excise (Settlement of Cases) Rules, 2007 • Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 • Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 • Central Excise (Compounding of Offences) Rules, 2005 • Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008 • Central Excise Tariff Act, 1985

(i) **Central Excise Act, 1944:** This Act contains the basic provisions relating to the levy of excise duty. There are 10 chapters in the Central Excise Act. These are stated briefly as follows:



(ii) **Central Excise Rules, 2002 [CER]:** These Rules contain procedures for the assessment and collection of duty including other procedures like the manner of

payment of duty, registration, maintenance of records, invoicing, rebate of duty, export without payment of duty, etc.

(iii) CENVAT Credit Rules, 2004 [CCR]: The provisions relating to Cenvat credit which were a part of the Central Excise Rules, 1944 were given a separate identity from 1st July 2001 and were called Cenvat Credit Rules, 2001. These Rules were superseded by the Cenvat Credit Rules, 2002. However, with effect from 10.09.2004, Cenvat Credit Rules, 2002 have been replaced by a new set of rules, viz., Cenvat Credit Rules, 2004 which provide for extending credit across goods and services.

(iv) Central Excise (Appeals) Rules, 2001: The procedure relating to appeals is covered in these rules.

(v) Central Excise (Settlement of Cases) Rules, 2007: The procedural aspects relating to the settlement commission are contained in these rules.

(vi) Central Excise (Advance Rulings) Rules, 2002: These rules contain the provisions relating to Advance Rulings.

(vii) Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001: These rules contain the provisions and procedure relating to the goods removed at concessional rate of duty for the manufacture of excisable goods.

(viii) Central Excise Tariff Act, 1985: The Central Excise Tariff, Act 1985 containing the Tariff schedules was enacted, based on the international product coding system called Harmonized System of Nomenclature (H.S.N.). However, w.e.f. 28.02.2005, the Central Excise Tariff (Amendment) Act, 2005 has been brought into.

(ix) Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000: These rules have been framed to prescribe valuation methods where transaction value cannot be determined under Section 4.

Applicability of the Central Excise Law

The Act applies to the whole of India, which includes Indian territorial waters. Indian territorial waters extend up to 12 nautical miles from the base line. It also extends to areas designated in the Continental Shelf and Exclusive Economic Zone of India. The 'exclusive economic zone' extends up to 200 nautical miles inside the sea from the base line. Though initially the Act did not apply to the State of Jammu and Kashmir, its application was extended to that State by the enactment of Taxation Laws (Extension to Jammu & Kashmir) Act, 1954.

Levy and collection of duty

Chapter II of the Central Excise Act, 1944 deals with the levy and collection of duty. This chapter contains sections 3 (Charging Section), 4 (provides for the method of valuation of excisable goods) & 4A (Valuation based on maximum retail price (MRP)).

Section 3(1) which is the charging section states:

There shall be levied and collected in such manner as may be prescribed:

(a) a duty of excise on all excisable goods (excluding goods produced or manufactured in the special economic zones [SEZ]) which are produced or manufactured in India as and at the rates set forth in the First Schedule to the Central Excise Tariff Act, 1985;

(b) a special duty of excise, in addition to duty of excise specified in clause (a) above, on excisable goods (excluding goods produced or manufactured in the special economic zones) specified in the Second Schedule to the Central Excise Tariff Act, 1985 which are produced or manufactured in India, as and at the rates set forth in the Second Schedule.

However, the excise duty leviable on any excisable goods manufactured by a hundred percent export oriented undertaking (100% EOU) and brought to any other place in India shall be an amount equal to the aggregate of the customs duties which would be leviable under the Customs Act or any other law for the time being in force on like goods produced or manufactured outside India if imported into India. The value of such goods shall be determined in accordance with the provisions of the Customs Act, 1962, if the duty to be levied is based on the value of such goods *(ad valorem).*

Where in respect of any such like goods, any duty of customs leviable for the time being in force is leviable at different rates, then such duty shall be deemed to be leviable at the highest of those rates.

Section 3(1A) provides that there is no distinction between excisable goods produced by the Government and those produced by others, with regard to the payment of excise duty. Excise duty is payable on goods manufactured by or on behalf of the Government (both Central and State) also.

Thus, four fundamental propositions can be derived from Section 3 of the Central Excise Act, 1944:

(i) There must be a manufacture.

(ii) The manufacture must be in India

(iii) The manufacture must result in "goods"

(iv) The resultant goods must be "excisable goods"

Goods and Excisable Goods

As per Section 2 (d) of the Central Excise Act, excisable **goods** means:

"goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt".

Explanation — for the purposes of this clause, "goods" includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable.

Therefore, first of all, the items which are subject to tax must be **goods**; they must be **specified in the Tariff**; and they must come into existence as a result of **manufacture**.

Goods The word *"goods"* has not been defined under the Act or Rules and one can refer to the definition given under the Sale of Goods Act, 1930 or as per Article 366 of the Constitution of India. The Constitution of India defines 'goods' in Article 366 (12) as **"goods include all materials, commodities and articles".**

The Sale of Goods Act, 1930 in section 2(7) defines "goods" as **"every kind of movable property other than actionable claims and money; and includes stocks and shares, growing crops, grass and things attached to and forming part of the land which are agreed to be served before sale or under the contract of sale".** To be "goods" the article concerned must be movable. In other words, immovable property cannot be goods. Any movable property whether visible, tangible, corporeal or not will constitute goods.

In the case of Union of India v. Delhi Cloth Mills Co. Ltd., [1977 (1) E.L.T. (J 199)], the Supreme Court has held that in order to be goods any article must be capable of coming to the market to be bought and sold. Therefore, to be called "goods", the items must be moveable and marketable.

From the above, **two fundamental aspects of the term "goods" arise: that they should be 'moveable' and 'marketable'.**

(a) **Goods must be Moveable :** In **Union of India v. Delhi Cloth Mills (1977) ELT J-199** and in **South Bihar Sugar Mills v Union of India (1978) ELT J-336,** the Supreme Court enunciated the principle that to be called goods, the articles must be such as are capable of being bought and sold in the market. The articles must be something, which can

ordinarily come or can be brought to the market to be bought and sold. As opposed to moveable goods, immoveable goods like property cannot be brought to the market to be sold.

Note :

(a) **Movable goods** mean property of every description, except immoveable property [Section 3(36) of the General Clauses Act of 1897]

(b) **Immovable goods** shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth. [Section 3(26) of the General Clauses Act of 1897]

Judicial decisions on immovable property

CCE, Ahmedabad vs. Solid & Correct Engineering Works [2010(252) ELT481(SC)]

Facts: Asphalt drums/hot mixes plant is supplied, erected, commissioned and after sales service is done as well relating thereto.

Decision: The plants are not per se immovable and they become immovable when embedded in earth. The attachment of plant with nuts and bolts intended to provide stability and prevent vibration not covered as attached to earth. The attachment can be easily detached from the foundation and is not permanent. The plant can be moved after road construction or repair project is completed. The plant in question is not an immovable property and not immune from excise duty.

Triveni Engineering Vs. CCE [2000 (120) E.L.T. 273 (S.C.)]

Facts: The process of combining steam turbine and alternator results in bringing in the existence of a new product, having a distinctive name, character or use. Thus, the process amounts to manufacture and the goods are liable to Excise Duty.

Decision: It was observed that "the marketability test requires that goods as such should be in a position to be taken to the market and sold. If they have to be separated, the test is not satisfied. Installation or erection of a turbo alternator on the platform specially constructed on the land cannot be treated as a common base; therefore, such alternator would be immovable property and not 'excisable goods'

(b) **Concept of 'Marketability':** Unless the goods are capable of being marketed, they cannot be charged to duty. Marketability is the capability of a product of being put into the market for sale. In order to become goods, an article must be something which can

ordinarily come to the market to be bought and sold. Marketability is an essential ingredient in order to render goods dutiable under law. Whether a product is marketable or not is to be decided on the facts of each case.

Specified in the Tariff

As per Section 2(d) of the Act, excisable goods means:

(i) Firstly, the goods must be specified in the First or Second Schedule to the Central Excise Tariff Act, 1985.

(ii) Secondly, the goods so specified must be subject to duty as per the tariff. Goods which are not covered in the schedules are referred to as non-excisable goods.

Thus, for becoming excisable goods, goods must not only be specified in the Tariff but must also be subject to a duty of excise.

The following points merit consideration in this regard :

(a) "NIL" rate is a rate of duty : Nil rate is also a rate of excise duty. Therefore, goods specified in the Tariff as being subject to "NIL" rate of duty are also excisable goods

(b) Non-excisable Goods : Goods not specified in the Tariff or the goods against which no rate has been specified in the Tariff are non-excisable goods.

(c) Non-dutiable Goods : Non-dutiable goods are excisable goods but are not liable to duty either on account of rate of duty being "NIL" in the Tariff or on account of 100% exemption granted by any notification.

(d) Exempted Goods : As per the Supreme Court's decision in **Wallace Flour Mills Ltd. Vs. C.C.EX. (1989) (44) ELT-598,** it was held therein that fully exempted goods were also excisable goods and hence were chargeable to duty if the exemption was removed prior to the removal of goods but subsequent to manufacture. Further in case of **UOI v. Nandi Printers P Ltd. 2001 (127) ELT 645**, the Hon'ble Supreme Court has held that goods which are fully exempted from duty under a notification are not non-excisable.

Manufacture

As per Section 2(f) of the Central Excise Act, 1944, "**manufacture**" includes any process, -

(i) incidental or ancillary to the completion of a manufactured product;

(ii) which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or

(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer,

and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;

Judicial decisions on manufacture

Since the definition of manufacture is an inclusive one and does not spell out or enumerate the activities covered therein, it is essential to arrive at an understanding of the term based on legal decisions on the point. Some decisions related to the term 'manufacture' are given below.

Union of India v. Delhi Cloth & General Mills Co. Ltd. 1977 (1) ELT J199

The expression 'manufacture' was considered at length by the Supreme Court. It held that the word manufacture when used as a verb is generally understood to mean as bringing into existence a new substance and not merely to produce some change in the substance. The Court thereafter emphasized the definition by citing a passage from an American judgement which was quoted in the Permanent Edition of Word and Phrases. The passage is as follows:-

"Manufacture implies a change, but every change is not manufacture and yet change of an article is the result of treatment, labour and manipulation. But something is necessary and there must be transformation; a new and different article must emerge having a distinctive name and character or use".

This famous paragraph is now the basis for determining whether or not an activity or process amounts to manufacture.

South Bihar Sugar Mills Ltd. v. Union of India (1978)(2)ELT J336 (SC)

The Apex court has held that the word manufacture implied a change, but every change in the raw material does not tantamount to manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character and use.

Empire Industries Ltd. v. Union of India 1985(20) ELT 1 (SC)

The Supreme Court held that to constitute manufacture it is not necessary that one should absolutely make out a new thing because it is well settled that one cannot absolutely make a thing by hand in the sense that nobody can create matter by hand (scientifically). It is

transformation of a matter into something else that would amount to manufacture. That something else is a question of degree. Whether that something else is a different commercial commodity having its distinct character, use and name and is commercially known as such, is an important consideration in determining whether there is a manufacture.

U.O.I. v. Parle Products 1994 (74) E.L.T. 492 (S.C.)

Whether or not something results in manufacture would depend on the facts of the case but any number of processes undertaken which do not result in a commercially different commodity cannot result in manufacture.

Ujagar Prints v. U.O.I 1988 (38) ELT 535

The Supreme Court held that prevalent and generally accepted test to ascertain whether there was manufacture was whether the change or the series of changes brought about by application of processes take the commodity to the point where, commodity can no longer be regarded as the original commodity but is, instead, recognized as a distinct and new article that has emerged because of the result of the processes. There might be border line cases where either conclusion can be reached with equal justification. Insistence on any sharp or intrinsic distinction between processing and manufacture results in an over simplification of both and tends to blur their interdependence in cases.

Narne Tulaman Manufacturing P Ltd Vs CCE[1988(38) ELT 566(SC)]

Facts: Whether the assembling of duty paid components of the weighbridge amounts to manufacture when both parts and final product are separately and specifically dutiable.

Decision: The activity of assembling amounts to manufacture as it brings into existence weighbridge, a new product known to the market and known under the excise item.

Clarifications

Circulars issued by the CBEC, from time to time, clarify the position of various activities/ processes *vis a vis* manufacture. Some of the clarifications are given below:

(a) **Activity of transferring goods from tankers into smaller drums is not manufacture:** As per note 10 to Chapter 29, the activity of repacking products mentioned in the said Chapter from bulk packs to retail packs shall amount to manufacture under section 2(f)(iii) of the Central Excise Act, 1944.

    In this regard, it has been clarified that the activity of transferring goods from tankers into smaller drums cannot be said to be covered by the said chapter note 10 because the tankers cannot be termed as bulk packs [Circular No. 910/30/2009-CX dated 16-12-2009].

(b) **Pickling and oiling is not manufacture:** "Pickling is removing surface oxides from metals by chemical or electro chemical reaction" and pickle means "the chemical removal of surface oxides (scale) and other contaminants such as dirt from metal by immersion in an aqueous acid solution." Therefore it can be said that the process of pickling is only a chemical cleaning process to remove scales and dirt from the metal by immersion in chemical solution and does not result in the emergence of any new commercially different commodity.

The Tribunal has also in the case of Resistance Alloys [1996 (84) ELT 507 (T)] & Bothra Metal Industries [1998 (99) E.L.T. 120 (Tribunal)] held that the process of pickling being a preparatory process to drawing of wire does not amount to manufacture.

Therefore, it has been clarified that undertaking the process of oiling and pickling as preparatory steps do not amount to manufacture [Circular No. 927/17/2010-CX dated 24.06.2010].

Manufacture and Processing

- There is a need to distinguish manufacture and processing. Manufacture involves a series of processes, whereas a process is one of the steps involved in the manufacture of a product from input material.

- If there is a difference between the product that results from the processes carried out on the incoming material and the material that entered the process, the manufacture of goods is said to take place. It was held in *McDowell & Company Ltd vs. Commr. Of C .Ex. Bangalore-III [2006(199)E.L.T.368(Tri.-Bang)]* that, as regards excisability of food flavors both essences and resultant product food flavor fall under same tariff heading 3302. The process of mixing of essences is not manufacture and the resultant food flavor is not excisable even if it is marketable-Sections 2(f) and 3 of Central Excise Act, 1944.

Deemed Manufacture

- Manufacture implies change but every change is not manufacture. Deemed manufacture includes a process which is termed as manufacture by the Section and chapter notes to the First Schedule of Central Excise Tariff Act.

- Manufacture is defined under clause (i) of the definition under section 2(f) that any process which is incidental or ancillary to the completion of a manufactured product to be considered as manufacture. The section notes or chapter notes of the Central Excise Tariff Section or chapters under which the product falls should be perused to see if it is specifically stated therein that a particular process amounts to manufacture and if there is no such specific provision in section or chapter note of the Tariff, the commodity would

not become excisable merely because a separate tariff item exists in respect of the commodity.

- In the case of goods mentioned in the Third Schedule of the Central Excise Act, 1944 even if a process/ activity (like packing, labeling, repacking, etc) NOT amounting to manufacture is undertaken, such a process would be DEEMED to be manufacture and the excise duty would have to be paid. Therefore, in respect of goods mentioned in the Third Schedule, apart from seeing if manufacture has taken place, it should be checked if any of the activities mentioned under Section 2(f)(iii) are carried out.

  One should carefully study the concept of 'deemed manufacture' as it leads to a situation where the minor processors or traders of certain goods carrying out certain activities in relation to some goods may be liable for payment of central excise duty if that activity amounts to manufacture in terms of the provisions of section 2(f) of the Central Excise Act, 1944. Consequently they would also be eligible for credit on the incoming products and exemptions, if any, provided under the law for a manufacturer.

Dutiability of Intermediate Products and Captive Consumption

The definition of manufacture under section 2(f) of the Act would also imply that manufacture would take place at an intermediate stage of the process, as long as the intermediate product was known commercially as a distinct and identifiable product. Further, the word 'product', as occurring in Entry 84, List I, Schedule VII of the Constitution, would cover intermediate goods also. However, although excise duty is chargeable on manufactured goods, the collection of the levy is postponed to the time of removal of goods from the factory, In other words, even though section 3 of the Act imposes levy on the event of manufacture, the Rules require the duty to be paid only at the time of removal from the factory. In case of *Collector* v. *Vazir Sultan Tobacco Co. Ltd.* 1996 (83) E.L.T. 3, the Hon'ble Supreme Court has held that the words used in section 3(1) "in such manner" applies to "collection". Hence, the section creates the "levy" itself and collection is left to be regulated by the Rules.

Captive Consumption in the context of the Excise Law signifies utilization of the whole or part of goods produced or manufactured within the factory of production. This is normally prevalent in large factories with several departments in diverse manufacturing processes with their departmental and intra-departmental stock transfers. In such cases, emergence of goods in one process, which are used in another process, would require compliance of procedure relating to captive consumption, as the removal of goods or consumption thereof for or in another process would be a 'clearance' which requires payment of duty.

In terms of Rule 4 of the Central Excise Rules, 2002, no goods on which the duty is payable, shall be removed without payment of duty from any place where they are produced or

manufactured or from a warehouse, unless otherwise provided. As per the Explanation to Rule 5 of the Central Excise Rules, 2002, if any excisable goods are used within the factory, 'the date of removal of such goods' shall mean the date on which the goods are issued for such use.

Judicial Decisions on Dutiability of Intermediate Products and Captive Consumption

J.K. Spinning & Weaving Mills Vs. UOI 1987 (32) ELT 234 (SC)

The Hon'ble Supreme Court, upheld the Finance Act, 1982 amend the provisions of Rule 9 and 49 of Central Excise Rules, 1944 with retrospective effect from 28.02.1944, to give the effect that intermediate goods would be chargeable to duty as they would be deemed to have been removed prior to consumption in the manufacturing process. Therefore, captive consumption would amount to removal though there are several exemption notifications like 67/95 which under specified circumstances exempt captive consumption from payment of duty.

Union Carbide India Ltd. Vs. Union of India (1986) (24) ELT-169 and in Bhor Industries Ltd. Vs. C.C.EX. (1989) (40) ELT-280

The Supreme Court held that an intermediate product would be excisable only if it is a complete product in the sense that it is capable of being sold to a consumer. Thus marketability is essential for charging an article to duty. Therefore where the intermediate product is not capable of being sold, it is not dutiable even if it is included in the Tariff Entry. In other words, intermediate goods will be chargeable to duty under law only if the test of marketability is met. This however would have to be seen in light of the amendment with effect from 16.05.08 where goods were deemed to be marketable if they are capable of being brought to the market for sale.

The Tribunal, in Hindustan Lever Ltd. Vs. C.C.EX. (1990) (30) ECR-180, has held that intermediate goods which are not sold and are not marketable are not excisable and that the burden of proof regarding marketability is on the Revenue.

Assembly *vis-a-vis* Manufacture

Assembly is a process of putting together a number of items or parts of an item to make a product or item. From a general point of view not all cases of assembly would amount to manufacture in as much as an already manufactured item may be put in a readily usable form.

The assembly may take place before or after the sale of manufactured goods and again at the factory gate of the manufacturer or at the customer's site. It may be done by the manufacturer/ buyer/ intermediary/ technician. In all such cases, the questions that arise are:

(a) Whether such assembly is manufacture?

(b) Do new goods emerge as a result of assembly?

Judicial Decisions on Assembly *vis-a-vis* Manufacture

Narne Tulaman Manufacturers Pvt. Ltd. V. CCE 1988 (38) E.L.T. 566 (S.C.).

The Hon'ble Supreme Court has held that as the tribunal had found that the appellant had fitted a platform, load cells and indicator system which in the assembled form became a weigh bridge, there was a commercial commodity, having a distinct name, character and use resulting in manufacture. The aspect whether the resultant product would become an immovable property was not argued or considered. Therefore, the general proposition would be that if the assembly results in a new commercial commodity with a distinct name, character and use, then it would amount to manufacture.

BPL India Ltd. Vs. CCE 2002 (143) E.L.T. 3

In the present case the Hon'ble Supreme Court held that assembly of imported kits of vcr with colour monitors imported in a disassembled condition amounted to manufacture since the end product had a distinct character and use and the process of assembly was done by technical experts or skilled persons.

Packing, Labelling and Branding Activities

Packing of dutiable goods is a process of manufacture. The definition of manufacture as contained in section 2(f) of the Act, covering incidental and ancillary activities thereunder, would incorporate within its ambit the activity of packing, which is a necessary adjunct to manufacture. Further, goods are normally treated as fully manufactured for the purpose of accounting in the statutory excise records at the stage where they are packed in their normal packing, without which they cannot be delivered in wholesale at the factory gate. In other words, the activity of packing of otherwise fully manufactured goods is the process which renders such goods marketable and consequently the activity of packing is part and parcel of manufacture. Reference is also made in this connection to section 4 of the Central Excise Act governing the determination of value of excisable goods. The aforesaid provisions of section 4 would also indicate that packing is always contemplated under excise law as a part of the entire process of manufacture by which input materials are transformed into commercially distinct, identifiable and marketable finished products. It is to be noted that for the goods

specified in the Third Schedule of the Central Excise Tariff, the process of packing or repacking of such goods in a unit container or labelling or re-labelling of containers amounts to manufacture. Further, the declaration or alteration of retail sale price or adoption of any other treatment on the goods to render the product marketable to the consumer also results in manufacture. The goods specified in the Third Schedule of the Central Excise Tariff are valued on MRP basis as per the provisions of Section 4A.

Further, several Chapters of the Central Excise Tariff also incorporate the duty rates on excisable goods packed in packages. In other words, the Tariff itself determines the duty rates of excisable goods in a fully packed and saleable condition. For example, milk powder is chargeable to duty only if it is put up in unit containers. In case it is produced and consumed within the factory of production without packing in such unit containers, there is no liability to duty. Unit containers are also defined in the Tariff as containers, large or small, designed to hold a predetermined quantity or number. Several examples of unit containers are also described therein.

The position in law however changes when excisable goods which are packed in bulk are charged to duty and are thereafter dispatched to outside godowns, wherein they are repacked into small containers. In such a situation, the principle in law is that since the bulk product has already been fully manufactured and has been marketed or dispatched in the factory, the repacking activity would not constitute manufacture in law. There are numerous decisions to this effect both of the Tribunal and of the High Courts. In **C.C.EX. Vs. Prabhat Packaging Corporation (1990) (47) ELT-112**, the Tribunal held that repacking of an already-manufactured product would not amount to manufacture in the excise law. Also, the reason why repacking would not constitute manufacture is that the activity does not result in the emergence of any commercially distinct end product since both the bulk duty paid finished products as well as the individually packed finished products are commercially known as one and the same articles. Hence, the test of transformation into a distinct end product is imperative and if according to the Hon'ble Supreme Court's decision in DCM's case, this test is not fulfilled, repacking would not amount to manufacture. The exception that would apply would be if the excisable goods are covered by clause (iii) of section 2(f).

Another aspect of the issue is that of packing together of a manufactured item together with a bought or purchased item. It was held by the tribunal that packing together of a fully manufactured product and the bought out item would not bring into existence any new commodity. Consequently, the duty liability would be restricted to the manufactured product only. The mere activity of packing together of two distinct goods in a single container would not bring into existence any new commodity; here it is important to distinguish the activity of packing together of two different products from that of assembly of the products together to form a distinct third product. In other words, while such packing would not constitute

manufacture, assembly would certainly constitute manufacture. Reference is made in this connection to the Supreme Court's decision in the *Narne Tulaman* case.

Coming now to the aspect of whether labelling and branding activities constitute manufacture or not, the settled position in law is that an unlabelled and a labelled product is normally treated in commercial parlance as the same and consequently the mere labelling of fully manufactured products would not constitute manufacture in law. The Bombay High Court in *Pioneer Tools and Appliances (P) Ltd. Vs. Union of India (1989) (42) ELT-384* has held that mere affixation of labels would not render the person who undertakes the said activity as a manufacturer since the activity would not constitute manufacture in law.

As far as the question of branding of goods is concerned, numerous decisions in this regard hold that such branding would not amount to manufacture. In most of these cases, the manufacturer was affixing the brand name of the customers on the specified goods and the Department sought to establish that the brand name owner was the manufacturer in law. This was negated by the Supreme Court in a series of three decisions in **Union of India Vs. Cibatul Ltd. (1985) (22) ELT- 302**, **Joint Secretary to Govt. of India Vs. Food Specialties Ltd. (1985) (22) ELT-324**, and in **Sidhosons Vs. UOI (1986) (26) ELT-881**. The question whether branding of already manufactured goods was a process of manufacture was not per se considered in these decisions and Court rendered its decision only on whether or not the brand name owner was the manufacturer under the excise law. However, in **Banner & Co. Vs Union of India (1994) (70) ELT-181**, the Calcutta High Court held that affixation of a brand name on specified goods did not amount to manufacture. Similarly, in the Pioneer Tools case (supra), the Bombay High Court impliedly held that the activity of branding carried out by a wholesale buyer on fully manufactured goods could not constitute manufacture under the excise law so as to require excise duty liability discharged on such an activity. The Apex Court agreed in this regard in *Metal Box (I) Ltd.(1996)*.

In view of the aforesaid position of law, wherever there are serious revenue implications, the Legislature has introduced the concept of artificial definition of manufacture to include the activity of repacking, relabelling or branding as amounting to manufacture. For example, you would find these activities as amounting to manufacture under Chapter 21 or Chapter 30 of the Tariff. Therefore, wherever the Tariff would state so, such activities would amount to manufacture.

Change in Tariff Heading/Sub-Headings be adopted for Identifying whether a Process Amounts to Manufacture

The manufacture and production of goods is the event for attracting the levy of duty. However, unless such goods are covered under the individual headings/sub-headings of the Chapters of the Central Excise Tariff, no duty liability would arise. There is thus an intricate link between

the manufacture of goods and the liability that would arise. The aforesaid aspect brings into focus the question whether there has to be a change necessarily from one Tariff Heading/sub-heading to another in order to bring the said activity within the ambit of the definition of manufacture under the excise law. In other words, the question to be answered is whether a change in Tariff heading or sub-heading between input material and the resultant finished product is required so as to render such finished products liable to duty.

This question was considered by the larger Bench of the Appellate Tribunal in **Guardian Plasticote Vs. C.C.EX. (1986) (24) T-542** wherein the Tribunal held that in such an eventuality, the definition of manufacture would be attracted. The reasoning was that there was a transformation from one identifiable and distinct article to another identifiable and distinct article, known differently in the trade parlance. It was held that since the market understood the two goods differently, the fact that the tariff headings or subheadings did not change as a result of the process was of no relevance for determining the chargeability.

The decision was upheld by the Hon'ble Supreme Court in its landmark decisions in **Laminated Packings (P) Ltd. Vs. C.C.EX. (1990) (49) ELT-326** and in **Union of India Vs. Babubhai Nychand Mehta (1991) (51) ELT-182**. The Supreme Court held that a process would amount to manufacture when input and output material were differentiated in the commercial or trade parlance and the fact that the same chapter heading or subheading would govern both the input and output material was not germane to the issue. The Supreme Ccourt in case of *Laminated Packings* case held that duty paid kraft paper and the resultant polyethylene laminated kraft paper falling under the same tariff entry is not relevant for determining dutiability of the goods as both are differently identifiable goods in the market. The Apex Court held that the commercial or trade parlance test was a safe and reliable test which must necessarily be adopted in such a situation to determine whether or not the process amounted to manufacture.

Therefore, the test would be of commercial differentiation and not whether the Tariff heading changes or not.

Determination of Taxable Event for Charge of Duty

Before getting into the discussion it will be relevant to note the differences between the exempted goods and the goods which are outside the purview of the Central Excise. Exempted goods are basically chargeable to duty but with an intention of giving relaxation, they are exempted from payment of duty. On the other hand, goods outside the purview of levy are goods which are not included in the tariff at all.

The taxable event for the charge of excise duty is the manufacture of goods as per section 3 of the Central Excise Act. However, the collection of duty is postponed to the stage of removal

of goods as per Rule 4 of the Central Excise Rules 2002. The question which arises for consideration is whether goods which are manufactured at the period in time when they were either not chargeable to duty or were exempted from duty could be charged to duty if, subsequent to manufacture but before removal, such goods become chargeable to duty, either due to their inclusion in the Tariff or due to withdrawal of the exemption from duty.

In its decision in *Wallace Flour Mills Vs. C.C.EX. (1989) (44) ELT-598*, the Supreme Court held that the taxable event for the liability to duty was manufacture of goods but the duty could be levied and collected at any later stage for administrative convenience. Merely because the payment of duty under Rules is postponed to the stage of removal, it could not be contended that the removal of goods has become the taxable event for the levy of duty. The excisable goods which were chargeable to duty under the Tariff at the time of manufacture but were exempted under an exemption notification will be liable to payment of duty if, post manufacture and prior to removal, such exemption from duty is withdrawn.

However, in cases where the goods were outside the purview of the Tariff at the time of manufacture, such goods would not be chargeable to duty even though, subsequent to manufacture but prior to removal, such goods were brought within the purview of the Tariff or were charged to a duty of excise by means of an amendment to the Tariff. In other words, since the goods were not excisable goods as per the provisions of section 2(d) at the time of manufacture, they would not be liable to duty even though they were brought within the purview of the aforesaid section prior to removal from the factory. This was the implication of the decision of the Supreme Court in *Vazir Sultan Tobacco Co. Ltd vs CCE 1996 (83) ELT 3.* In this case a special excise duty of 5% of the amount of excise duty was introduced on the manufacture of cigarettes. The assesse contended that the special duty is not payable as the goods were manufactured prior to the introduction of new levy. The Supreme Court also held that the levy can be imposed only on goods manufactured after the date of levy.

To summarise, the current position in law is that exempted goods will be chargeable to duty at the time of removal if, subsequent to manufacture but before removal, the exemption from duty is withdrawn. However, goods that are not covered within the ambit of the Central Excise Tariff at the time of manufacture will not be chargeable to duty even though subsequent to manufacture but before removal such goods are bought within the purview of the tariff or are made chargeable to a specified rate of duty under the Tariff.

Other provisions

Section 83 of the Finance Act, 1994 (ST law) adopts many provisions of the CE Act, 1944. Hence it could be stated that the provisions of the CE law are aligned with or allied to the ST provisions.

CENTRAL SALES TAX (CST) ACT, 1956

INTRODUCTION

Taxation of inter-state sale transactions has vexed the law-makers since independence. To overcome this problem, Article 286 was introduced in the Constitution. But unfortunately, it led to further problems and confusion. To remove the confusion, the Act was amended by the Constitution (Sixth Amendment) Act, 1956, whereby:

1. A new entry 92A was inserted in the Union List bestowing on the Union the power to levy *"tax on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce"*.

2. Entry 54 in the State List was substituted and the States' powers were limited to levy *"taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I (Union List)*".

3. The Government of India was given more power by inserting a new sub-clause (g) in Article 269(1). Article 269(1)(g) provides that the Government of India shall levy and collect taxes on the sale or purchase of goods other than newspapers where such sale or purchase takes place in the course of inter-State trade or commerce. However, it also provided for the assignment of such taxes to the States in the prescribed manner.

   Further, a new clause (3) was inserted in Article 269, whereby the Parliament was empowered to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce.

4. Article 286, which put restrictions on the imposition of taxes on the sale or purchase of goods was amended. The amended article stipulates as follows:

   i. No law of a State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place—

      a. outside the State or

      b. in the course of the import of goods into or export of the goods out of the territory of India.

   ii. The Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1) namely,

sale or purchase of goods outside the State or in the course of the import into or export out of the territory of India.

iii. Any law of a State shall, in so far as it imposes or authorises the imposition of a tax on the sale or purchase of goods declared by the Parliament by law to be of special importance in inter-State trade or commerce, be subjected to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax, as the Parliament may, by law, specify.

Acting on the powers conferred by the above amendments, the Central Government introduced the Central Sales Tax Bill, 1956.

Objects of the Central Sales Tax Act, 1956

The Central Sales Tax Act has been designed:

(i) to formulate principles for determining :

(a) when a sale or purchase of goods takes place in the course of inter-State trade or commerce,(Section 3); or

(b) when a sale or purchase takes place outside a State,(Section 4); or

(c) when a sale or purchase takes place in the course of import into or export from India (Section 5).

(ii) to provide for the levy, collection and distribution of taxes on sale of goods in the course of inter-State trade or commerce;

(iii) to declare some goods to be of special importance in inter-State trade or commerce (Section 14);

(iv) to subject the State laws to restrictions and conditions in the matter of imposing taxes on the sale or purchase of goods declared by the Central Government to be of special importance (Section 15).

CHARGE OF CENTRAL SALES TAX ACT, 1956

Section 6(1) provides that subject to the other provisions contained in the Central Sales Tax Act, 1956, *every dealer shall be liable to pay tax under this Act on sales of all goods, other than electrical energy, effected by him in the course of inter-State trade or commerce during any year.*

IMPORTANT TERMS AS DEFINED IN CENTRAL SALES TAX ACT, 1956

Appropriate State [Section 2(a)]

"Appropriate State" means:

(i) In relation to a dealer who has one or more place of business situated in the same State, that State;

(ii) In relation to a dealer who has places of business situated in different States, every such State with respect to the place or places of business situated within the territory.

Business [Section 2(aa)]

"Business" includes:

(i) any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce manufacture, adventure or concern, is carried on with a motive to make gain or profit and whether or not gain or profit accrues from such trade, commerce, manufacture, adventure or concern; and

(ii) any transaction in connection with or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern.

Dealer [Section 2(b)]

"Dealer" means any person who carries on (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods, directly or indirectly, for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and includes-

(i) a local authority, a body corporate, a company, any cooperative society or other society, club, firm, Hindu undivided family or other association of persons which carries on such business;

(ii) a factor, broker, commission agent, del credere agent, or any other mercantile agent, by whatever name called, and whether of the same description as hereinbefore mentioned or not, who carries on the business of buying, selling, supplying or distributing goods belonging to any principal whether disclosed or not; and

(iii) an auctioneer who carries on the business of selling or auctioning goods belonging to any principal, whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal.

Explanation 1: Every person who acts as an agent, in any State, of a dealer residing outside that State and buys, sells, supplies, or distributes, goods in the State or acts on behalf of such a dealer as

(i) a mercantile agent as defined in the Sale of Goods Act, 1930, or

(ii) an agent for handling of goods or documents of the title relating to goods, or

(iii) an agent for the collection or payment of the sale price of goods or as a guarantor for such collection or payment, and every local branch or office in a State of a firm registered outside that State or a company or other body corporate, the principal office or headquarters whereof is outside that State, shall be deemed to be a dealer for the purposes of this Act.

Explanation 2: A Government which, whether or not in the course of business, buys, sells, supplies or distributes, goods, directly or otherwise, for cash or for deferred payment or for commission, remuneration or other valuable consideration, shall, except in relation to any sale, supply or distribution of surplus, unserviceable or old stores or materials or waste products or obsolete or discarded machinery or parts or accessories thereof, be deemed to be a dealer for the purposes of this Act.

Goods [Section 2(d)]

Goods include all materials, articles, commodities and all other kinds of movable property, but does not include newspapers, actionable claims, stocks, shares and securities.

ANALYSIS: As per the definition of goods, they must be movable, and include all kinds of movable property. However, the following are specifically excluded from the definition of goods:

(i) **Newspapers:** Newspapers are not goods under the Central Sales Tax Act and State VAT laws. Although in a general sense, newspapers are goods, but they have been specifically excluded from the definition of goods in view of Entry 92A of the Union List and Entry 54 of the State List.

(ii) Stocks, shares and securities

(iii) Actionable claims: are outside the purview of the definition of goods under the CST Act. Actionable claim means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the civil courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent [Section 3 of the Transfer of Property Act, 1882].

Note: Electricity is capable of abstraction, consumption and use and it can be transmitted, transferred, delivered, stored, possessed, etc. and is, therefore, goods, but it has specifically been excluded from the purview of the CST by the charging section.

Registered Dealer [Section 2(f)]

"Registered Dealer" means a dealer who is registered under Section 7.

No dealers can make an inter-State sale unless they are registered dealers under the Central Sales Tax Act, 1956.

Sales

Sale, with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or deferred payment or for any other valuable consideration, and includes

(i) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) a delivery of goods on hire-purchase or any system of payment by installments;

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(vi) a 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

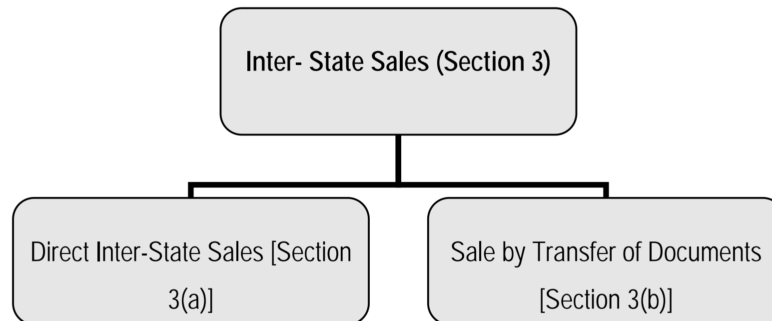
not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

but does not include a mortgage or hypothecation of or a charge or pledge on goods.

Sales Tax Law [Section 2(i)]

Sales tax law means any law for the time being in force in any State or part thereof which provides for the levy of taxes on the sale or purchase of goods generally or ***on any specified goods expressly mentioned in that behalf*** and **includes** Value Added Tax (VAT) law, and **"general sales tax law"** means the law for the time being in force in any State or part thereof which provides for the levy of tax on the sale or purchase of goods generally and **includes** VAT law.

INTER-STATE SALE



A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce, if the sale or purchase:

(a) Occasions the movement of the goods from one State to another, or

(b) Is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation 1: Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2: Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely

of the fact that in the course of such movement the goods pass through the territory of any other State.

Sales/ Purchase which occasion the movement of goods from one State to another [Section 3(a)]

'Occasion the movement of goods' means goods moved by reasons of sale and it shall be associated with the transfer of property from the seller to the buyer, as defined in the Sale of Goods Act. It is necessary that the goods should have moved from one State to another in pursuance to contract of sales including agreement of sale. In this regard, the following points merit consideration:

The stipulation for movement of goods outside the State may be either express or implied

It is immaterial in which State the ownership of the Goods is passed on to the buyers

Movement of Goods should be incident to sale and should be necessitated by the contract of sale

Mode of Transport of Goods is immaterial

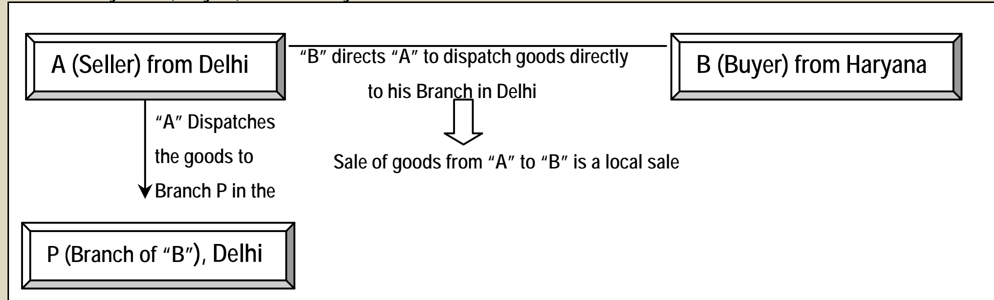
For the purpose of Section 3(a), there is no distinction between unascertained future goods and goods which are already in existence, if at the time when the sale took place these goods come into existence.

Note: Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement, the goods pass through the territory of any other State [Explanation 2 to section 3].

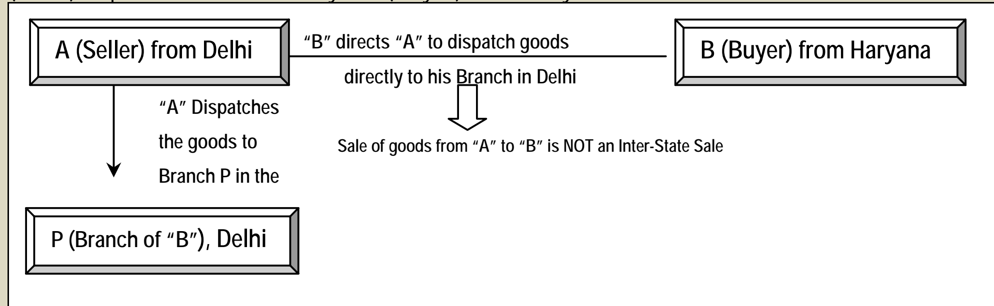
A sale or purchase of gas introduced into a pipeline in one State and taken out in another State transported through a common carrier pipeline or common transport or distribution system would be treated as an inter-State Sale. The Central Government proposes to include Explanation 3 to Section 3 of the CST Act, 1956 to give effect to the above.

Illustration of Inter-State Sales under Section 3(a)

Example 1 : "A" (Seller) from Delhi sent specific goods to B's branch "P" (Delhi) in pursuance of order by "B" (Buyer) from Haryana in the other State.



Example 2 : "A" (Seller) from Delhi sent some goods (unascertained goods) to B's branch "P" (Delhi) in pursuance of order by "B" (Buyer) from Haryana in the other State.



Sales/ Purchase is effected by a transfer of documents of title to the goods from one State to another [Section 3(b)]

As per section 3(b), a sale or purchase shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase is affected by a transfer of documents of title to the goods ***during their movement from one State to another***.

ANALYSIS

(a) **Meaning of *'Documents of title to the goods'***: Documents of title to the goods is generally a lorry receipt in case of transport by road, railway receipt in case of transport by rail, bill of lading in case of transport by sea and airways bill in case of transport by air.

Document of title to the goods substantiates that the person holding the document has the title to the goods mentioned in the document. ***Transfer of title to the goods*** means transfer of the right of possession of such goods or control over such goods.

Thus, a person in whose name the document of title to the goods is endorsed would be entitled to the delivery of goods.

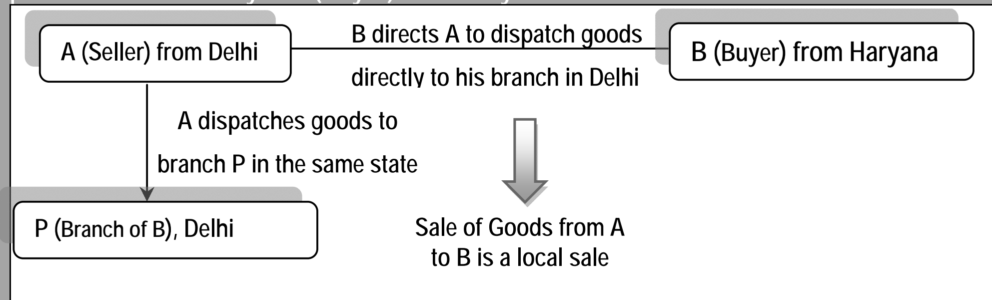
(b) **Transfer must be during the movement of goods:** A sale would be covered under clause (b) of section 3, if sale/purchase is effected by transfer of documents of title to the goods *during the movement of such goods* from one place to another.

Commencement and termination of movement of goods: Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee [Explanation 1 to section 3].

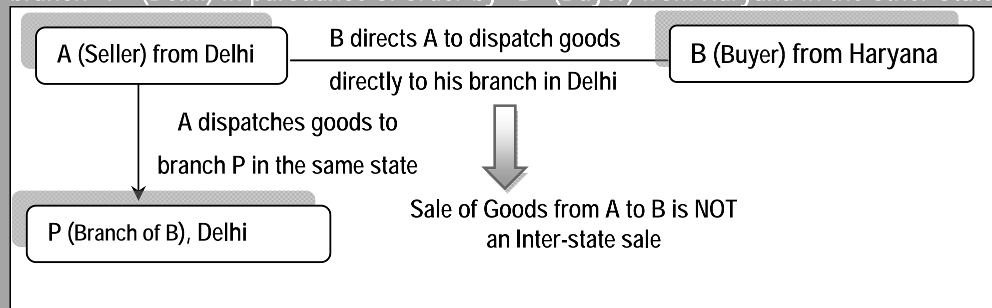
Thus, any sale by transfer of documents of title to the goods after the goods are delivered to a carrier, but before *physical delivery of such goods is taken* at the final destination would be termed as inter-State sale as per section 3(b).

Illustration of Inter-State Sales under Section 3(a)

Example 1 : "A" (Seller) from Delhi sent specific goods to B's branch "P" (Delhi) in pursuance of order by "B" (Buyer) from Haryana in the other State.



Example 2 : "A" (Seller) from Delhi sent some goods (unascertained goods) to B's branch "P" (Delhi) in pursuance of order by "B" (Buyer) from Haryana in the other State.

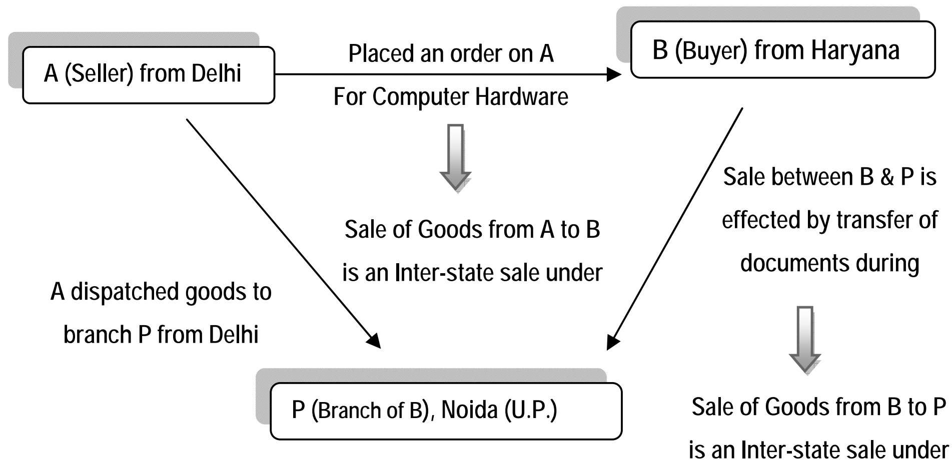


Inter-State stock transfer/ Inter-State consignment transfer

Many a times, a dealer (principal) sends goods to his consignment agent in another State so that the goods are sold by the agent in that State on his behalf. Similarly, a dealer may send the goods to his own branch/depot in another State from where such goods are to be sold. Section 6A applies to a situation, where the goods are sent by a dealer outside the State to his other place of business or his agent/principal in the other State.

In the aforesaid cases, although goods have been transferred from one State to another, such movement of goods is not being occasioned on account of any pre-existing agreement, the property in goods does not pass from principal to the agent. Thus, there is no sale and consequently, no CST is payable.

The burden of proving that the movement of those goods was occasioned otherwise than by way of sale shall be on the dealer transferring the goods to his branch/ agent/ principal. For this purpose, he shall furnish 'Form F' along with the evidence of movement of goods to the assessing authority, within 3 months from the end of the month to which the transactions relate to.



Sale outside the State

As per Article 286 and Entry 54 of the Constitution of India, it is apparent that a State can levy sales tax only on intra-State sales of goods provided such sales take place inside such State and outside all other States.

The principles as to when a sale is deemed to take place inside a State and outside a State have been formulated under section 4 of the Central Sales Tax Act. It reads as follows:-

(1) Subject to the provisions contained in Section 3, when a sale or purchase of goods is determined in accordance with sub-Section (2) to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States.

(2) A sale or purchase of goods shall be deemed to take place inside a State if the goods are within the Stat-

(a) in the case of specific or ascertained goods, at the time the contract of sale is made; and

(b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation.

Explanation: Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of this sub-Section shall apply as if there were separate contracts in respect of the goods at each of such places.

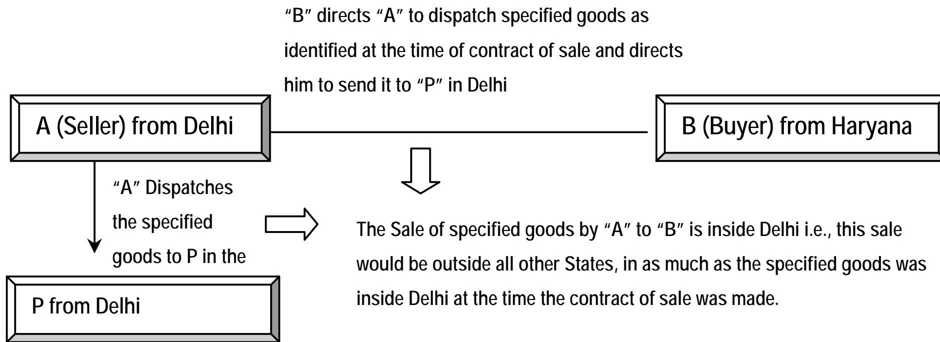
Specific Goods
• Goods identified and agreed upon at the time a contract of sale is made - Section 2(14) of the Sales of Goods Act, 1930. Thus, these are the goods which are in existence and which are identified by the parties at the time of contract of sale.

Unascertained Goods
• The goods defined only by description and not identified and agreed upon at the time of contract. Unascertained Goods may be existing goods or future goods.

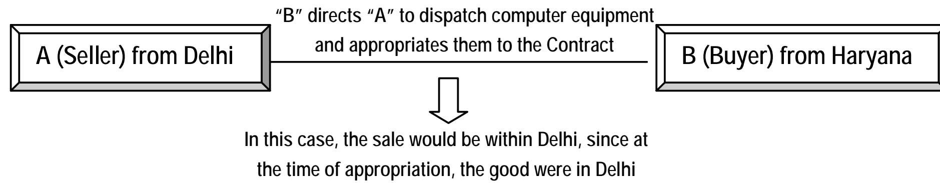
Ascertained Goods
• Unascertained Goods become ''ascertained'', when after the contract of sales has been made, the goods are identified in accordance with the agreement.

Illustrations explaining the concept of sale inside a State and sale outside a State

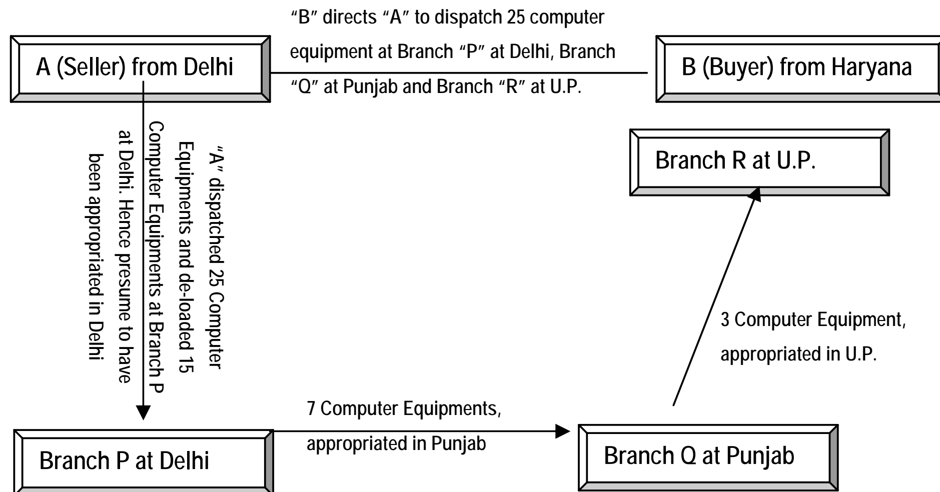
Example 1: Sale of specific goods



Example 2: Sale of unascertained goods, though appropriated in Delhi to the Contract



Example 3: Sale of specified/ unascertained goods situated at more than one places



Note :

Section 4 is subject to the provisions of Section 3. It implies that the provisions of Section 4 would apply only when the sale of goods is not an 'inter-State sale' under Section 3. In case of intra-State sales, sales tax shall be levied by the State inside which such sale is deemed to have taken places.

Sale in course of import/export

Article 286(1)(b) of the Constitution of India stipulates that no State can impose a tax on the sale or purchase of goods where such sale or purchase takes place in the course of import/ export. Further, clause (2) of Article 286 confers on the Parliament the power to formulate principles for determining when a sale or purchase of goods shall be deemed to have taken place in the course of import/export.

In exercise of the powers conferred by the Constitution, Section 5 was introduced. Section 5 stipulates as to when a sale or purchase is deemed to take place in the course of import/export. Central sales tax is not leviable on sale in the course of export/import. The provisions of Section 5 are discussed hereunder:

Sale in the Course of Export

A sale or purchase of goods shall be deemed to take place in the course of the export of goods out of the territory of India only if:

(i) sale or purchase occasions such export, or

(ii) sale or purchase is effected by a transfer of documents of title to the goods after they have crossed the customs frontiers of India, or

(iii) it is a penultimate sale..

Sale/purchase occasioning the export

In such a case

(i) there shall be a sale of goods;

(ii) such a sale shall occasion export, involving transhipment of goods from one country to the other and shall be between two parties of two countries and

(iii) the final result of transhipment shall be that the goods have come to rest in the other country.

Sale or purchase effected by a transfer of documents of title to the goods

In such a case, sale is effected by a transfer of documents of title to the goods, after they have crossed the customs-frontiers of India. Such transfer of documents of title to the goods can take place immediately on loading of goods in a conveyance after obtaining clearance from the customs authorities for export.

Penultimate sales for export

Penultimate sale of those goods is the sale preceding the sale occasioning the export. Such sale would also be deemed to be the sale in course of exports and would not be liable to central sales tax.

However, the penultimate sale or purchase is considered a sale or purchase in the course of export only if the dealer selling the goods furnishes a declaration in Form H, duly filled in and signed by the exporter to whom the goods are sold, to the prescribed authority in the prescribed form and manner.

Conditions to be fulfilled for a sale to be considered as penultimate sale:

A sale is considered as the penultimate sale if the following conditions are fulfilled:

(a) There is a pre-existing ***agreement or order in relation to export.***

(b) Penultimate sale must be, ***after the agreement*** with the foreign buyer, for the purpose of complying with such agreement or order in relation to export.

(c) Same goods which are sold in the penultimate sale must be exported, though those goods may not be in the same form.

Purchase of ATF by any designated Indian carrier for the purposes of its international flight deemed to take place in course of export

If any designated Indian carrier purchases Aviation Turbine Fuel for its international flight, such a purchase shall be deemed to take place in the course of the export of goods out of the territory of India.

In this regard, the following points merit consideration:

- CST and sales tax within the State will not be applicable on such a purchase as it is not an inter-State sales, but a purchase in the course of the export.

- Exemption is only available to Indian carriers notified by the Central Government in this behalf. Some of the designated Indian carriers so specified are Air India, Indian Airlines, Jet Airways, and Spicejet.
- Exemption is available only in the case of international flights and not on domestic flights.

Sale in the Course of Import

A sale or purchase of goods shall be deemed to take place in the course of the import of goods into the territory of India only if:

(i) sale or purchase occasions such import, or

(ii) sale or purchase is effected by a transfer of documents of title to the goods before they have crossed the customs frontiers of India,

Sale occasioning the import

In such a case:

(i) there shall be a sale of goods;

(ii) such a sale shall occasion import, involving transhipment of goods from one country to the other and shall be between two parties of two countries and

(iii) the final result of transhipment shall be that the goods have come to rest in India.

Sale or purchase effected by a transfer of documents of title to the goods

In such a case, sale is effected by a transfer of documents of title to the goods before they have crossed the customs-frontiers of India. Such a transfer of documents of title to the goods can take place at any time before the clearance of goods from the customs. The act of Importation starts when the goods cross the customs barrier in a foreign country and ends when they cross the customs barrier in the importing country.

Further, if the documents are transferred when goods are in the bonded warehouse of the customs, it will be treated as transfer of documents before the goods cross the customs barrier. However, on the other hand, if the imported goods are cleared from the customs and then sold to a buyer in India, such sale would not be termed as sale in the course of import. Such a sale shall be inter-State sale or intra-State sale, as the case may be.

RATES OF TAX ON SALES IN THE COURSE OF INTER-STATE TRADE OR COMMERCE

As per Section 8(1) of the CST Act, 1956, the liability to pay Central Sales Tax is on the dealer who sells goods in the course of inter-State trade or commerce. For computing CST payable, the applicable rates would be determined as per the provisions of sub-Sections (1) to (4) of Section 8, in the following manner:

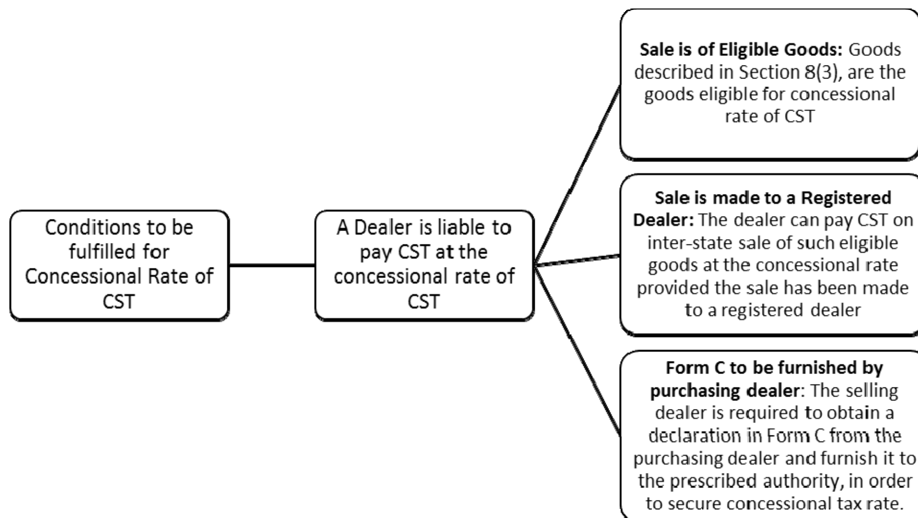
(A) CASES WHERE CONCESSIONAL RATE OF CST IS APPLICABLE: The concessional rate of CST is:

(i) 2% of the turnover of the dealer (provided the goods purchased are listed in an appropriate column in the registration certificate in Form B of the buying dealer

or

(ii) the rate applicable to the sale or purchase of such goods inside the appropriate State[3] under the sales tax law of that State

whichever is **lower.**



[3] Appropriate State means (i) in relation to a dealer who has one or more places of business situated in the same State: that State; (ii) in relation to a dealer who has places of business situated in different States: every such State with respect to the place or places of business situated within its territory [Section 2(a)].

(B) **CASES WHERE CONCESSIONAL RATE OF CST IS NOT APPLICABLE:** In case any of the aforesaid three conditions are not fulfilled, the rate of CST would be the rate applicable to the sale or purchase of such goods inside the appropriate State under the sales tax law of that State.

DETERMINATION OF TURNOVER FOR CENTRAL SALES TAX

Turnover means the aggregate of the sale prices received and receivable by him in respect of sales of any goods in the course of inter-State trade or commerce made during any prescribed period[4] and determined in accordance with the provisions of this Act and the rules made thereunder [Section 2(j)].

DEDUCTIONS TO BE MADE WHILE COMPUTING THE TURNOVER

While determining the turnover of a dealer for the purposes of computing CST payable, the following deductions shall be made from the aggregate of the sale prices:

(i) **Central sales tax payable:** The aggregate of sales price is taken inclusive of central sales tax, whether it is shown separately in the invoice or not.

Consequently, the turnover is arrived at by deducting the CST from the aggregate of sales price. CST is calculated as follows:

$$\textbf{Central Sales Tax payable} = \text{Aggregate of Sales Price} \times \frac{\text{Rate of Tax}}{100 + \text{Rate of Tax}}$$

(ii) **Sale price[5] of all goods returned by the purchasers:** Deduction of sale price of all goods returned is available from the aggregate of the sales prices provided:

(a) the goods are returned by the purchaser within a period of 6 months from the date of delivery of the goods, and

(b) satisfactory evidence of such return of goods and of refund or adjustment in accounts of the sale price thereof is produced before the competent authority.

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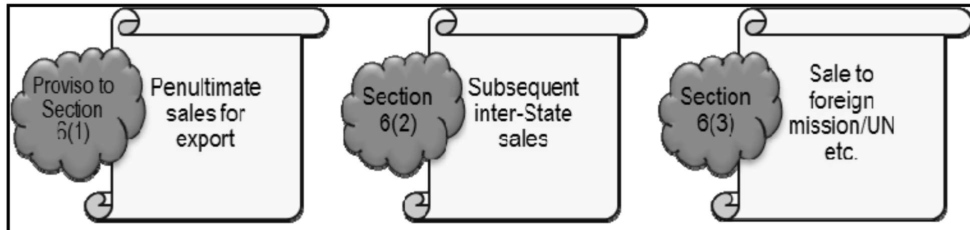
[4] **Prescribed period** is the period in respect of which a dealer is liable to submit returns under the general sales tax law of the appropriate State.

[5] ***Sale price*** means the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery or the cost of installation in cases where such cost is separately charged [Section 2(h)].

(iii) Such other deductions as the Central Government may prescribe, keeping in mind the prevalent market conditions, facility of trade, and interests of consumers.

EXCEPTIONS TO LEVY OF CENTRAL SALES TAX (CST)



I. **No CST on penultimate sales for export** [Proviso to Section 6(1)]

A dealer shall not be liable to pay CST on the penultimate sales for export under Section 5(3)[6].

II. **No CST on subsequent sales** [Section 6(2)]

Where a sale of any goods in the course of inter-State trade or commerce has either occasioned the movement of such goods from one State to another or has been effected by a transfer of documents of title to such goods during their movement from one State to another, any subsequent sale during such movement effected by a transfer of documents of title to such goods to a registered dealer, if the goods are of description referred to in section 8(3), shall be exempt from tax under this Act.

However, no such subsequent sales shall be exempted from tax under this sub-Section unless the dealer effecting the sale furnishes to the prescribed authority within three months after the end of the period to which the declaration/certificate relates or within such further time as that authority may, for sufficient cause, permit,-

(a) a certificate duly filled and signed by the registered dealer from whom the goods were purchased containing the prescribed particulars in a prescribed form obtained from the prescribed authority (Form E-I[7]/ Form E-II[8]); and

(b) if the subsequent sale is made to a registered dealer, a declaration referred to in sub-Section (4) of Section 8 (Form C).

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[6] The provisions explaining penultimate sale for exports have been discussed in detail subsequently in this Unit.

[7] *Form E-I is issued by the selling dealer who first moves the goods in case of inter-State sales.*

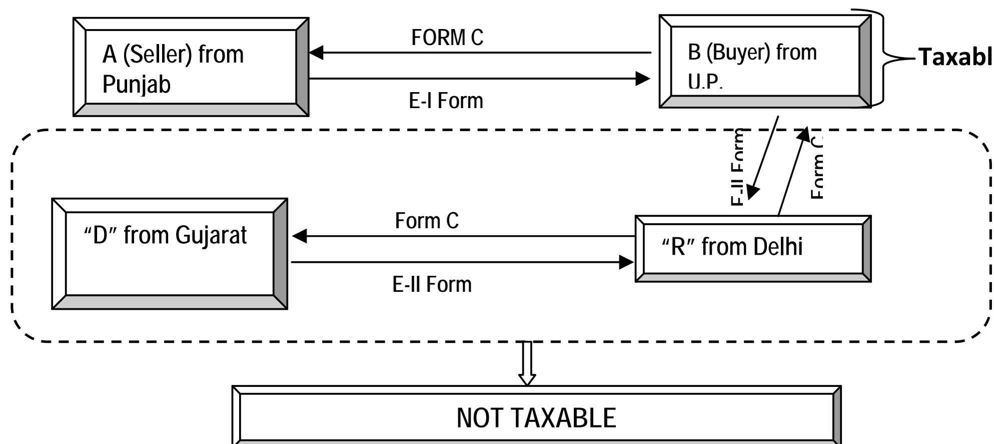
[8] *Form E-II is issued by the second or subsequent transferor of such goods*

Further, it shall not be necessary to furnish 'Form C' as referred to in clause (b) above in respect of a subsequent sale of goods if,-

(a) the sale or purchase of such goods is, under the sales tax law of the appropriate State, exempt from tax generally or is subject to tax generally at a rate which is lower than 2% (whether called a tax or fee or by any other name); and

(b) the dealer effecting such a subsequent sale proves to the satisfaction of the prescribed authority that it is of the nature referred to in this sub-Section.

Example: "A" seller of Punjab sells his goods to B of U.P, registered dealer. As per the contract, "A" was required to deliver the goods in U.P. For this purpose, "A" dispatches the goods from Punjab to U.P. During the movement of goods, "B" sells the goods by transfer of documents of title to the goods to "R" of Delhi (registered dealer) who in turn sells them to "D" of Gujarat (registered dealer) during such movement. "D" ultimately takes the delivery of the goods. Here, all the four dealers are registered dealers.



Levy of CST in case subsequent sales is taxable: If a subsequent sale is made to an unregistered dealer or if necessary certificates/declaration are not furnished, the subsequent sale would become taxable. Levy and collection of CST, in such cases, would be in the States:

(a) **Where such subsequent sale has been effected by a registered dealer:** It is the State in which the registered dealer obtains or could have obtained "Form C" from the sales tax authorities; in other words, the State in which he is registered.

(b) **Where such subsequent sale has been effected by an unregistered dealer:** It is the State from which the subsequent sale has been effected [Proviso to Section 9(1)].

III. **No CST on sale to foreign missions/UN etc.:** No CST is payable on sale of any goods made by a dealer, in the course of inter-State trade or commerce, to any official or personnel/consular or diplomatic agent of:

(i) any foreign diplomatic mission or consulate in India or

(ii) the United Nations or any other international body.

They are entitled to privileges under any convention or agreement to which India is a party or under any law for the time in force if such official, personnel, consular or diplomatic agent, as the case may be, has purchased such goods for himself or for the purposes of such mission, consulate, United Nations or any other body.

However, the aforesaid exemption is available only if the dealer selling such goods furnishes to the prescribed authority Form J obtained from the official, personnel, consular or diplomatic agent.

EXEMPTION FROM CST

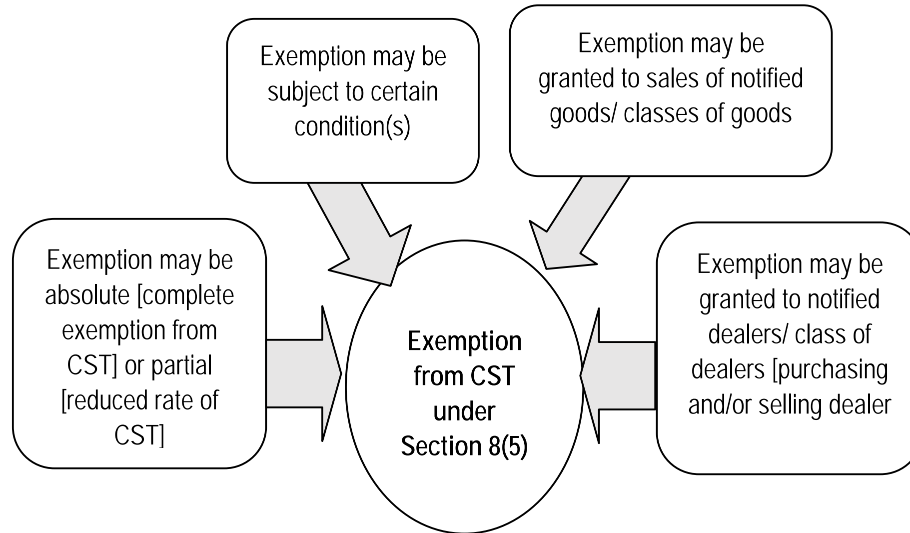
The following exemptions may be granted from the CST in case of sale to a registered dealer:

(I) **Exemption by notification granted by the State Government** [Section 8(5)]: A State Government may grant exemption, by issuing a notification in the Official Gazette, in respect of the inter-State sales effected from the State subject to the fulfilment of the following conditions:

(a) The State government is satisfied that such exemption is necessary in the **public interest**.

(b) The sale must be made to a **registered dealer**.

(c) The selling dealer must furnish **Form C** as obtained from the registered purchasing dealer.



(II) Exemption from CST to a sale to unit/developer in Special Economic Zone (SEZ) [Section 8(6), 8(7) & 8(8)]: A registered dealer in SEZ (unit in SEZ/developer of SEZ) can obtain goods from outside SEZ, for specified purposes, without payment of CST. The following conditions must be satisfied to claim the said exemption:

1. **Purposes for which unit/ developer of SEZ[9] may use the goods sold:**

   (a) ***Unit in SEZ***, for the purpose of setting up, operating, maintaining, manufacturing, trading, processing, assembling, repairing, re-conditioning, re-engineering, packaging or for use as packing material or packing accessories in a unit located in any SEZ.

   (b) ***Developer of SEZ***, for the purpose of development, operation and maintenance of the SEZ by a developer.

[9] A Special Economic Zone (SEZ) is a geographically bound zone where the economic laws relating to export and import are more liberal as compared to other parts of the country. These are like a separate island within the territory of India. SEZs are projected as duty free area for the purpose of trade, operations, duty, and tariffs. SEZ is considered to be a place outside India for all tax purpose. Within SEZs, a unit may be set-up for the manufacture of goods and other activities including processing, assembling, trading, repairing, reconditioning, making of gold/ silver, platinum jewellery etc. As per law, SEZ units are deemed to be outside the customs territory of India. Goods and services coming into SEZs from the domestic tariff area or DTA are treated as exports from India and goods and services rendered from the SEZ to the DTA are treated as imports into India.

2. **Authorised unit/ developer:** The unit in SEZ must be authorised to establish such a unit or a developer of SEZ must be authorized to develop, operate and maintain such a SEZ, by the authority specified by the Central Government in this behalf.

3. **Sale to registered dealer:** Goods must be sold to a unit/developer of SEZ who is a registered dealer.

4. **Declaration to be furnished:** The purchasing dealer has to submit a declaration in Form I.

5. **Goods specified in the registration certificate:** Goods should be of such class or classes as are specified in the Certificate of registration of the registered dealer

Certain goods to be of special importance in inter-State trade or commerce

The Central Sales Tax Act, 1956 provides for levy of tax on inter-State sales as well as rules to determine when any sale or purchase of goods shall be deemed to be effected in the course of inter-State trade or commerce, import or export and outside the State. It also provides the list of goods of special importance and specifies restrictions on the power of States to levy tax on sale or purchase of such declared goods. Declared goods under Section14 of the CST Act include cereals like rice, paddy, wheat and coarse grains, coal and coke, cotton, cotton fabrics and yarn, crude oil, hides and skins, iron and steel, jute, oilseeds, pulses, sugar and Khandasari sugar, and woven fabrics of wool. CST on declared goods shall be calculated at a maximum of 5% or the local Value Added Tax rate applicable for the sale/purchase of goods inside the appropriate State if it is less than 5%. The State Government cannot levy sales tax on these goods exceeding 5%. .

Levy and collection of tax and penalties

- Where the tax is payable by the dealer under the CST Act on sales of goods effected by him in the course of inter-State trade or commerce, the tax shall be levied by the Central Government and the tax so levied shall be collected by the Government of the State from where the movement of goods has commenced.

- In the case of a sale of goods during their movement from one State to another, being a sale subsequent to the first sale in respect of the same goods and if such a first inter-State sale does not fall under Section6(2) as stated above, then the tax shall be levied and collected as follows.

- Where such a subsequent sale has been effected by a registered dealer in the State from which the registered dealer obtained or as the case may be could have obtained the Form prescribed for the purposes of Section8(4) of the CST Act in connection with the purchase of such goods.

- Where such a subsequent sale has been effected by an unregistered dealer in the State from which such subsequent sale has been effected.

- **Summary**

Sale u/s 3(a)	State from which the movement of goods started
Subsequent sale made by a Registered dealer	State where he is registered
Subsequent sale made by an Unregistered dealer	State where such goods are located at the time the subsequent sale has been effected

- On the whole. one can say that a subsequent inter-State sale can be allowed exemption if all the inter-State sales are effected from one registered dealer to another registered dealer.

- Under the general sales tax law of a State, the authorities are empowered to assess, reassess, collect and enforce payment of any tax on behalf of the Central Government. They can exercise all the provisions available within the State law, including provisions applicable to returns, provisional assessment, advance payment of tax, registration of the transferee, compounding of offences, etc. If there is no general sales tax law in a State, the Central Government may by rules impose all the necessary provisions for that State. The interest provisions and penalty provisions applicable in the general sales tax law will be applicable under the CST law also.

VALUE ADDED TAX (VAT) LAWS

Basic Concepts of State-Level Value Added Taxes

To avoid a multi-level taxation system and to negate the cascading effect of taxes, the Empowered Committee of State Finance Ministers brought out a ***White Paper*** that provided the base for the preparation of various State VAT legislations. Broadly, the White Paper consists of the following:

(a) Justification of VAT and Background

(b) Design of State-Level VAT.

(c) Steps taken by the States.

What is Value Added Tax (VAT)?

'Value Added Tax (VAT)' acquires its legal status from Entry 54 of the State List for which the States are sovereign to make laws. VAT is a tax on the value added to the commodity at each stage in the production and distribution chain. It is a system to collect the tax on the value at the final or retail point of sale. Under the VAT system, a dealer collects tax on his sales, retains the tax paid on his purchase and pays balance to the Government Treasury. It is a consumption tax because it is borne ultimately by the final consumer. For example, A retailer has an input worth ₹ 1,00,000/- on its purchases and sales are worth ₹ 2,00,000/- in a month, and input tax rate and output tax rate are 4% and 10% respectively, then input tax credit/set-off and calculation of VAT will be as shown below:

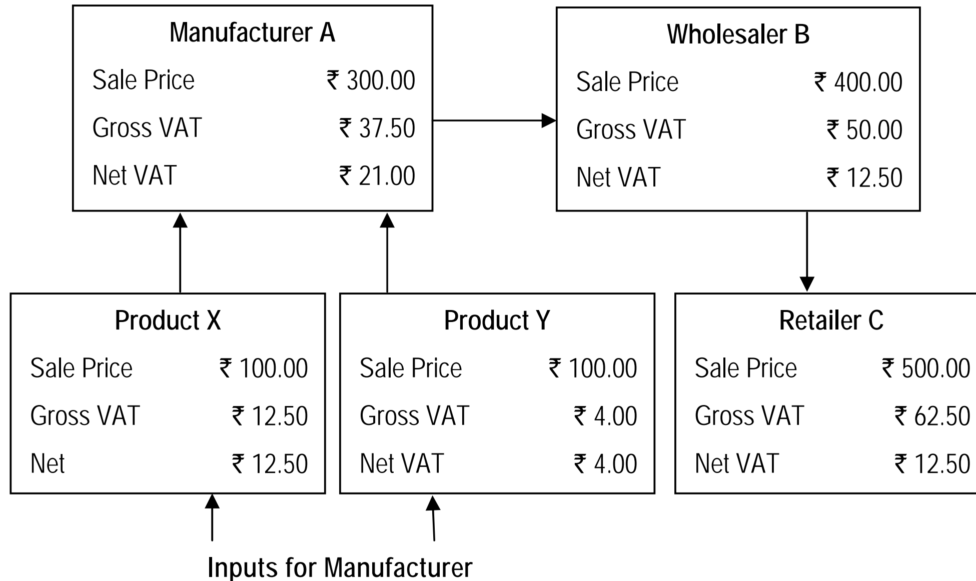
(a)	Input purchased within the month	:	₹	1,00,000.00
(b)	Output sold in the month	:	₹	2,00,000.00
(c)	Input Tax Credit @ 4%	:	₹	4,000.00
(d)	Output Tax Payable @ 10%	:	₹	20,000.00
(e)	VAT Payable for the month [(d)- (c)]	:	₹	16,000.00

VAT is an important constituent of the tax structure of India and can be called a multi- point system of taxation.

How does VAT operate?

Value Added Tax (VAT) is levied as a proportion of the value added at each stage of

production or distribution (i.e., sales minus purchase) which is equivalent to wages plus interest and other costs and profits. To illustrate, a chart of the transactions is given below:



Problems with Erstwhile Sales Tax System

The biggest drawback of the sales tax regime of taxation was the cascading effect of taxes since sales tax was levied on the gross value without allowing any credit or set-off for the taxes paid on inputs (i.e., tax is levied on gross value). This cascading effect of taxes resulted in increased consumer prices by an amount higher than what accrued to the exchequer by way of revenues from it.

In the VAT regime of taxation, a set-off is given for input tax on the basis of tax paid on previous purchases. Further, in the erstwhile sales tax structure, there were multiple taxes for the same transaction, such as turnover tax, surcharge on sales tax, additional surcharge, etc. With the introduction of VAT, these other taxes have been abolished. As a result, the overall tax burden has been rationalized, and prices in general have come down. Moreover, the VAT largely replaced the inspection system by a system of built-in self-assessment or a self-policing system by the dealers themselves. Thus, the tax structure has become simple and transparent, which has improved tax compliance and augmented revenue as well.

State Value Added Tax

With effect from 01.04.2005 most States in India have replaced sales tax with the value added taxes under Entry 54, list II of the VII Schedule to the Constitution of India, which read as, *"Taxes on sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I"*. The essence of the VAT system is in providing set-off for the tax paid earlier and this is given effect through the concept of input tax credit/ rebate.

VAT is based on the value addition to goods, and the related VAT liability of a dealer is calculated by deducting input tax credit from tax computed on sales during the payment period. This input tax credit can be availed by both manufacturers and traders for the purchase of input/ supplies meant for both sales within the State as well as to other States irrespective of when these will be utilized/ sold. If the tax credit exceeds the tax payable on sales in a given month, the excess credit will be carried over to the end of the next financial year. If there is any excess unadjusted input tax credit at the end of the second year then the same will be eligible for refund or be permitted for carry forward and set-off. For all exports, tax paid within the State will be refunded in full. (Tax paid on inputs procured from other States through inter-State by way of purchases the central sales tax paid is not permitted to be claimed as input tax credits.
After the introduction of VAT, local taxes like *luxury tax, entertainment tax, entry tax, octroi, and CST* continues. The State VAT Act does not replace the CST i.e., CST Act will still govern all inter-State transactions. However, the dealer can offset his CST liability against input tax credits available under the State VAT Act.

Levy of VAT

(a) ***Output Tax on Sales including Deemed Sale within the State*** covers all kinds of transfer of property in goods under the Sale of Goods Act including deemed sales i.e. transfer of property in goods by way of Works Contract, transfer of right to use goods, delivery of goods on the basis of a hire purchase agreement or instalment, etc.

(b) ***Purchase Tax*** covers purchases made from unregistered dealers by a registered dealer or under any other specified circumstances mentioned in the respective State Value Added Tax.

(c) ***Composition Tax*** is a scheme of taxation for a specified class of dealers wherein subject to certain conditions (such as no input tax credit, no inter-state purchase, no stock transfers, no collection of taxes and limited maintenance of books of accounts, etc), the tax is paid at a rate lower than the normal rate.

The levy of tax in most cases is governed by the concept of ***the point of sale***, i.e., at the time a sale effected by a person who is registered or liable to register. Though the levy may be on the concept of the ***point of purchase,*** i.e. tax is liable to be paid by a registered dealer or a person liable to register on purchases effected by him under certain circumstances. The levy of tax is to be understood from two angles, one from the point of sale and the other at the time of purchase, which makes the levy of tax of a multi-point nature. To attract levy there should be sale of goods within the State and such sale should be effected either by registered dealers or dealers liable to be registered under the State VAT Act.

Registered Dealer	• Dealer who is registered under State VAT Act.
Dealer liable to be Registered	• The Person who is supposed to have been registered as precribed in law but has failed to register.

With respect to the definition of dealers, the following judgments are relevant:

1. A building contractor who is engaged in purchasing building materials and using the same in the work of building construction is a dealer – *Ganesh Prasad Dixit vs. Commissioner of Sales Tax, MP 24 STC 343 – Supreme Court.*

2. A port cannot be termed as a dealer: The main activity of Madras Port Trust which was in relation to provision of services of landing, shipping, trans-shipping, receiving, shifting, transporting, storing or delivery of goods was held to be not carrying on business of buying, selling, supplying or distribution of goods. Carrying on business requires something more than merely selling or buying, etc., it depends on the volume frequency, continuity and regularity of transactions. Even if the profit motive is statutorily excluded from the definition of business, still the person may be carrying on business. Hence, if the main activity is not business, the sales made in connection with or incidental or ancillary to the main activity would not be business – State of Tamil Nadu vs. Board of Trustees (1999) 114 STC 520 – Madras High Court.

3. **A trust set-up to spread the message of Saibaba is not a dealer:** A trust set up to spread the message of Saibaba of Shirdi sold publications for spreading his message. Sale proceeds went to the trust which could be utilised only for the work of the trust. It was held that irrespective of the profit motive, the trust is not a dealer and the main

activity of the trust, which is to spread the message of Saibaba, does not amount to business. It was held that only those persons who carry on business of buying and selling goods are dealers. To be a dealer the main activity of a person should be business. – *CST vs. Sai Publication Fund (2002) 126 STC 288 Bombay High Court*

4. **Department of Railways is a dealer:** The Department of Railways is held to be a dealer and liable to tax for the sale of scrap and un-serviceable materials as well as of unclaimed goods. It was further held that the said activity is incidental and ancillary to its business, of being as carrier of goods – *Member, Board of Revenue vs. Controller of Stores (1989) 74 STC 5 – Supreme Court.*

5. **Catering activity of Railways – dealer:** Railway catering department supplying food to employees and passengers for price is held to be a dealer and liable to pay sales tax – *UOI vs. State of Bihar 139 STC 142 – Patna High Court and also CST vs. Departmental Catering (Northern Railways) (2006) 146 STC 287 – Delhi High Court.*

Goods

Goods means all kinds of movable property (other than newspapers, actionable claims, stocks and shares and securities) and include livestock, all materials, commodities and articles (including goods, as goods or in some other form) involved in the execution of a works contract or goods used in fitting out, improving or repairing of movable property, and all growing crops, grass or things attached to, or forming part of the land which are agreed to be severed before sale or under a contract of sale.

Analysing the definition of goods it is apparent that all kinds of movable property constitute goods. However, the following are specifically excluded from the definition of goods:

Newspapers

Newspapers are not goods under the State VAT laws. This is because although in a general sense, newspapers are goods, they have been specifically excluded from the definition of goods in Entry 92A of the Union List and Entry 54 of the State List.

Actionable claims

Actionable claims: Actionable claims are outside the purview of the definition of goods under the State VAT laws. Actionable claim means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the civil courts recognise as affording grounds for relief, whether such

debt or beneficial interest be existent, accruing, conditional or contingent [Section 3 of the Transfer of Property Act, 1882].

Goods – important judicial pronouncement

- **Plant and machinery erected at a site cannot be treated as goods:** Plant and machinery or structure assembled and erected at a site cannot be treated as goods for the purpose of levy of sales tax, if it is not marketable and movable. Goods erected and installed in the premises and embedded to earth cease to be goods and cannot be held to be excisable goods. – Mittal Engg Works vs. CCE (1997) 106 STC 201 – Supreme Court.

- **Mobile recharge coupons are not goods:** Recharge coupon vouchers sold by distributors of mobile telephone companies are for accessing telephone services for a pre-determined period of time. Thus, a recharge coupon is an acknowledgment of receipt of money in advance for providing telecom service in future is an actionable claim and hence not subject to sales tax. – Bharti Airtel vs. ACST (2010) 34 VST 202

- **Lottery tickets are not goods:** Lottery ticket is an actionable claim. Hence lottery ticket is not goods for the purpose of levy of sales tax. – Sunrise Associates vs. Government of NCT of Delhi – (2006) 145 STC 576 – Supreme Court.

- **Goods can be tangible or intangible:** Goods may be tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold and (c) capable of being transferred, delivered, stored and possessed. It was further observed that whether goods are incorporeal or corporeal, tangible or intangible, they must be deliverable. – BSNL Ltd., vs. UOI (2006) 145 STC 91 – Supreme Court.

- **Trademarks are goods:** Trademark is an intangible good. Transfer of right to use a trademark is a deemed sale and consideration and is taxable. - SPS Jayam & Co., vs. Registrar (2004) 137 STC 117 – Madras High Court.

- **Advance Authorisation / DEPB are goods:** DEPB license has an intrinsic value that makes it a marketable commodity. Hence DEPB qualifies as goods. – Yasha Overseas vs. CST (2008) 17 VST 182 – Supreme Court.

- **Supply of SIM card is service:** SIM card does not have any intrinsic value. The value of SIM card forms part of the activation charges as no activation is possible without a valid functioning of SIM card and the value of the taxable service is calculated on the gross total amount received by the operator from the subscribers. It is liable to service tax and

not VAT. – Idea Mobile Communication Ltd., vs. CCE&C (2011) 43 VST 1 – Supreme Court.

- **Electromagnetic waves are not goods:** Electromagnetic waves by which data is transmitted are not goods, since they can neither be abstracted nor consumed in the sense that they are not extinguished by their user. They are not delivered, stored or possessed. Nor are they marketable. – BSNL vs. UOI (2006) 3 VST 95 – Supreme Court.

- **Software can be goods:** Canned software (i.e. computer software packages sold off the shelf) like oracle, Lotus, etc., are goods. The copyright in the program may remain with the originator of the programme, but the moment copies are made and marketed, they become goods. – Tata Consultancy Service vs. State of Andhra Pradesh (2004) 137 STC 620 – Supreme Court.

- **Development of software amounts to service:** Agreement for the development of software by providing trained staff who would develop software according to the specifications of customers is not a contract of sale. The developer would have no right or claim on the developed software, which would be the absolute property of the customer. It was held to be a contract of service simplicitor liable to service tax and not VAT. – Sasken Communication Technologies Ltd., vs. JCCT (Appeals) (2011) 33 STT 507 – Karnataka High Court.

Input tax credit: judicial pronouncements

1. **Cancellation of registration certificate of the selling dealer – buyer cannot be denied input tax credit:** The Honourable Delhi High Court after considering the provisions of Section 9(1) of the Delhi VAT Act, 2003 held that in the absence of any mechanism by which the purchasing dealer can verify the payment of tax by the selling dealer, the benefit of input tax credit cannot be denied simply because the registration certificate of the seller was cancelled after the transaction with the assesse. *[Shantikiran India Private Limited vs. Commissioner, Trade Tax (2013) (44 PHT 222) (Delhi)]*

2. **Cancellation of registration certificate of the selling dealer – buyer cannot be denied input tax credit:** The honourable AP High Court considered the provisions of Section 13(1) of the AP VAT Act, 2005 and held that merely because the registration of the selling dealer is cancelled after the transaction with the concerned assesse, the claim of input tax cannot be denied even if the selling dealer did not file the return or remit the tax. *[Harsh Jewellers vs. Commercial Tax Officer, Hyderabad (2013) (22 STJ 221) (AP)]*

3. **Retrospective cancellation of registration certificate of the selling dealer – buyer cannot be denied input tax credit:** In the writ petition the assesse pleaded that the denial of input tax credit on the grounds that the registration certificate of the selling dealers was cancelled with retrospective effect was not justifiable. The writ petition was allowed on the basis that the petitioner purchased goods from the registered dealers and accordingly availed the input tax credit of taxes paid on such purchases. The input tax claim benefit was granted to the petitioner by the assessing officer in the assessment order. The petitioner claimed the input tax credit on the basis of valid invoice. Accordingly, the notice, the revised assessment orders and the provisional assessment order denying the benefit of input tax credit were set aside because of the decision of the Honorable Supreme Court in the case of ***State of Maharashtra Vs. Suresh Trading Company [1998] 109 STC 439 (SC)*** wherein it was held that retrospective cancellation of registration certificate by the selling dealer can have no effect on the person who acted upon the strength of the registration certificate when it was in force. *[Jinsasan Distributors Vs. Commercial Tax Officer, Chintadripet Assessment Circle, Chennai [2013] 59 VAT 256 (Mad)]*

4. **Input tax credit of Vat paid on accessories used in export of goods cannot be denied:** The issue before the Tribunal is whether input tax credit of tax paid on hangers used in the export of readymade garments is allowable. The Sales Tax Officer (STO) disallowed the input tax credit claim on the grounds that hangers are not an integral part of the garments exported nor are they used as packing material. The Tribunal setting aside the order of the STO held that the plastic hangers are an integral part of the item exported and are purchased for the purpose of export within the meaning of Section 5 of the Central Sales Tax Act, 1956. The sale of readymade garments with hangers should be treated as zero-rated sales as defined under Section 2(59) of the Act. Accordingly, the dealer was entitled to claim input tax credit of VAT paid on such purchases in terms of Section 2(59), 21A(2) and 22(4)(i) of the Act. *[Bonie Apparels Pvt Ltd., Vs. STO [2013] 60 VST 206 (WBTT)]*

5. **Non-deductible input tax in case the assesse engaged in the sale of taxable and exempted goods as well cannot be computed on the basis of quantity produced: The** Tribunal held that assessments were invalid and consequential levies of penalty under Section 72(2) and interest under Section 36 are irregular and invalid according to law for the reason that the method and the formula adopted for disallowing the input tax credit under Section 17 read with Rule 131(3) is based on yield and quantity of finished goods produced. As such, the case was remanded back to the lower authorities to decide the course of proper calculation of non-deductible input tax according to law and to

finalise assessments. [*Habib Agro Industries, Boothanahosur, Mandya Vs. State of Karnataka 2013(75) Kar. L. J. 319 (Tri.)(DB)]*

6. **Disallowance of input tax credit on the grounds that, the selling dealer has not declared the turnover in monthly VAT returns: The** Tribunal upheld the order passed by the Adjudicating Authority disallowing the input tax credit on purchases made from certain dealers on the ground that the invoice issued by the selling dealers is false as the dealers who sold the goods to appellants are not traceable and further they have filed nil returns declaring no turnovers without discharging the tax liability. It was observed that Section 70(1) of Karnataka VAT Act imposes the burden of proof on the appellant that claim of input tax should be correct, meaning that it should be obtained through tax invoices and other evidences prescribed by law after having been remitted by the selling dealer. Input tax for the appellant being the output tax for the selling dealer is not at all paid, so the question of allowing input tax credit does not arise. [*Smt. Nisha B. Patel Vs. State of Karnataka 2013(75) Kar. L. J.. 465 (Tri.)(DB)]*

7. **If job work charges includes cost of consumables, input tax credit on consumables is not allowable:** The issue before the Honourable High Court is whether the dealer undertaking job work can claim input tax of VAT paid on purchase of consumables. It was observed that when the appellant is doing job work for a third party, the nature of work of the appellant is inclusive of not only the labour, but also the input used for finishing the product. Therefore, it is held that the refund is not allowed as it amounts to unjust enrichment. [*Jay Enterprises Vs. Additional Commissioner of Commercial Taxes, Zone I, Gandhinagar, Bangalore: [2013] 60 VST 313 (Karn)]*

8. **Input tax credit not declared in the original return is not admissible on the grounds that requirement of Section 10(4) is not complied with:** The appellant was engaged in the business of construction of residential complexes. For the subject year 2005-06 and 2006-07 he had filed returns declaring 'nil' turnover. The appellant's premises were inspected on 25.03.2006, and on 20.12.2006 a notice for reassessment under Section 39(1) of the Karnataka Value Added Tax Act, 2003 (in short KVAT Act) was issued to the appellant. Just two days prior to the audit and verification the assesse filed a revised return. In the process of concluding the assessment, the assessing officer rejected the claim of the assesse in respect of input tax as declared in the revised returns on the ground that the appellant had filed incorrect and false original returns and had failed to rectify the mistake in the original return on its own account by filing revised return in terms of Section 35(4) of the KVAT Act. Accordingly, the assessment was concluded by way of best judgment levying interest and penalty.

The Honourable High Court of Karnataka observed that the appellant did not file any revised return or anything even after inspection which would enable the assessing officer to provide the deduction on account of input tax credit. The conduct of the appellant in filing the 'nil' returns cannot be accepted as bona fide, as the appellant was made aware of the tax liability which the same was admitted and was provisionally paid by the appellant during the course of first inspection. A return claiming nil tax liability on the face of the return appears to be an obvious attempt on the part of the assesse to take undue advantage of the due assessment procedure. The revised returns were filed in pursuance of inspection but not voluntarily. The appellant has not complied with the requirements of Section 10(4) and further, full particulars of the purchases made and the actual tax paid on such purchases has not been furnished and the revised returns were filed after several months of filing the original returns. The contention of the appellant that there is a provision under Section 38(3) of the Act wherein the best judgment assessment can be withdrawn if the dealer furnishes the return for the period to which the assessment relates is also turned down on the ground that Section 38(3) is applicable only in case the returns are not filed but however in the present case, the assesse had filed original returns declaring 'nil' turnover. Accordingly, the appeals were dismissed and held in favour of Revenue. *[M/s Infinite Builders and Developers Vs. The additional Commissioner of Commercial Taxes 2013-14 (18) KCTJ]*

9. **Charges collected by the motor vehicle dealer towards registration, insurance and handling charges are not liable to VAT and is entitled to claim input tax credit on accessories given free of cost:** The issue before the Tribunal in the case of an assesse, a motor vehicle dealer, pertains to the levy of taxes on the charges collected towards facilitation of registration of vehicle, insurance charges and handling charges for various expenditures incurred in providing the above facilities. Another issue was eligibility of input tax credit of VAT paid on the local purchases of various accessories which were provided to customers free of cost. The Revenue's contention is that the handling charges collected from the customers are pre-sale expenses and therefore are liable to tax. It was also contended that the input tax credit on accessories supplied free of cost cannot be claimed. The Tribunal analysing the Motor Vehicles Act and related rules held that it is the obligation of the owner to get the registration and insurance of the vehicle. The charges collected towards registration and insurance are in the nature of service charges towards providing the facilitation for registration and insurance and, therefore, are not liable to VAT. Handling charges are collected to incur expenditure like the RTO fee, agent fee, fuel expense for transporting the vehicle to RTO's office for registration, sweet, Ganesh idol, pooja items and number plate which are nothing but the post-sale expenditures which shall not form part of the taxable turnover and are not liable to VAT. In so far as input tax

credit, the cost of accessories supplied free are included in the value collected from the customer on which tax is charged. Further, Section 11 of KVAT Act, 2003 does not deny the input tax credit on the goods supplied free of cost. Therefore, the appellants are entitled to input tax credit. Accordingly, appeals were allowed. *[Concorde Motors (India) Limited vs. State of Karnataka 2013(76) Kar. L.J. 241(Tri.) DB]*

10. **The Burden of proof for eligibility to claim input tax credit is on the dealer: O**n the issue of disallowing input tax credit on the purchase of goods on the ground that the selling dealer is not traceable, has filed nil returns and has not remitted the taxes, the Tribunal held that, as per Section 70(1), the burden to prove the claim of input tax credit is on the appellant. It is one of the conditions that the State exchequer should have realised the revenue on account of the selling dealer remitting the applicable taxes and such taxes should be declared in the tax returns filed for the respective tax periods. The Tribunal observed that it is a well settled principle that for refund there must be a fund. The contention of the appellant that the subject purchases were duly supported by tax invoice was held to be insufficient to discharge the burden of proof as per Section 70(1). Furnishing documents with the seal of the check post to prove that the goods were actually received was held to be insufficient. *[M. K. Agro Tech Private Limited, Shrirangapatna, Mandya District Vs. State of Karnataka 2014 (88) Kar. L. J. 223 (Kar)]*

11. **Input tax credit on purchases made from the vendor prior to the order of cancellation of registration certificate can be claimed:** The input tax credit was denied on the grounds that registration of the vendor from whom the petitioner purchased goods was cancelled vide order dated 06.03.2012 with effect from 01.01.2011 under Section 11(5)(mmmm) of Gujarat Value Added Tax Act, 2003. Input tax credit which was the subject matter of the petition pertained to the period prior to 06.03.2012. On a writ petition, the Honourable High Court of Gujarat allowed the petition and held that, as the order for cancellation of registration was issued on 06.03.2012, the publication of the name of such a dealer would be some time after the date of order. Accordingly, input tax credit of purchases made prior to 06.03.2012 was allowed. [*Meet Traders Vs. State of Gujarat and Another [2013] 63 VST 246 (Guj)]*

12. **Input tax credit cannot be claimed if purchases are not declared in the return:** The Honourable High Court of Kerala has held that input tax credit cannot be claimed if purchases are not declared in the returns filed, not supported by tax invoices, and credit not determinable from books of accounts or if purchase value is suppressed in the books of accounts. [*M. Mohammed Haji Vs. State of Kerala [2013] 63 VST 317 (Ker)]*

13. **Ineligible input tax credit: The** Honourable High Court of Karnataka has held that input tax credit cannot be claimed on purchase of fertilizers, pesticides, agricultural machinery, pump sets, etc., used in the cultivation and production of tea and coffee. [*Balanoor Plantations and Industries Ltd., Vs. State of Karnataka & Others 2013 NTN (Vol. 52) P 220*]

14. **Input tax credit cannot be claimed if the seller is de-registered at the time of sale:** The input tax credit claimed by the Petitioner was disallowed on the ground that on the date of purchase of goods the selling dealer was already de-registered. On a writ petition, the Honorable High Court of Karnataka held that Section 70(1) of the Karnataka Value Added Tax Act, 2003 cast the burden of proof on the dealer who claimed exemption or input tax rebate. Therefore, in the absence of evidence from the petitioner to the effect that the seller has remitted the tax collected from the Petitioner, the Petitioner is not liable to claim input tax credit and has to pay penalty and interest under Section 72(2) and Section 36 respectively of the Act. Reference was made to the judgment of the Honorable Supreme Court in the case of Rahman Vs. State of Andhra Pradesh reported in [1961] 12 STC 392 (SC). *[M.M.Udyog V. Additional Commissioner of Commercial Taxes, Zone-1, Gandhi nagar, Bangalore (2013) 64 VST 215 (Karn)]*

15. **Input tax credit must be claimed in the same tax period in which the purchase was effected:** During assessment proceedings, the claim of input tax of the assesse for the month of February 2007 was rejected on the ground that such claim did not pertain to the tax period February 2007. Moreover, the assessing officer was of the view that the assesse was to claim input tax rebate in the respective period of purchases effected and also that the assesse had not filed revised returns within 6 months as provided under Section 35(4) of the Act. On an appeal before the High Court, it was argued that the statute prescribes the time within which a return is to be filed. If there was an omission to claim input tax rebate in such return, a revised return was to be filed within 6 months for putting forth such a claim. However, if no such revised return was filed within the time prescribed, in a return filed for the subsequent period a claim for input tax for the earlier period cannot be put forth. The aassesse however contended that in law there was no prohibition for putting forth such claim beyond the period prescribed in the statute. The High Court relying on a strict interpretation of Section 10(3) of the KVAT Act, 2003 held that the dealer not putting forth the claim of input tax credit in the return filed for the relevant period or in the revised return is not entitled to claim input tax credit for the returns filed for another period even within six months. [*State of Karnataka Vs Centum Industries (80 KLJ 65)]*

16. **Input tax credit may be claimed in any tax period and not necessarily that tax period in which the seller raises the tax invoice**: A single judge of the Hon'ble High Court of Karnataka in the case of Sonal Apparel Private Limited, Bangalore and Others v State of Karnataka and Others, in Writ Petition Nos. 22483-22494 of 2015 (T-RES) negated the Centum's case and held that it would not be possible to hold that Section 10(3) first restricts availment of credit to the same month as the month of purchase and then Section 35(4) goes on to permit the same by way of revision of return as that would be an absurd construction. Such an interpretation would lead to the conclusion that the KVAT Act encourages availment of credit by the dealer without ensuring eligibility for the same, as delay in availment would result in denial of credit altogether and thereafter rectifying any incorrect credit available by revising the return. Such a view could not have been the intention of the legislature as that would lead to a situation where the filing of revised return under Section 35(4) would become the rule, rather than an exception. In other words, every dealer may be necessarily required to file two returns for the same tax period, firstly an original return reflecting incorrect credit and then a revised return availing the eligible credit. It further went on to hold that Section 10(3) of the KVAT Act, prior to its amendment vide Karnataka Value Added Tax (Amendment) Act, 2015, shall be read down to enable the petitioners to calculate the net tax liability by deducting the input tax paid on its purchases from its output tax liability, irrespective of the month in which the selling dealer raises invoices. [*Sonal Apparels Vs State of Karnataka (WP 22483-22494)]*

17. **No benefit can be granted beyond what is claimed by the assesse:** The issue involved in the present case was whether land cost in excess of what has been claimed by the assesse in the returns is allowable. The Divisional bench of the Karnataka High Court relying on the judgement of the very same court in the case of Infinite Builders and Developers held that the Act provides for filing a revised return. If the aassesse fails to avail the benefit of filing a revised return then it is only the return filed by the aassesse ought to be considered by the Assessing Officer and nothing more than what is claimed in the return can be granted by the authorities in favour of the asesesse. [*Nandi Constructions Vs State of Karnataka (84 KLJ 1)]*

Deemed Sales

The term "sale" as defined with all its grammatical variations and cognate expressions means every transfer of property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration and includes

(a) a transfer otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;

(b) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a delivery of goods on hire purchase or any system of payment by installments;

(d) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or the valuable consideration.

Hire Purchase

A hire-purchase agreement has two elements: (1) element of bailment and (2) element of sale, in the sense that it contemplates an eventual sale. In other word, hire purchase is a type of instalment credit under which the hire purchaser, called the ***'hirer'***, agrees to take the goods on hire at a stated rental, which is inclusive of the repayment of principal as well as interest, with an option to purchase. Under this transaction, the hirer acquires the goods immediately on signing the hire purchase agreement but the ownership or title of the same is transferred only when the last instalment is paid.

Hire Purchase
• As per sub-clause c of Clause (29A) of Article 366 of the Constitution of India *inter alia* provides that "tax on sale or purchase" includes "a tax on delivery of goods on hire purchase or any system of payment by installments"

By virtue of this sub-clause, State legislations have been able to deem that a sale takes place on the date of delivery of the goods on hire purchase notwithstanding the fact that the option to purchase is exercised only at the end when the title of the goods as per the terms stands transferred from the dealer to the hirer.

Therefore, intra-State hire-purchase transactions are liable to VAT. Inter–State hire-purchase transactions are subject to CST.

Under the VAT laws of different States, hire-purchase and instalment sales are at par with normal sales and hence the provisions of the State VAT laws as applicable to normal sales are equally applicable to hire-purchase and instalment sales.

Taxable event

The definition of 'sale' under Value Added Tax laws of various States provides that the taxable event will be the actual or physical delivery of goods on hire purchase or any system of payment by instalments. It is implicit that such a transaction should be for monetary

consideration. It is important to note that in case of hire-purchase transactions, the delivery of goods has been made the taxable event and not the completed sale on payment of the last instalment.

Input tax credit

The hire purchase transaction is at par with the normal sale transaction. Therefore, normal provisions relating to the input tax credit apply in this case also. However, some States have provided for pro rata credit.

Some special aspects

- **Liability to tax when sale concludes:** A debatable question which arises is whether in case of hire-purchase, VAT will have to be paid again when a transaction fructifies into a concluded sale, in spite of tax having been deposited on instalment (payable as and when due, whether or not recovered). Answer to this problem depends mostly upon the provisions of the VAT laws of the States in which goods are located when the transaction fructifies into a concluded sale.

- One view is that when the transaction fructifies into a concluded sale, tax will not be payable as tax has already been paid on instalments. The other view is that earlier tax was a tax on delivery of the goods on hire-purchase or instalment. Therefore, at that time only the consideration received for hire-purchase or instalment was taxed and the consideration receivable at the time of concluded sale was not taxed. Hence, tax is payable again on the fructified sale on the depreciated value of the asset or its market value. However, if no consideration is payable on the fructified sale, then tax is not attracted.

- **Unpaid instalments/ forfeited instalments:** If, for any reason, the transaction of hire purchase fails, then the vendor takes possession of the goods. Normally, in such cases the instalments received for the intervening period are forfeited.

- **Finance charges/interest:** It is common knowledge that the instalment fixed for payment in the case of a hire-purchase arrangement involves an element of interest or finance charges in addition to the price of the goods sold. While some State VAT legislations have provided for deduction of such interest or charges in arriving at the sale price to be treated as turnover in a hire purchase transaction, some other States have not done that.

- **Goods returned:** VAT is payable on the date of delivery of goods. If for any reason the goods are returned, then refund of tax will have to be claimed as per the provisions of respective State VAT laws. In substance, this is a sales return. Many States have provided a time limit for granting the claim of goods returned. Therefore, if the goods are not returned during that specified period, no benefit will be available.

- **Issue of 'Form C':** In terms of Section 8(3)(b) of the CST Act, a registered dealer can issue Form C only in respect of goods which are purchased for resale, for manufacture of goods or processing of goods for sale or in mining or in the generation of electricity or any other form of power or packing materials. Therefore, the Form can be issued if the goods are purchased for Hire/ Instalment sale.

Hire Purchase

Calculation of Taxable turnover and tax payable under VAT

Assumptions

Description of goods:	Machinery
Sale Price	₹ 5, 50,000/-

Rate under VAT Act for Machinery is at 12.5%
All assets purchased are given for hire

Hire charges at the time of execution of the agreement

Further maximum of 20% per annum can be reduced and then the hire charges are to be identified

Purchases effected for manufacturing Machinery

Local purchase	₹ 1, 00,000/-
Import purchase	₹ 1, 75,000/-
Inter-State purchase	₹ 1, 25,000/-
	₹ 4, 00,000/-

Sales Price

Hire/ Installment sale of Machinery	₹ 5,50,000/-
Calculation of Sales turnover for VAT	
Total Sales Turnover	₹ 5,50,000/-

Less: Unpaid Interest (20% of 550000)	₹ 1,10,000
Taxable Turnover	₹ 4,40,000/-

The tax rates will be applicable depending upon the classification of goods and it will be the same as applicable for normal sales. So assuming the rate of tax at 12.5%, the computation is as follows:

Calculation of tax payable for hire purchase transactions

Tax calculated at 12.5% on ₹ 4,40,000/-	₹ 55,000/-
Less: Input tax credit on Local purchases from RD (100000*12.5%)	₹ 12,500/-
Tax payable	₹ 42,500/-

Right to Use (Lease)

The right to use any goods is a special type of transaction, under which a party owning the asset (called the *'lessor'*) provides that asset for use over a certain period of time to another party (called the *'lessee'*) for consideration (called *'rentals'*). The legal ownership of the asset remains with the lessor, but the lessee retains the possession and uses the asset over the period of the lease.

Therefore the characteristics of a lease are:

(a) There must be a lessor and a lessee, both competent to contract;

(b) There must be an asset to be leased;

(c) Actual possession and control on the asset must be transferred;

(d) There must be an acceptance of the leased property;

(e) There must be transfer of right of enjoyment by the lessor to the lessee;

(f) There must be a consideration.

As per Article 366(29A)(d) of the Constitution of India, ***Transfer of right to use*** involves transfer of both possession and control of goods to their user. Goods should thus be a movable property capable of being bought and sold and capable of being transmitted, transferred, delivered, stored and possessed.

The presumption here seems to be that VAT/ Sales Tax is levied in cases where both right of possession as well as effective control over the goods is transferred to the user. The risk and reward of ownership would lie with the person who enjoys the possession.
The tax is attracted, if the transfer of the right to use is in respect of any goods. This postulates that it should be a movable asset. Such transfer of right to use goods could be for any purpose and the period may or may not be fixed. It is argued that the transfer of goods takes place only once and hence tax should be imposed only at that point of time. It is true that transfer of right is only once but receipt of the consideration is spread over a period. Thus, it can also be argued that the total consideration receivable should be taxed at the point when transfer takes place.

So long as the consideration is fixed in the form of cash, deferred payment or other valuable consideration, by a fiction of law, the transaction is deemed to be a "transfer" of a right to use goods and would attract the incidence of sales tax.

Various State legislations have amended the definition of '*sale*' in the respective State sales-tax law to include, *inter-alia*," transfer of the right to use goods". Thus, under the VAT regime tax is attracted on transactions of lease.

Taxable event

There may be three stages in a contract for the transfer of the right to use property. The first stage would be to enter into an agreement to transfer the right to use property for a specified period on payment of an agreed consideration. The second stage would be to transfer the possession of the property under the agreement to the transferee; and the third stage would be the actual enjoyment of the right to use the property by the transferee. The first stage cannot be considered a taxable event because it shows only the intention of the parties to transfer the right but the right is not actually transferred because the physical possession of the property in question is not handed over to the transferee. The second stage would be considered a taxable event, because it is at that stage that exclusive possession is given to the transferee so that the transferee can have the right to enjoy the property in terms of the agreement. The taxable event is, therefore, not dependent on the third stage to happen. Taxable event is clearly a one-time affair that is at the stage of transfer of right and not dependent on the use of the asset. It is therefore not a continuous event of use. However, consideration for transfer of property is taxable. Therefore, whenever the consideration is due, the same is taxed in the period in which it becomes due.

Taxable turnover

The turnover is the total amount paid or payable to the dealer as consideration for transfer of the right to use any goods for any purpose (whether or not for a specified period).

Normally 'sale price' means the amount of valuable consideration paid or payable for any sale made during the given period. It will also include some other charges before delivery thereof. However, certain States have provided for the interest or charges as deduction for determining the sale price and taxable turnover.

Input tax credit

(i) **Input tax credit allowed on purchase of the asset which is to be leased:** The lessor pays VAT (input tax) at the time of procurement of goods. However, liability to pay VAT (output tax) on lease rentals is spread over the tenure of the lease. Therefore, some States provide for the utilization of input tax credit for paying output tax only over the entire period of lease. This results in accumulation of input tax credit in the hands of the lessor for a long period of time. However, States like Maharashtra and Karnataka have provided for immediate utilization of such input tax credit against payment of any tax.

(ii) **Input tax credit as capital goods:** The assets given on lease are generally capitalized by the lessor in his books and are treated as capital assets. Thus, provisions relating to input tax credit on capital goods apply in this case also. For example, if the VAT law allows input tax credit on capital goods in 36 months, then irrespective of the period of lease, input tax credit would be available only in 36 months.

Maintenance of leased asset

Maintenance of the leased asset involving supply of materials for maintenance / repair, which are in the nature of consumables, by the lessor does not amount to works contract, as there is no transfer of property in such materials to the lessee. Thus, there would be no VAT on the value of the consumables used during the maintenance/repair of the asset. In such a case, the contract becomes a service contract liable to service tax.

However, if parts are also supplied during the maintenance, then such a contract becomes a works contract liable to VAT as there is a transfer of property in goods involved in its execution. In such a case, the materials required for such maintenance/repair would be input for sale and input tax credit will be available.

Sale of leased asset after lease period

Sale of a leased asset after the lease period is completed is taxable in the same manner in which normal sale of such asset would have been taxed. Normally, such a sale is effected to the same lessee and hence such sale would be a local one exigible to tax under the VAT laws of the State in which the asset is located.

Details of Assets Purchased to be given on Lease

Local purchase of goods vehicles	₹ 2,00,000/-
Import of goods vehicles	₹ 3,75,000/-
Inter-State purchase of goods vehicles	₹ 4,25,000/-
	₹ 10,00,000/-

Assumptions

1) Rate under VAT Act is 12.5%

2) All assets purchased are given for lease.

The total amount due from the lessee ₹ 15, 00,000

The tax rates will be applicable, depending upon the classification of goods and it will be the same as is applicable for normal sales. So assuming the rate of tax at 12.5%, the computation is as follows:

Output VAT payable on Lease rental at 12.5%	₹ 1,87,500
Input VAT Credit (200000*12.5%)	₹ 25,000
NET VAT PAYABLE	₹ 162,500

Works Contract

Works contract is a contract which envisages utilisation of labour as well as materials. The quantum of materials could vary from contract to contract. The States are empowered to charge tax only on goods and not on the service element of the transaction.

After the Constitution of India's 46th Amendment, it has become possible for the States to levy sales tax / value added tax on the value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of goods and materials. The definition of 'dealer' was amended and includes a person engaged in the transfer of property in goods

involved in the execution of works contract. The definition of the word 'goods' was amended to include "goods as goods or in some other form" involved in the execution of works contract. The definition of 'sale' also was amended to include a transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract.

The difference between a sale and a works contract is that a sale involves transfer of property in the goods, whereas in a works contract, there is only a contract to render work on the customer's property - whether movable or immovable. The transfer of goods in the execution of works contract is a ***deemed sale*** and, therefore, works contract can be split into contract for labour and contract for sale. The transfer of property in goods involved in the execution of works contract is chargeable to VAT. For arriving at the taxable turnover, various deductions from the contract receipts are allowed. These deductions are in respect of labour charges and payments to sub-contractors. Input tax credits can be claimed on purchase of material from local registered dealers.

Scope of Works Contract

To be covered under the scope of levy under this act on works contract, the following are to be fulfilled:

(a) There should be transfer of property in goods.

(b) Such transfer of property in goods may be in the form of goods or in some other form.

(c) Such goods, which are being transferred, should be involved in the execution of works contract.

(d) The definition of works contract given in the State Acts is merely an inclusive definition. In terms of the said definition, in addition to the normal meaning of the term works contract, it will specifically include any agreement for carrying out for cash, deferred payment or other valuable consideration, the following: building; Construction; Manufacture; Processing; Fabrication; Erection; Installation; Fitting out; Improvement; Modification; Repair; or commissioning of any movable or immovable property.

(e) The person doing such an activity should be a dealer as defined.

If any of the above-mentioned conditions are not fulfilled, the activity will not be subject to levy under the VAT. (However, there are numerous decisions in this context under various sales tax laws considering different type of activity independently. Therefore though the above is only a broad principle, each transaction would be required to be examined in the light of the State Laws, the given circumstances and the decided cases as may be applicable to the

goods dealt with by them. Considering the above factors it becomes essential to identify whether the activity is covered under the scope of levy in the course of execution of works contract or not. If yes, then the next thing is the quantification of such levy. The quantification of tax levy will be based on the tax rate, which has to be applied on the value to be determined.

Sale Price

'Sale price' in relation to transfer of property in goods is arrived at by deducting from the amount of valuable consideration paid or payable to a person for the execution of the works contract, the amount representing labour charges for such execution. ***In Gannon Dunkerly and company and others Vs. State of Rajasthan and others (1993) 88 STC 204 (SC)*** it is stated that the value of the goods involved in the execution of works contract will have to be determined by taking into account the entire value of the contract and deducting therefrom the charges towards labour and other services. In other words, labour, service, and other charges not relatable to transfer of property have to be deducted from the total consideration of the works contract.

Turnover

Turnover for imposition of VAT in relation to the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract shall mean the sale price of goods in which there is a transfer of property. ***Works contract being a composite contract, such amount is to be arrived at by deducting from the total amount of valuable consideration paid or payable to a person for the execution of such works contract, the amount which does not represent the value of the sale. Thus, the amount representing labour and other service charges incurred for such execution will have to be excluded.*** Where such labour and other service charges are not quantifiable, ***the sale price shall be the cost of acquisition of the goods and the margin of profit on them prevalent in the trade plus the cost of transferring the property in the goods and all other expenses in relation thereto till the property in them, whether as such or in any other form, passes to the contractee and where the property passes in a different form shall include the cost of conversion.*** The value of the goods involved in the execution of a works contract will, therefore, have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services which would cover:

(a) labour charges for execution of the works;

(b) amount paid to a sub-contractor for labour and services;

(c) charges for planning, designing and architect's fees;

(d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;

(e) cost of consumables, such as water, electricity, fuel, etc., used in the execution of the works contract, the property which is not transferred in the course of execution of a works contract; and

(f) cost of establishment of the contractor to the extent it is relatable to the supply of labour and services;

(g) other similar expenses relatable to the supply of labour and services;

(h) Profit earned by the contractor to the extent it is relatable to the supply of labour and services.

Rate of Tax

(a) Schedule rate: Basically, tax is chargeable on the transfer of property in the goods involved in the execution of a works contract at the rates prescribed for the concerned goods in the relevant schedules to the concerned State VAT legislation. Where the value of each item of material transferred in the course of execution of a works contract is identifiable, tax is charged on the value of individual items of materials as provided under the schedules to the concerned State VAT legislation. The works contractor is entitled to avail input tax credit on inputs.

(b) Revenue neutral rate: If the values of individual goods are not identifiable, the contractor can pay tax at Revenue Neutral Rate (RNR - generally 12.5% / 13.5%/14.5%) after deducting the value attributable towards labour and such other charges.

Composition Scheme

The salient features of the Composition Scheme provided under various State VAT Acts are:

- VAT legislations provide for an optional Composition Scheme to collect tax (some States do not provide for collection of taxes) on works contracts in a simple manner so as to minimize the inconvenience caused to the dealers.
- Tax is paid at a composite rate on the gross contract value. The tax rate is generally lower in such a scheme.

- Input tax credit is not allowed under the scheme. However, in some States (e.g. Maharashtra) partial input tax credit is granted.
- Interstate sales or purchases are prohibited. Some States permit interstate purchases on payment of the standard rate of tax applicable to such goods. Interstate stock transfers are also barred.
- Composition dealers are barred from issuing tax invoices.

Input tax credit on capital goods

Several kinds / classes of works contracts do not envisage any manufacturing or processing of goods. For example, contracts for construction of roads, bridges, etc., and yet capital goods of substantial value are used in the execution of such contracts. Majority of the State VAT legislations provide for availing input tax credit on capital goods only where such goods are used in manufacturing or processing of goods.

Withholding of Tax at Source

Most State legislatures have provided, in their respective Value Added Tax Acts, for withholding of tax at source in the matter of works contract / sale to some specified dealers. The provision requires tax to be withheld at the appropriate rate from payments above the prescribed limit to contractors or to vendors for the purchase of goods and to be deposited in the Government Treasury. The procedural provisions are similar to the provisions under the Income Tax Act. Most States provide for T.D.S. number and returns. If a contractor finds that the total net VAT liability (output tax less input tax credit) is lower than the amount of tax to be deducted, then the contractor may approach the Assessing Officer and obtain a certificate for no / lower tax deduction on the basis of which he will be entitled to receive the payment without/lower tax deduction at source.

In some States, the Government companies deduct the tax at source in respect of the works contract executed within the State at the net tax payable by the contractor within the State. The TDS provisions are not applicable for inter-State trade and Imports and exports respectively. Such provisions are applicable for the sales made within the State. In some States, works contractors have to deduct the TDS on purchase of notified goods used for the execution of works contract. In some States the commercial establishments have to deduct the tax at source on canteen payments, exceeding the specified limit. Thus, every State has different provisions for withholding tax on specified goods and specified transactions for specified dealers.

Sales – Judicial Pronouncements

- **Barter or exchange is not a 'sale' –** As per the definition of a 'Sale' under the Karnataka VAT Act, 2003 transfer of goods can be for 'any other valuable consideration'. In Devi Dass Gopal Krishnan v. State of Punjab (1967) 20 STC 430 (SC), it was held that in the definition of 'sale', 'valuable consideration' takes colour from the preceding expression of 'cash or deferred payment'. It has been a consistent legislative practice to treat the expression as 'monetary consideration'. If so, it can only mean some other monetary payment in the nature of cash or deferred payment,' such as issue of shares for machinery. Exchange of goods is a 'barter' and not a 'sale' and hence not taxable**.** – *Steel Authority of India v. ACCT ILR 1996 Karn 1136.*

- **Free replacement of goods during warranty would not attract sales tax. –** *CST vs. Prem Nath Motors (1979) 43 STC 52 – Delhi High Court.*

- **Right to use vehicles:** The transfer of exclusive possession of lorries to sister concerns wherein the maintenance was taken care of by the sister concern was held to be the transfer of right to use goods and is liable to VAT. – *Kaveri Feed vs. Secretary, STAT (2011) 42 VST 255 – Madras High Court.*

- **Right to use a trademark: The t**ransfer of intangible property like a trademark by mere permission in writing is a transfer of the right to use goods and is taxable. It is not necessary that the trademark itself or the right therein need not be transferred. – *CST vs. Duke and Sons (1999) 112 STC 370 – Bombay High Court.*

- **Right to use telephone apparatus:** Supplying instrument / apparatus and other appliances in the premises of a subscriber, which are connected with a telephone line to the area exchange is a transfer of right to use goods and hence is taxable. – *State of UP vs. UOI (2003) 130 STC 1 – Supreme Court.*

- **Sale of business as a whole is not liable to tax:** The Hon'ble High Court of Allahabad in an issue relating to the Revenue taxing of the proceeds of sale of business has held that business is not goods and as such proceeds of the sale of a business do not amount to turnover on which sales tax may be payable. In relation to the provision specifically providing for deduction of sale proceed of business as a whole it was held that it is not understood why the State Government still provided for deduction in relation to amounts received for the sale of business as a whole because such sale proceeds do not form part of the turnover. If a dealer carrying on a business in certain goods sells the entire business, he has not to rely upon this clause and plead that the proceeds of the sale are to be "deducted" from the turnover for purposes of taxation. The sale proceeds of the business are not to be included in the turnover at all. One

cannot deduct from a turnover something which is not a turnover. Therefore, to say that proceeds of the sale of the dealer's entire business are to be deducted from his turnover is meaningless; they are not to be included in the turnover because they never came within its meaning. - *Sri Ram Sahai Vs. CST 14 STC 275 (All)*

- **Transfer of goods in the course of transfer of business is not liable to tax:** The Hon'ble High Court of Karnataka has held that the transfer of goods like designs, copy rights, trademarks, brand names etc., in the process of selling business as a whole do not amount to business and is not a sale in the course of business and therefore not liable to tax. – *Kwality Biscuits (Private Limited), Bangalore vs. State of Karnataka 71 KLJ 16 (Kar HC)*

- **Composite contract of supply of goods and provision of services – liable to tax: The** Constitutional Bench of the Hon'ble Supreme Court has held that the indivisible contract for supply of goods and the provision of service by a legal fiction can be divisible into one for sale of goods and the other for provision of service. The State legislatures are empowered to levy tax on transfer of property in goods involved in the execution of such composite contracts. – *Builders Association of India and Others vs, UoI 73 STC 370 (SC)*

- *Larsen & Toubro Limited and Another Vs. State of Karnataka and Another (65 VST 1)* Contract for sale of a flat is a works contract liable to tax: the Larger bench of the Honorable Supreme Court, upholding the judgment in the case of K Raheja, held that the developer constructing the flat for prospective customers under an agreement for construction is a works contract in terms of Article 366(29-A)(b) and is liable to tax on transfer of goods used in the execution of such contract.

  — Three conditions must be satisfied for levy of tax on goods deemed to have been sold under a works contract (i) there must be a works contract, (ii) 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.

  — The activity of the construction of a flat has a component of deemed sale and has all the characteristics and elements of works contract; even otherwise the ultimate transaction between the parties may be the sale of a flat. Deemed sale of goods in the execution of works contract is liable to tax if the contract is for works involving use of goods, the property in which it is transferred either as goods or in some other form.

- — If the developer has received or is entitled to receive valuable consideration, the above three conditions are fulfilled. During the performance of a contract of building construction, goods like cement, concrete, steel, bricks etc. are intended to be incorporated in the structure and the property in such goods ultimately gets transferred to the customers.

- — The activity of construction would be a works contract only from the stage the developer enters into a contract with the buyer of the flat. The value addition made to the goods transferred after the agreement can only be made chargeable to tax by the State.

- — The contention of the developer that the flat is transferred only after the payment of all the installments and as such the contract is for the sale of the flat and not a contract for executing works for the purchaser was turned down based on the analysis of the various provisions under the Karnataka Ownership Flat Rules and Maharashtra Ownership Flat Rules.

- — As per Article 366(29A)(b) during the time the contract / agreement stands between the buyer and the developer, it is classified as works contract. The developer undertakes the works contract from the date the contract is entered with the buyer. Such a position does not alter only because of the fact that the developer has a right of lien on the property in the event of non-payment of installments by the purchaser.

- — The taxable value of goods shall be the value of goods at the time of incorporation of such goods in the works even though the property in such goods is transferred after incorporation.

- — In the course it was further held that the dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance in case of transactions contemplated in Article 366(29-A). -

- **Processing and supplying of photographs, photo prints and photo negatives are works contract and goods component therein is exigible to sales tax:** The issue before the Hon'ble Supreme Court in an SLP filed by the Revenue is in relation to the constitutional validity of Entry 25 of Schedule VI (Processing and supplying of photo graphs, photo prints and photo negatives) to the Karnataka Sales Tax Act, 1957. Revenue's contention is that the State Legislature is empowered to segregate goods and impose sales tax thereon by virtue of Article 366(29-A). The contention of the assesse is that processing of photographs is not works contract but essentially a

service wherein the cost of paper, chemical or other material used in processing and developing photographs and photo prints etc., is negligible. Processing of photographs is a contract for service with no elements of goods at all. The Hon'ble Supreme Court observed that by virtue of Article 366(29-A) the value of works contract is permitted to be bifurcated into sale of goods and provision of services. The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are composite in nature. Tax may be levied even when the dominant intention of the contract is not to transfer the property in goods but to render a service. Accordingly, the Hon'ble Supreme Court held that Entry 25 of Schedule VI of Karnataka Sales Tax Act, 1957 is constitutionally valid. The activity of processing and supplying of photographs, photo prints and photo negatives is a works contract and goods component therein is exigible to sales tax. - *State of Karnataka vs. PRO Lab [2015] 53 taxmann.com 530 (SC)*

- **Composite contract of supply and installation can be vivisected and tax can be levied by State on transfer of property in goods:** Composite contract of manufacture, supply and installation of lifts in a building (involving civil construction) amounts to works contract; however, if there are two contracts of purchase of components of lift from a dealer and separate contract for installation, they would be 'sale' and 'labour and service' respectively. The concept of "dominant nature test" or "degree of intention test" or "overwhelming component test" for treating a contract as a works contract is not applicable. – *Kone Elevator India (P) Ltd., vs. State of Tamil Nadu [2014] 45 taxmann.com 150 (SC)*

1. VAT Invoice (Tax invoice): Its importance

A VAT Invoice:

- helps in determining the input tax credit,
- prevents the cascading effect of taxes,
- facilitates multi-point taxation on the value addition,
- promotes assurance of invoices,
- assists in performing audit and investigation activities effectively,
- checks evasion of tax, and in that sense is self-policing.

Note: The importance of Invoice increases because it places more and more trust on the tax payer.

2. **Contents of the VAT invoice**

The VAT legislations of most States may provide for the contents of the tax invoice. By and large there would be no need for a separate tax invoice. A regular invoice can also be termed as tax invoice if it has the prescribed contents. Generally, the tax invoice should have the following contents:

- the words 'Tax invoice' in a prominent place,
- name and address of the seller,
- registration number of the seller,
- name and address of the buyer,
- registration number of the buyer (may not be under all VAT legislations),
- pre-printed or self-generated serial number,
- date of issue,
- description, quantity and value of goods,
- tax charged and the rate at which it is charged,
- signature of the dealer or his/her representative.

3. **Other invoices**

Normally, a VAT dealer is expected to indicate the rate of tax and the amount of tax charged in the invoice issued. However, in case of small dealers or end consumers, other invoices without the details of tax ae permitted. Such invoices should contain the following particulars:

- name and address of the dealer,
- registration number of the seller,
- name and address of the buyer,
- registration number of the buyer, if any,
- pre-printed or self-generated serial number,
- date of issue,

- description of goods, and their quantity and value,
- signature of the dealer or his/her representative.

4. However, to ensure that the revenue legally due to the States is realized and remitted it is advisable that the invoice should contain details of the rate of tax and the tax charged in an explicit manner.
5. Even the format of invoices is specified in some States for inter-State sales, composition dealers, unregistered purchases, works contractors
6. If the buyer claims to have lost the original tax invoice, the selling dealer may, subject to certain conditions and restrictions, provide a copy clearly marked as duplicate.

C. Credit Notes and Debit Notes

A VAT dealer is required to issue a Credit / Debit note when goods sold or bought are returned to the supplier or customer, when additional discount is offered, when the sale or purchase price requires an amendment / change, when tax invoice is required to be cancelled for any reason after its issue, when the tax charged in the invoice exceeds the amounts of tax payable or when a mistake is detected in the tax invoice.

Credit Note: Where the sale invoice has been issued in respect of sale and the amount shown as tax in sales invoice exceeds the tax payable by the dealer then in such instance he shall provide the dealer a copy of the credit note containing such particulars as may be specified (Sales return)

Debit Note: In case the tax payable in respect of the sale exceeds the amount shown as tax on the tax invoice, the dealer shall provide the purchaser with a debit note containing such particulars as may be prescribed. (Purchase return)

The contents of the debit note or credit note will be the same as that of the Invoice. Reasons for issuing such a note should be stated. There should be nexus between the sale invoice and the note. Even the contents of a debit note or credit note should consist of the details specified in the sale invoices, such as, the date of debit note/credit note, name of the issuing dealer and the name and address of the person to whom it is issued, and descriptions, such as, rate difference, discount, etc., quantity and amount with tax, if any.

Further, such a document should be with the registered dealer (taking the deduction at the time any return in respect of the sale is furnished. However, this requirement is not an essential condition for claiming deduction in respect of tax paid on purchases.

The dealer availing credit in the return filed for a tax period should have the tax invoice or the credit note or debit note on the basis of which credit is availed by him at the time of furnishing the return for the tax period. In other words, the benefit of the input tax deduction is inadmissible to a dealer registered under the Act, unless he is in possession of a valid Tax Invoice or a debit note or credit note, as the case may be.

Only the seller of goods can issue debit/ credit notes in cases where a tax invoice has been issued and the amount of tax shown in the tax invoice exceeds the tax payable against that invoice (Credit Note) and where the tax payable against the invoice exceeds the amount of tax shown in the invoice (Debit Note).

There is no modification in the existing system under the Central Sales Tax and the existing limit of 6 months will be applicable. But in the case of Sales Return against Local Sale on which VAT has been charged there is no time limit fixed for claiming tax credit. Tax credit on such returns can be claimed during the period in which the said goods are returned and a credit note is issued for the same.

In respect of reduction in prices of goods already purchased by a dealer, such purchasing dealer shall intimate to the selling dealer, who will issue a credit note for such change in the nature of the sale. The debit note/ credit note issued by the selling dealer shall necessarily contain the following particulars.

- The date of DN, Name of the dealer (with TN where applicable) issuing DN/CN, Name of the seller (with TIN where applicable) to whom DN/CN, Description, quantity and amount of de-escalation in respect of goods, Whose value de-escalates, Tax if any, relating to the amount of de-escalation.

- In case the agreement of sale provided for de-escalation in the prices of goods sold under the agreement and prices of goods could not have been determined at the time of their original sale, the purchasing dealer in such cases will adjust his purchases, and reverse the proportionate input tax credit on the basis of such debit in the tax period in which such debit note is raised by him.

- In case input tax credit has been reversed by the buying dealer, the selling dealer will be permitted to reduce the output tax liability to that extent on the basis of such debit note. Such tax credit will be available in the tax periods (which he issues such debit note / credit note is received by him.

Judicial Pronouncements

- The Hon'ble Supreme Court has held that the provision of registration of dealers is not a restriction on carrying on business. It is reasonable provision in order to administer the Act. – *M. A. Rahman vs. State of AP 12 STC 392 (SC)*

- The Honourable High Court of Bombay has held that the dealer who is registered under the provisions of the Act cannot be treated as an unregistered dealer in respect of any place of business situated in the State. He would be a registered dealer authorized to carry on business in the whole of the State in that capacity. – *Niranjan Mills Ltd., vs. State of Maharashtra 99 STC 587 (Bom)*

- The Honourable High Court of Karnataka has held that failure to keep the account books on the business premises is an offence. – *State of Mysore vs. P. L. Prabhu and Others, Criminal Appeal No. 37 of 1967 dated 28.02.1968*

CUSTOMS

Introduction to Customs Law in India

Customs is a form of indirect tax. The Standard English dictionary defines the term 'customs' as duties imposed on imported or less commonly exported goods. The term is usually applied to those taxes which are payable upon goods or merchandise imported or exported.

Customs duty is on import into India and export out of India. As per the ancient custom, a merchant entering a kingdom with his goods had to make a suitable gift to the King. In the course of time, this 'custom' was formalized as *'customs duty'*. This is collected on imports (and occasionally on exports too). The word '*customary'* is derived from '*customs'*, which indicates that it is a very old tax. Tax was levied on various goods right from the Vedic times. In due course, it became a significant source of revenue for the state. It also proved a useful mechanism to protect domestic trade and commerce.

All the laws enacted by the Parliament have their source in the Constitution of India. The power for enacting laws is conferred on the Parliament and on the legislatures of States by Article 245 of the Constitution. The said Article states:

Subject to the provisions of this Constitution, the Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of the state. No law made by the Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

As regards the constitutional power for the Government of India to levy Customs Duty, it is enumerated in Entry 83 of List I (Union List) of the Seventh Schedule to the Constitution. The entry reads as "*duties of customs including export duties*". Thus import and export duty is a Union subject and the power to levy duty is derived from the Constitution.

One of the purposes of Customs levy is to raise revenue for the Central Government.

But that is not the only purpose of the Customs Act. The Customs Act is also used to:

(a) Regulate/ Prohibit Imports and exports;

(b) Protect Indian industry from dumping by other countries;

(c) Collect revenue from customs duty.

(d) Prevention of smuggling and violation of Rules and Regulations on Imports and Exports, its enforcement and collection of Statistics relating to Foreign Trade and Revenue

In addition, provisions of the Customs Act are connected with Acts like the Foreign Trade (Development and Regulation) Act, the Foreign Exchange Management Act, etc. The Customs Law comprises Acts, Rules Regulations and Notifications, which are as follows:

a. ***CUSTOMS ACT, 1962***: This is the main Act, which provides for levy and collection of duty, import/export procedures, prohibitions on importation and exportation of goods, penalties, offences, etc.

b. ***CUSTOMS TARIFF ACT, 1975 (CTA)***: This Act contains two schedules: one providing classification and the rate of duties for imports (Schedule I) while the other provides for classification and rates of duties for exports (Schedule II). In addition, the CTA makes provisions for duties like additional duty (CVD), preferential duty, anti-dumping duty, protective duty, etc.

c. ***RULES UNDER CUSTOMS ACT***: Under Section 156 of the Customs Act, the Central Govt. has been empowered to make rules, consistent with provisions of the Act, to carry out the purposes of the Act. Various rules have been framed under these powers.

d. ***REGULATIONS UNDER CUSTOMS ACT***: Section 157 of the Customs Act has empowered the Board (CBEC) to make regulations, consistent with provisions of the Act, to carry out the purposes of the Act. Various regulations have been framed under these powers.

e. ***NOTIFICATIONS UNDER CUSTOMS ACT***: Various provisions of the Act or Rules authorize the Central Government to issue notifications. The main provisions in Sec. 25 grants partial or full exemption from duty and Sec. 11 empowers the Central Government to prohibit import or export of goods for various purposes specified under sub-section (2).

Before dealing with the concepts involved, we will set out the basic definitions that can assist in understanding the various provisions and procedures in a better manner.

Taxable Event

Introduction

All taxes and duties are imposed in three stages; these are levy, assessment and collection. Levy is the stage where the declaration of liability is made and the persons or the properties in respect of which the tax or duty is to be levied is identified and charged. Assessment is the procedure of quantifying the amount of liability. The liability to tax or duty does not depend upon assessment. The final stage is where the tax or duty is actually collected.

The collection of tax or duty may for administrative or other reasons be postponed to a later time as is done in the case of excise duty, wherein the liability towards duty arises upon manufacture of excisable goods, but the duty is collected only upon removal of goods from the factory. Here we would examine the event which attracts the levy of customs duty.

Taxable Event for Import Duty

Goods become liable to import duty when they are imported. As per Section 2 (23) 'import' with its grammatical variations and cognate expressions, means bringing into India from a place outside India.

India includes its territorial waters. Hence, it was thought that import is complete as soon as goods enter territorial waters. But in *Kiran Spinning Mills Vs CC (1999(113)ELT 753)*, it has been held by the Apex Court that import is completed only when goods cross the customs barrier. The taxable event is the day of crossing of customs barrier and not the date when goods landed in India or had entered territorial waters. In the case of goods, which are in the warehouse of the customs, barrier would be crossed only when they are sought to be taken out of the customs and brought to the mass of goods in the country.

In *Garden Silk Mills Ltd., Vs UOI (1999(113)ELT 358(SC)*, it was held that the import of goods into India commences when they enter into its territorial waters but continues and is completed when the goods become part of the mass of goods within the country. Summarizing these decisions, it is clear that the process of import would commence when the goods enter into **territorial waters** and the **taxable event would be reached when the goods cross the customs barrier.** Though there is a slight variation in the SC judgments, it can be said that 'mixing up with the mass of goods in the country' after crossing the customs barrier is the 'taxable event' for customs duty on imports.

Taxable Event for Export Duty

As per section 2 (18), 'exports' with its grammatical variations and cognate expressions means taking out of India to a place outside India. Export is complete only when goods cross the territorial waters of India. This was also held in *UOI v. Rajindra Dyeing and Printing Mills (2005) 10 SCC 187 = 180 ELT 433 (SC).* It may be noted that even if export duty is collected before a ship leaves the port it does not mean that taxable event has occurred, since duty can be collected in advance also.

Types/ Components of Duties of Customs

The Modes of Duty Computation

Customs duty is levied by using any one or a combination of the modes specified below:

(a) *Specific Duty:* It is a rate of duty based on the weight or the measurement of the goods to be imported or exported.

(b) *Ad-valorem levy:* This rate is based on the value of the goods imported into or exported out of India. As stated earlier, valuation of goods for charging by this mode becomes vitally important, as the duty amount will be based on the value declared by the importer.

(c) Under the third method there can be a combination of both ad-valorem as well as specific duty.

The various types of Customs duties levied are:

(a) ***Basic Customs Duty***: This duty is levied under Section 12 of the Customs Act. Normally, it is levied as a percentage of value as determined under Section 14 (1). The rates vary for different items, but general rate on non-agricultural goods at present is 10%, except for a few goods.

(b) ***Additional duty of Customs u/s 3(1) of CTA 1975***: This is popularly known as countervailing duty or CVD. This is also a duty of customs levied at the rates equal to the duty of excise. This duty is imposed in order to counterbalance the excise duty, which is leviable on similar goods if manufactured within the State, and accordingly this duty will not be levied if there is no entry in the Central Excise tariff for the said goods or if there is any exemption under the Central Excise Act exempting excise duty for that product. CVD is payable on assessable value plus basic customs duty.

Here it should be noted that in respect of some consumer goods, excise duty is payable on the basis of MRP printed on goods/packing as per section 4A of the Central Excise Act. If such goods are imported, duty would be payable based on MRP printed on goods/packing less abatement allowed on such goods. For goods to be sold in retail the need to affix the same before clearance would also be required. This duty is to ensure that the local goods are not discriminated against imported goods and that they suffer the same duty as that of the local ones. Normally all countries ensure that exported goods are free from any duty component.

CVD is neither an excise duty nor a basic customs duty. However, all provisions of the Customs Act are applicable to CVD.

(c) ***Special Additional Duty u/s 3(3) of CTA 1975***: In addition to CVD u/s 3 (1) of CTA, which is chargeable on all goods, further additional duty can be levied by the Central Government to counterbalance the excise duty leviable on raw materials, components etc. similar to those used in the production of such articles. This levy comes into use when goods manufactured indigenously are exempted from excise duty. This duty also is to ensure that local goods are not discriminated against and imported goods suffer the same duty as that of the local ones. Normally all countries ensure that exported goods are free from any duty component.

(d) ***Special Additional Duty u/s 3(5) of CTA 1975***: It is the duty levied at 4% on imports to equalize the imported goods with that of the domestic goods, which have to bear the local sales taxes/VAT. Explanation to section 3 (5) makes it clear that even if the imported article was not sold in India, tax will be leviable on the basis of sales tax/VAT that would have been payable if the goods were sold, purchased or transported in India. When introduced, this duty was levied only on Information Technology Agreement (ITA) bound items and on specified inputs for the manufacture of electronic/information technology items. But w.e.f. 1-3-2006 it is extended to almost all the goods. All the clearances from the SEZ into DTA are being exempted from this duty which is levied at 4%, provided such goods are levied to VAT/CST. When imported goods are sold in India, the traders importing goods can get refund of the Special Additional Duty SAD. The CENVAT Credit Rules were amended to permit the transfer of unutilized credit of SAD lying in balance at the end of each quarter to other registered premises of the same manufacturer.

(e) ***Protective Duties***: As per the recommendations of the Tariff Commission, the Central Government may impose protective duties u/s 6 of the CTA, if it is satisfied that immediate action is necessary to protect the interests of the Indian Industry.

(f) ***Countervailing Duty on Subsidized Goods***: If a country or territory pays any subsidy (directly or indirectly) to its exporters for exporting goods to India, the Central Government can impose countervailing duty up to the amount of such subsidy u/s 9 of CTA. Most countries provide this, especially to the farm sector.

(g) ***Anti-Dumping Duty u/s 9A of CTA***: Often large manufacturers from abroad may export goods at very low prices compared to prices in their domestic market. Such dumping may be resorted by exporters to dominate and cripple the domestic industry of the importing country or to dispose their excess stock. This is an unfair trade practice.

In order to avoid such dumping and to protect domestic industry, the Central Government can impose anti-dumping duty *vide* notification if the goods are being sold at less than their normal value. This is permissible under the WTO agreement, only when the Indian industry is already producing the 'like goods'. Presently, countries like China and Taiwan are involved in dumping. Even Indian steel exporters are facing charges of dumping goods in the USA.

Dumping duty is decided by the designated authority after enquiry and imposed by the Central Government by issuing a notification. Provisional anti-dumping duty can be imposed during the period of enquiry. Dumping duty is decided by the designated authority after enquiry. Rules have been made for the purpose of enabling the designated authority to investigate and identify alleged dumping of articles, and submit findings to the Government and to recommend the amount of anti-dumping duty.

(h) ***Safeguard Duty u/s 8B***: This is charged on any article *vide* section 8(B) to be imported into the country, which if so imported would threaten to cause injury to our domestic industry. This duty cannot be imposed on imports from developing countries from where not more than 3% of the imports of that article are made into India. The aggregate of the imports of such article from all such developing countries shall not however exceed 9% of its total imports into India. The Central Govt. has the power to impose safeguard duty pending determination of such a percentage as specified above if the preliminary reports state that such imports have caused or threatened to cause serious injury to the domestic industry. Levy of this duty is permissible under the WTO agreement, provided it should not discriminate between imports from different countries having the Most Favored Nation status. Moreover, now it has been provided that safeguard duty shall be leviable on Input / Raw Materials imported by the EOU/ SEZ units if articles imported (on which Safeguard duty is leviable) are cleared as such into the DTA by such units or used in manufacture of goods that are cleared into the DTA.

(i) ***Education Cess on Duties of Customs***: Education Cess on customs was imposed on imported goods on 9-7-2004. The cess will be 2% on the value of aggregate duty of customs. However, education cess will not be payable on (i) Special CVD payable u/s 3 (5) of Customs Tariff Act, (ii) Safeguard duty under Section 8B and 8C, (iii) countervailing duty u/s 9, (iv) anti-dumping duty u/s 9A of Customs Tariff Act, (v) Education Cess on imported goods and (vi) Secondary and Higher Education Cess on imported goods.

(j) ***NCCD of Customs***: The National Calamity Contingent Duty of customs has been imposed u/s 134 of the Finance Act 2003, on pan masala, chewing tobacco and cigarettes, besides some other specified goods.

(k) ***Export Duty***: Since the Government actively encourages export, export duty is imposed only on articles that are given in the Second Schedule of the CTA. At present, export duty is imposed on iron ore, luggage leather, hides, skins, leather and some other items.

(l) ***Secondary and Higher Education Cess***: Secondary and Higher Education Cess (SHE Cess) on customs was imposed on imported goods on 01-03-2007. The cess will be 1% on the value of aggregate duty of customs. However, SHE Cess will not be payable on (i) Special CVD payable u/s 3 (5) of the Customs Tariff Act, (ii) Safeguard duty under Section 8B and 8C, (iii) countervailing duty u/s 9, (iv) anti-dumping duty u/s 9A of Customs Tariff Act, (v) Education Cess on imported goods and (vi) Secondary and Higher Education Cess on imported goods.

An Example of Calculation of Duty Payable is as follows:

	Description	**Amount**
A	Assessable value (CIF + Landing Charges)	100000
B	Basic customs duty (BCD) 10%	10000
C	Value for CVD (A+B)	110000
D	CVD equivalent to central excise duty 12.5%	13750
E	Educational Cess on CVD 2%	0
F	Sec. and Higher Educational Cess 1%	0
G	Customs duty for calculation of Cess	23750
H	Customs Educational cess 2%	475
I	Customs Secondary and higher educational cess 1%	237.50
J	Value for SAD	124462.50
K	SAD @ 4%	4978.50
Total Duty		**29441**

Duty Drawback and Export Promotion Schemes

Introduction

An important principle in the levy of customs duty is that goods should be consumed within the country of importation. If the goods are not so consumed, and exported out of the country, the cost of export goods gets unduly escalated on account of the incidence of customs duty.

Customs and Central Excise Duties and Service Tax Drawback Rules, 1995

In exercise of the powers conferred upon it by section 75(2), the Central Government has made the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995 *vide Notification No.37/95 dated 26.05.1995*.

Definitions [Rule 2]

(a) **Drawback** in relation to any goods manufactured in India and exported **means** the rebate of duty chargeable on any imported materials or excisable materials used in the manufacture of such excisable goods. These are subject to the Customs Act, 1962, the Central Excise Act, 1944 and Drawback rules.

(b) **Export** with its grammatical variations and cognate expressions means

(i) taking out of India to a place outside India or

(ii) taking out from a place in the Domestic Tariff Area (DTA) to a special economic zone and includes loading of provisions or store or equipment for use on board a vessel or aircraft proceeding to a foreign port.

The export is complete when goods cross the territorial waters of India and property passes to purchases. If export is not complete, the duty drawback is not payable.

[UOI v. Rajindra Dyeing and Printing Mills 2005 (180) ELT 433 (SC)]

Drawback [Rule 3]: Drawback may be allowed at such amounts and such rates determined by the Government and reduced by any amount of exemption availed on the export of goods (reduced rate of duty or tax paid/Cenvat Credit availed).

Revision of rates/amount [Rule 4]: The rates/amount of drawback may be revised by the Central Government.

Determination of date from which the amount or rate of drawback is to come into force and the effective date for application of amount or rate of drawback [Rule 5]

(i) The Central Government will specify the period of validity for the drawback.

(ii) Retrospective effect – from the date of notification.

(iii) The rate must be determined under section 16 or under section 83(2).

The Government annually notifies ALL INDUSTRY RATES in the form of a Drawback Schedule, after the announcement of the Union Budget.

Cases where the amount or rate of drawback has not been determined [Rule 6]:

Where no drawback is determined, the manufacturer/exporter has to apply for drawback within 3 months seeking a brand rate from the Government giving the date and information about the use of inputs, manufacture, etc.

Cases where the amount or rate of drawback determined is low [Rule 7]: When the drawback rate is low, a SPECIAL BRAND RATE will be applicable.

Where the rate is lower than $4/5^{th}$ of the duty/taxes paid, revised rate may be applied for within 3 months. Proper rate will be fixed by the Government and brand rate letter will be issued accordingly and provisional payment will be allowed subject to adjustment.

Cases where no amount or rate of drawback is to be determined [Rule 8]: No drawback will be determined if:

(i) it is less than 1% of FOB value, except where the amount of drawback per shipment exceeds ₹ 500/-; or

(ii) if the export value is less than the value of imported materials used in such export goods or is not more than such percentage of the value of the imported materials used in the manufacture of such goods or class of goods notified by the Central Government in this behalf.

Upper Limit of Drawback money or rate [Rule 8A]: The upper limit of drawback money or rate determined under rule 3 should not exceed one third of the market price of the export product.

Power to require submission of information and documents [Rule 9]: Any officer of the Government authorized by the Assistant Commissioner/Deputy Commissioner of the Central

Excise/Customs has power to require submission of information and documents to determine the rate of drawback.

Access to factory [Rule 10]: Access to factory has to be provided to the Assistant/Deputy Commissioner Customs of Central Excise to verify the facts.

Payment of drawback and interest [Rule 14]: One or more claims can be combined and adjustments of all dues can be made and cheques issued or amounts credited to the exporter or his Custom House account.

Supplementary claim [Rule 15]: Supplementary claims can be made in the Form Annexure III within 3 months from the

(a) Date of publication of such rate in case of revised rate granted

(b) Date of communication of the said rate in case of brand rate (rule 6 & 7)

(c) Date of payment of original drawback in other cases.

Repayment of erroneous or excess payment of drawback and interest [Rule 16]

Erroneous payments are to be repaid on demand or otherwise recovered u/s 142 of Customs Act with interest.

Recovery of amount of drawback where export proceeds not realised [Rule 16A]: If the exporter fails to produce evidence in respect of realization of export proceeds within the period allowed under the Foreign Exchange Management Act, 1999, or any extension of the said period by the Reserve Bank of India, the Deputy/Assistant Commissioner of Customs shall issue a notice to the exporter to produce evidence of the realization of export proceeds within 30 days.

If export proceeds are not realized, duty drawback allowed can be recovered even if proceedings under the FEMA are dropped.

Power to relax [Rule 17]: Any relaxation in procedure may be made by the Government after recording the reasons in writing.

FOREIGN TRADE POLICY

New Foreign Trade Policy 2015-2020 has come into effect from April 1, 2015. The salient features of the new policy are discussed hereunder:

Introduction

Foreign Trade Policy is a set of guidelines or instructions issued by the Central Government in matters related to import and export of goods in India, viz., foreign trade. In the era of globalization, foreign trade is the lifeline of any economy. Its primary purpose is not merely to earn foreign exchange, but also to stimulate greater economic activity. International trade not only enables a nation to specialize in producing goods that it can produce cheaply and efficiently, but also to consume more than it would be able to produce with its own resources. International trade enlarges the potential market for the goods of a particular economy.

Legislation governing foreign trade: In India, the Ministry of Commerce and Industry deals with the promotion and regulation of foreign trade. The main legislation concerning foreign trade is the Foreign Trade (Development and Regulation) Act, 1992 FT (D&R) Act. The FT (D&R) Act provides for the development and regulation of foreign trade by facilitating imports into, and augmenting exports from, India and for matters connected therewith or incidental thereto. As per the provisions of the Act, the Government:

A. may make provisions for facilitating and controlling foreign trade;

B. may prohibit, restrict and regulate exports and imports, in all or specified cases as well as subject them to exemptions;

C. is authorised to formulate and announce an export and import policy and also amend the same from time to time, by notification in the Official Gazette;

D. is also authorised to appoint a 'Director General of Foreign Trade' for the purpose of the Act, including formulation and implementation of the export-import policy.

Foreign Trade Policy: In exercise of the powers conferred by the FT (D&R) Act, the Ministry of Commerce and Industry, Government of India generally announces the integrated **Foreign Trade Policy (FTP)** every five years with certain underlined objectives. The Foreign Trade Policy was earlier called Export Import policy, EXIM Policy. However, export import policy is now referred to as Foreign Trade Policy (FTP) of the country as it covers areas much beyond export and import. This policy is updated every year, in addition to changes that are made throughout the year.

The FTP, in general, aims at developing export potential, improving export performance, encouraging foreign trade and creating favourable balance of payments position. The policies are driven by factors like export led growth, improving efficiency and competitiveness of Indian industries, ease of doing business, etc.

Some of the salient features of the FTP:

- Export-Import of goods and services is generally free unless specifically regulated by the provisions of the Policy or any other law for the time being in force.
- Export and import goods are broadly categorized as (a) Free (b) Restricted (c) Prohibited.
- Some goods are 'free' for import and export but can be imported/exported only through State Trading Enterprises (STE).
- Restrictions can be imposed on exports and imports for various strategic, health, defence, environment, and other reasons. If goods are restricted for import/export but not prohibited, the Government can give permission/license in specific cases.
- Exports are promoted through various promotional schemes.
- Goods and services are to be exported. Hence, the taxes on exports are either exempted or adjusted or refunded on both outputs and inputs, through the schemes of Duty Exemption, Duty Refund (Drawbacks and Rebates).
- Capital goods can be imported at NIL duty for the purpose of exports under the scheme of EPCG.
- For units undertaking to export all their production, there are special schemes so that they can avoid taxes at every stage under the scheme of EOU/SEZ.
- In certain cases, imports get duty exemption/concession for certain special purposes. In such cases, to enable domestic suppliers compete with the international suppliers, the supplies of domestic suppliers are treated as deemed exports.
- Duty credit scrips schemes are designed to promote exports of some specified goods to specified markets and to promote export of specified services.

Foreign Trade Policy 2015-2020: The present Foreign Trade Policy, which was announced on 01.04.2015, is an integrated policy for the period between 01.04.2015 and 31.03.2020.

The guiding principles of the FTP 2015-2020 are as follows:

- Generation of employment and increasing value addition in country, in keeping with 'Make in India' vision.
- Focus on improving 'ease of doing businesses and 'trade facilitation' by simplifying procedures and extensive use of e-governance, a move towards paperless working.
- Encouraging e-commerce exports of specified products.
- Steps to encourage manufacture and export by SEZ, EOU, STP, EHTP and BTP.
- Duty credit scrips to (a) encourage exports of specified products to specified markets (b) export of services.
- Special efforts to resolve quality complaints and trade disputes.

The various measures taken in the said direction include:

- The number of mandatory documents required for exports and imports of goods from/into India have been reduced to 3 each (discussed in detail in subsequent pages).
- The facility of 24 X 7 Customs clearance for specified imports has been made available at 18 specified sea ports. The facility of 24 X 7 Customs clearance for specified imports has also been made available at 17 specified air cargo complexes.
- Single window scheme has been introduced to enable importers and exporters to lodge their clearance documents at a single point thereby providing a common platform to trade to meet requirements of all regulatory agencies involved in exim trade.
- To facilitate the processing of shipping bills before actual shipment, prior online filing facility for shipping bills has been provided by the Customs - 7 days for air shipments and ICDs and 14 days for shipments by sea.
- DGFT under the EDI initiatives has provided the facility of o line filing of applications to obtain Importer Exporter Code and various authorizations /scrips.

Exports from and imports into India need a number of regulatory requirements to be complied with at various stages. Yet if properly planned, exports and imports can utilize many benefits that are available under various provisions of the FTP. The policy not only prescribes the guidelines as to which goods and services can be imported/exported and the relevant procedures thereto but also provides a lot of benefits if properly planned.

Schemes like Duty Exemption Schemes, EPCG Schemes, Deemed Exports, etc., benefit exporters, importers and even defined domestic businesses, thereby assisting all businesses to reduce costs at every stage in the value chain. In addition, exporters can avail other benefits under promotional schemes.

Administration of the FTP: The FTP is formulated, controlled and supervised by the office of the Director General of Foreign Trade (DGFT), an attached office of the Ministry of Commerce & Industry, Government of India. The DGFT has several offices in various parts of the country which work on the basis of the policy formed by the headquarters at Delhi.

DGFT issues **authorization** (earlier called as license) for import/export. 'Authorization' means a permission in terms of the FT(D&R) Act to import or export. It also grants **Importer Exporter Code** (IEC) Number to importers and exporters. Import and Export without the IEC number is not permitted, unless specifically exempted.

The decision of the DGFT is final and binding in respect of interpretation of any provision of foreign trade policy, classification of any item in ITC(HS), content scope or issue of any authorization issued under the FTP.

Other authorities involved: Though the FTP is formulated by the DGFT, it is administered in close coordination with other agencies. Other important authorities dealing with FTP are:

(1) **The Central Board of Excise and Customs (CBEC):** The CBEC comes under the Ministry of Finance and its two Departments, namely Customs and Central Excise, facilitate in implementing the provisions of the FTP.

The Customs Department is responsible for the clearance of export and import goods after their valuation and examination. Customs authorities follow the policy formed by the DGFT while clearing the goods. Since there is a central excise duty on almost all the manufactured products, Central Excise authorities need to be involved for all matters of exports, where goods have to be cleared without duty. The Central Excise Department works as Customs Departments at various required places, and has a crucial role in the procedural aspects.

(2) **The Reserve Bank of India (RBI): The** RBI is the nodal bank in the country which formulates policies related to the management of money, including payments and receipts of foreign exchange. It also monitors the receipt and payments for exports and imports. The RBI works under the Ministry of Finance.

(3) **State VAT Departments:** Since VAT is payable on domestic goods but not on export goods, formalities with State VAT departments assume importance in ensuring tax free exports.

Contents of Foreign Trade Policy: The contents of the FTP 2015-2020 are as follows:

(i) **FTP 2015-2020:** has 9 Chapters which give the basic policy. This has been notified by the Central Government on 01.04.2015. The policy is amended normally in April every year and also any time during any time of the year.

(ii) **Handbook of Procedures 2015-2020:** (HBP 2015-2020) these contain 9 chapters, covering procedural aspects of policy. This was notified by the Director General of Foreign Trade on 01.04.2015. It is amended from time to time, as per requirements.

(iii) **Appendices and Aayat Niryat Forms (AANF):** These are various appendices and forms relating to import and export.

(iv) **Standard Input-Output Norms:** Standard Input-Output Norms (SION) of various products are notified from time to time. Based on SION, exporters are provided the facility to make duty-free import of inputs required for the manufacture of export products under the Duty Exemption Schemes like Advance Authorization and DFIA.

(v) **ITC(HS) Classification of Exports and Import Items:** The Export Import Policy regarding import or export of a specific item is given in the Indian Trade Classification Code based on Harmonized System of Coding [ITC(HS)]. ITC-HS Coding was adopted in India for import-export operations. Indian custom uses eight digit ITC-HS Codes to suit the national trade requirements.

    ITC-HS codes are divided into two schedules. **ITC(HS) Import Schedule I** describes the rules and guidelines related to import policies whereas **Schedule II** describes the rules and regulations related to export policies. Presently, most of the goods can be imported without any authorization. Schedule II contains very few products, where export is prohibited or restricted. Excluding those items, export of all other goods is free.

    Any change or formulation or addition of new codes in ITC-HS Codes is carried out by the DGFT (Directorate General of Foreign Trade).

Foreign Trade Policy *vis a vis* tax laws: The Foreign Trade Policy is closely knit with the Customs and Excise laws of India. However, the policy provisions *per-se* do not override tax laws. The exemptions extended by the FTP are given effect by issuing notifications under respective tax laws (e.g., Customs Tariff Act). Thus, actual benefit of the exemption depends on the language of exemption notifications issued by the CBEC. In most cases, the exemption notifications refer to policy provisions for detailed conditions. The Ministry of Finance/ Tax Authorities cannot question the decision of authorities under the Ministry of Commerce (so far as the issue of authorization etc. is concerned).

FTP, Handbook of procedures under FTP, Central Excise Act and Customs Act and notifications issued hereunder form an integrated scheme of indirect taxation. All these statues have to be read as a whole and not in isolation, since they are series of statues relating to same subject matter.

Scope of FTP: The FTP covers the policies and regulations with respect to the following matters:

(i) Legal framework and trade facilitation – Chapter 1

(ii) Policy for regulating import and export of goods and services – Chapter 2

(iii) Export Promotional Measures – Export from India Scheme – Chapter 3

(iv) Duty Remission and Duty Exemption Scheme for promotion of exports – AA and DFIA and duty drawback – Chapter 4

(v) Export promotion Capital Goods (EPCG) Scheme – Chapter 5

(vi) Export Oriented Undertakings (EOU) / Electronic Hardware Technology Park (EHTP) / Software Technology Park (STP) and Bio Technology Parks (BTU) Schemes – Chapter 6

(vii) Deemed Exports – Chapter 7

(viii) Quality Complaints and Trade Disputes – Chapter 8

(ix) Definitions – Chapter 9

Provisions relating to the Special Economic Zone (SEZ) are contained in a separate Act and are not part of the FTP. However, provisions of the SEZ are closely related to the Foreign Trade Policy.

Handbook of Procedures (HBP 2015-2020) has 9 corresponding chapters which deal mainly with procedural aspects of the foreign trade policy.

Special Focus Initiatives: The FTP provides certain special focus initiatives for Market Diversification, Technological Upgradation, Support to status holders, Agriculture, Handlooms, Handicraft, Gems & Jewellery, Leather, Marine, Electronics and IT Hardware Manufacturing Industries, Green products, Exports of products from North-East, Sports Goods and Toys sectors wherein the Government of India shall make concerted efforts to promote exports.

Board of Trade: Board of Trade (BOT) has been constituted to advise the Government on

Policy measures for increasing exports, review export performance, review policy and procedures for imports and exports and examine issues relevant for the promotion of India's foreign trade. The Commerce & Industry Minister will be the Chairman of the BOT. The Government shall also nominate up to 25 persons, of whom at least 10 will be experts in trade policy. In addition, the Chairmen of the recognized Export Promotion Councils (EPCs) and President or Secretary-Generals of National Chambers of Commerce will be ex-officio members. The BOT will meet at least once every quarter.

Trade facilitation through EDI initiatives: The DGFT has put in place a robust EDI system for the purpose of export facilitation and good governance. It has set up a secured EDI message exchange system for various documentation related activities including import and export authorizations established with other administrative departments, namely, Customs, Banks and EPCs. This has reduced the physical interface of exporters and importers with the Government Departments and is a significant measure in the direction of reduction of transaction cost. The endeavour of the DGFT has been to enlarge the scope of EDI to achieve higher levels of integration with partner departments. E-BRC (Electronic Bank Realisation Certificate) has enabled the DGFT to capture details of realization of export proceeds directly from the banks through the secured electronic mode. Further, an online complaint registration and monitoring system allows users to register complaints and receive status/ reply online.

DGCI&S Commercial Trade Data: DGCI&S has put in place a Data Suppression Policy. Transaction level data would not be made publically available to protect privacy. DGCI&S trade data shall be made available at aggregate level with a minimum possible time lag in a query based structured format on commercial criteria.

Export Promotion Schemes

Exports of a country play an important role in its economy. The Government always endeavors to encourage exports by introducing various export promotion schemes. Consequently, there are various promotional measures under the FTP and other schemes operated under the Ministry of Commerce through various Export Promotion Councils.

As per the WTO, export incentives cannot be given to exporters as such otherwise there would be no free competition. Hence, all the export promotion schemes in India are directed towards ensuring that inputs as well as final products are made tax-free.

Duty remission schemes

1. DUTY DRAWBACK (DBK) SCHEME

At present, this scheme is used to allow rebate on duties (central excise, customs and service

tax) paid on inputs and input services used for exported final product. This scheme has been discussed in detail in Chapter-11-Duty Drawback.

2. DUTY REMISSION SCHEMES IN the CENTRAL EXCISE LAW

Duty remission/exemption is also granted under the central excise law, through CENVAT credit scheme and Rules 18 and 19 of the Central Excise Rules, 2002. These schemes are discussed in Section A: Central Excise.

2. Reward Schemes

Reward schemes are the schemes which entitle exporters to duty credit scrips subject to various conditions. These scrips can be used for the payment of customs duties on the import of inputs/goods, including notified capital goods, payment of excise duties on domestic procurement of inputs/goods, including capital goods, and payment of service tax on the procurement of services.

These scrips are transferable, i.e. they can be sold in the market, if the holder of duty credit scrip does not intend to import goods against the scrips. Goods imported under the scrip are also freely transferable.

Two schemes for the export of merchandise and services are:

(i) Merchandise Exports from India Scheme (MEIS)

(ii) Service Exports from India Scheme (SEIS)

1. MERCHANDISE EXPORTS FROM INDIA SCHEME (MEIS)

The objective of the MEIS scheme is to compensate infrastructural inefficiencies and associated costs involved in the export of goods/products which are produced/manufactured in India, especially goods having high export intensity, employment potential and thereby enhancing India's export competitiveness.

(i) Reward under the scheme: Under the MEIS, exports of notified goods/products to notified markets shall be eligible for reward at the specified rate(s). Unless otherwise specified, the basis of calculation of reward would be:

(i) on realised FOB value of exports in free foreign exchange,

or

(ii) on FOB value of exports as given in the Shipping Bills in free foreign exchange, whichever is less.

(ii) Ineligible categories under MEIS: Some export categories/sectors ineligible for Duty Credit Scrip entitlement under the MEIS are listed below:

(1) EOUs / EHTPs / BTPs/ STPs who are availing direct tax benefits / exemption

(2) Supplies made from DTA units to SEZ units

(3) Exports through trans-shipment, i.e., exports that originate in a third country but are trans-shipped through India

(4) Deemed Exports

(5) SEZ/EOU/EHT P/BPT/FTWZ products exported through DTA units

(6) Export products which are subject to the Minimum export price or export duty

(7) Ores and concentrates of all types and in all formations

(8) Cereals of all types

(9) Sugar of all types and all forms, unless specifically notified.

(10) Crude / petroleum oil and crude / primary and base products of all types and all formulations

(11) Export of milk and milk products and meat and meat products unless specifically notified.

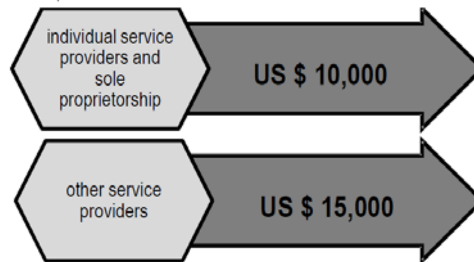
(iii) Export of goods through courier/foreign post offices using e-commerce: Exports of handicraft items, handloom products, books/periodicals, leather footwear, toys and tailor made fashion garments through courier or foreign post office using e-commerce of FOB value upto ₹ 25,000 per consignment shall be entitled for rewards under the MEIS.

2. SERVICE EXPORTS FROM INDIA SCHEME (SEIS)

The objective of SEIS scheme is to encourage export of notified services from India. The scheme applies to the export of services made on or after 01.04.2015.

(i) Eligible service providers: A service provider (with active IEC at the time of rendering services) located in India, providing notified services rendered in the specified manner*

shall be eligible for reward at the notified rate(s) on net foreign exchange earned provided the minimum net free foreign exchange earnings of such service provider in the preceding financial year is:



***Specified manner** is the supply of a 'service' from India to any other country; (Mode 1-Cross border trade) and the supply of a 'service' from India to service consumer(s) of any other country in India; (Mode 2-Consumption abroad).

Payment in Indian Rupees for service charges earned on specified services shall be treated as receipt in deemed foreign exchange as per the guidelines of the Reserve Bank of India. The list of such services and the notified rates of rewards are as under:

Sl. No	SECTORS	Admissible rate
1.	**BUSINESS SERVICES**	
A.	Professional services Legal services, Accounting, auditing and bookkeeping services, Taxation services, Architectural services, Engineering services, Integrated engineering services, Urban planning and landscape architectural services, Medical and dental services, Veterinary services, Services provided by midwives, nurses, physiotherapists and paramedical personnel	5%
B.	Research and development services R&D services on natural sciences, R&D services on social sciences and humanities, Interdisciplinary R&D services	5%
C.	Rental/Leasing services without operators Relating to ships, Relating to aircraft, Relating to other transport equipment, Relating to other machinery and equipment	5%
D.	Other business services Advertising services, Market research and public opinion	3%

	polling services, Management consulting service, Services related to management consulting, Technical testing and analysis services, Services incidental to agricultural, hunting and forestry, Services incidental to fishing, Services incidental to mining, Services incidental to manufacturing, Services incidental to energy distribution, Placement and supply services of personnel, Investigation and security, Related scientific and technical consulting services, Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment), Building- cleaning services, Photographic services, Packaging services, Printing, publishing and Convention services	
2.	**COMMUNICATION SERVICES** Audiovisual services Motion picture and video tape production and distribution service, Motion picture projection service, Radio and television services, Radio and television transmission services, Sound recording.	5%
3.	**CONSTRUCTION AND RELATED ENGINEERING SERVICES** General Construction work for building, General Construction work for Civil Engineering, Installation and assembly work, Building completion and finishing work	5%
4.	**EDUCATIONAL SERVICES** (Please refer to Note 1) Primary education services, Secondary education services, Higher education services, Adult education	5%
5.	**ENVIRONMENTAL SERVICES** Sewage services, Refuse disposal services, Sanitation and similar services	5%
6.	**HEALTH-RELATED AND SOCIAL SERVICES** Hospital services	5%
7.	**TOURISM AND TRAVEL-RELATED SERVICES**	
A.	Hotels and Restaurants (including catering)	
	a. Hotel	3%
	b. Restaurants (including catering)	3%
B.	Travel agencies and tour operators services	5%
C.	Tourist guides services	5%

8.	**RECREATIONAL, CULTURAL AND SPORTING SERVICES** (other than audiovisual services) Entertainment services (including theatre, live bands and circus services), News agency services, Libraries, archives, museums and other cultural services, Sporting and other recreational services	5%
9.	**TRANSPORT SERVICES (Please refer to Note 2)**	
A.	Maritime Transport Services Passenger transportation*, Freight transportation*, Rental of vessels with crew*, Maintenance and repair of vessels, Pushing and towing services, Supporting services for maritime transport	5%
B.	Air transport services Rental of aircraft with crew, Maintenance and repair of aircraft, Airport Operations and ground handling	5%
C.	Road Transport Services Passenger transportation, Freight transportation, Rental of Commercial vehicles with operator, Maintenance and repair of road transport equipment, Supporting services for road transport services	5%
D.	Services Auxiliary To All Modes of Transport. Cargo-handling services, Storage and warehouse services, Freight transport agency services	5%

Note:

(1) Under education services, SEIS shall not be available on Capitation fee.

(2) *Operations from India by Indian Flag Carriers only is allowed under Maritime transport services.

1. **Net Foreign exchange earnings**

   = Gross Earnings of Foreign Exchange **Minus** Total expenses/ payment/ remittances of Foreign Exchange by the IEC holder, relating to service sector in the financial year.

2. **'Services'** include all tradable services covered under General Agreement on Trade in Services (GATS) and earning foreign exchange.

3. **'Service Provider'** means a person providing:

   (i) Supply of a 'service' from India to any other country; *(Mode1- Cross border trade)*

   (ii) Supply of a 'service' from India to service consumer(s) of any other country in India; *(Mode 2- Consumption abroad)*

   (iii) Supply of a 'service' from India through commercial presence in any other country. *(Mode 3 – Commercial Presence)*

   (iv) Supply of a 'service' from India through the presence of natural persons in any other country *(Mode 4- Presence of natural persons)*.

(ii) Ineligible categories under SEIS:

(A) Foreign exchange remittances other than those earned for rendering of notified services would not be counted for entitlement. Thus, other sources of foreign exchange earnings such as equity or debt participation, donations, receipts of repayment of loans etc. and any other inflow of foreign exchange, unrelated to rendering of service, would be ineligible.

(B) The following shall not be taken into account for the calculation of entitlement under the scheme:

(1) Foreign Exchange remittances

A. Related to Financial Services Sector:

- Raising of all types of foreign currency Loans Export proceeds realization of clients
- Issuance of Foreign Equity through ADRs/ GDRs or other similar instruments
- Issuance of foreign currency Bonds
- Sale of securities and other financial instruments
- Other receivables not connected with services rendered by financial institutions.

B. Earned through contract/ regular employment abroad (e.g. labour remittances)

(2) Payments for services received from the EEFC Account

(3) Foreign exchange turnover by Healthcare Institutions like equity participation, donations, etc.

(4) Foreign exchange turnover by Educational Institutions like equity participation, donations, etc.

(5) Export turnover relating to services of units operating under SEZ/ EOU/ EHTP/ STPI/ BTP Schemes or supplies of services made to such units

(6) Clubbing of turnover of services rendered by SEZ/ EOU/ EHTP/ STPI/ BTP units with turnover of DTA Service Providers

(7) Exports of Goods

(8) Foreign Exchange earnings for services provided by Airlines, Shipping lines service providers plying from any foreign country X to any foreign country Y routes not touching India at all

(9) Service providers in Telecom Sector

Common Provisions for Exports from India Schemes (MEIS and SEIS)

(i) CENVAT/ Drawback:

- Additional Customs duty/excise duty/Service Tax paid in cash or through debit under Duty Credit scrip shall be adjusted as CENVAT Credit or Duty Drawback as per DoR rules or notifications.
- Basic Custom duty paid in cash or through debit under Duty Credit scrip shall be adjusted for Duty Drawback as per DoR rules or notifications.

Duty credit scrip shall be permitted to be utilized for payment of duty in case of import of capital goods under lease financing.

(ii) Transfer of export performance: Transfer of export performance from one IEC holder to another IEC holder shall not be permitted. Thus, a shipping bill containing the name of the applicant shall be counted in export performance / turnover of applicant only if exp-ort proceeds from overseas are realized in the applicant's bank account and this shall be evidenced from e - BRC / FIRC.

However, MEIS rewards can be claimed either by the supporting manufacturer (along with disclaimer from the company / firm which has realized the foreign exchange directly from overseas) or by the company/ firm which has realized the foreign exchange directly from overseas.

(iii) Incentives of MEIS & SEIS are available to units located in the SEZs also.

3. STATUS HOLDER

Status Holders are business leaders who have excelled in international trade and have successfully contributed to country's foreign trade. All exporters of goods, services and technology having an import-export code (IEC) number shall be eligible for recognition as a status holder. Status recognition depends upon export performance**.

An applicant shall be categorized as status holder upon achieving export performance during current and previous two financial years, as indicated below:

Status category	Export Performance [FOB/ FOR (as converted) Value (in US $ million)]
One Star Export House	3
Two Star Export House	25
Three Star Export House	100
Four Star Export House	500
Five Star Export House	2,000

****Points which merit consideration while computing export performance for grant of status:**

(a) Export performance will be counted on the basis of FOB value of export earnings in free foreign exchange.

(b) For deemed export, FOR value of exports in Indian Rupees shall be converted in US$ at the exchange rate notified by CBEC, as applicable on 1st April of each Financial Year.

(c) For granting status, export performance is necessary in at least 2 out of 3 years.

(d) For calculating export performance for grant of One Star Export House Status category, exports by IEC holders under the following categories shall be granted double weightage:

(i) Micro, Small & Medium Enterprises (MSME)

(ii) Manufacturing units having ISO/BIS

(iii) Units located in North Eastern States and Jammu & Kashmir.

(iv) Units located in Agri Export Zones.

(e) Export performance of one IEC holder shall not be permitted to be transferred to another IEC holder. Hence, calculation of exports performance based on disclaimer shall not be allowed.

(f) Exports made on re-export basis shall not be counted for recognition.

Export of items under authorization, including SCOMET items, would be included for calculation of export performance.

Privileges of Status Holders: Status holders are granted benefits like:

(a) Authorization and custom clearances for both imports and exports on self-declaration basis.

(b) Fixation of Input Output Norms (SION) on priority, that is, within 60 days.

(c) Exemption from compulsory negotiation of documents through banks. The remittance receipts, however, would continue to be received through banking channels.

(d) Exemption from furnishing Bank Guarantee in Schemes under FTP.

(e) Two Star Export Houses and above are permitted to establish export warehouses.

(f) Three Star and above Export House shall be entitled to get the benefit of Accredited Clients Programme (ACP) as per the guidelines of CBEC.

(g) Status holders shall be entitled to export freely exportable items on free of cost basis for export promotion subject to an annual limit of ₹10 lakh or 2% of average annual export realization during the preceding 3 licensing years, whichever is higher.

Export Promotion Capital Goods Scheme (EPCG)

Export Promotion Capital Goods Scheme (EPCG) permits exporters to import capital goods for pre-production, production and post-production at zero customs duty or procure them indigenously without paying duty in the prescribed manner. In return, exporters have to fulfill the export obligation.

Import under the EPCG scheme shall be subject to an export obligation equivalent to 6 times of duty saved on capital goods to be fulfilled in 6 years, reckoned from the date of issue of

authorization. Authorization shall be valid for 18 months from the date of issue. Import of capital goods shall be subject to 'Actual User' condition till export obligation is completed. After that, capital goods can be sold or transferred.

(i) Eligible exporters: The following are eligible for the EPCG scheme:

- Manufacturer exporters with or without supporting manufacturer(s),
- Merchant exporters tied to supporting manufacturer(s), and
- Service providers including service providers designated as Common Service Provider (CSP) subject to prescribed conditions.

(ii) Eligible and ineligible capital goods:

<table>
<tr><th>Eligible capital goods include</th><th>Ineligible capital goods include</th></tr>
<tr><td>Capital Goods including capital goods in CKD/SKD condition</td><td>Second hand capital goods</td></tr>
<tr><td>Computer software systems</td><td rowspan="4">Any capital goods (including captive plants and Power Generator Sets of any kind) for:
• Export of electrical energy (power)
• Supply of electrical energy (power) under deemed exports
• Use of power (energy) in their own unit, and
• Supply/export of electricity transmission services</td></tr>
<tr><td>Spares, moulds, dies, jigs, fixtures, tools & refractories for initial lining and spare refractories</td></tr>
<tr><td>Catalysts for initial charge plus one subsequent charge</td></tr>
<tr><td>Capital goods for Project Imports notified by CBEC</td></tr>
</table>

(iii) Export Obligation: Export obligation means obligation to export product(s) covered by Authorization/ permission in terms of quantity or value or both, as may be prescribed/specified by the Regional or competent authority. Export obligation consists of average export obligation and specific export obligation.

Conditions applicable to the fulfilment of the Export Obligation (EO): **Specific export obligation (Specific EO)** under the EPCG scheme is equivalent to 6 times of duty saved on capital goods imported under EPCG scheme, to be fulfilled in 6 years reckoned from the Authorization issue-date. Specific EO is over and above the Average EO.

Note: In case countervailing duty (CVD) is paid in cash on imports under EPCG,

incidence of CVD would not be taken for computation of net duty saved, provided CENVAT is not availed.

Average export obligation (Average EO) under the EPCG scheme is the average level of exports made by the applicant in the preceding 3 licensing years for the same and similar products. It has to be achieved within the overall EO period (including extended period unless otherwise specified).

Conditions for the fulfilment of the Export Obligation (EO):

(a) EO shall be fulfilled by the authorization holder through export of goods which are manufactured by him or his supporting manufacturer / services rendered by him, for which the EPCG authorization has been granted.

(b) In case of indigenous sourcing of capital goods, specific EO shall be 25% less than the EO mentioned above, i.e. EO will be 4.5 times (75% of 6 times) of duty saved on such goods procured.

(c) Shipments under Advance Authorization, DFIA, Drawback scheme, or reward schemes would also be counted for the fulfilment of the EO under the EPCG Scheme.

(d) EO can also be fulfilled by the supply of Information Technology Agreement (ITA-1) items to DTA, provided realization is in free foreign exchange.

(e) Both physical exports as well as specified deemed exports shall also be counted towards the fulfilment of export obligation.

(iv) Incentives for early fulfillment of export obligation

In cases where Authorization holder has fulfilled 75% or more of specific export obligation and 100% of Average Export Obligation till date, if any, in half or less than half the original export obligation period specified, the remaining export obligation shall be condoned and the Authorization redeemed.

(v) Post Export EPCG Duty Credit Scrip(s)

Under this scheme, capital goods are imported on full payment of applicable duties in cash. Later, basic customs duty paid on capital goods is remitted in the form of freely transferable duty credit scrip(s) [similar to the Reward schemes discussed earlier].

- Salient features of the schemes are as follows:

- Specific EO shall be 85% of the applicable specific EO stipulated under the EPCG scheme. The Average EO remains unchanged.
- Duty remission shall be in proportion to the EO fulfilled.
- These Duty Credit Scrip(s) can be utilized in a similar manner as the scrips issued under reward schemes.

EOU, EHTP, STP & BTP Schemes

Units under Export Oriented Unit (EOU) Scheme, Electronics Hardware Technology Park (EHTP) Scheme, Software Technology Park (STP) Scheme or Bio-Technology Park (BTP) Scheme export their entire production of goods and services (except permissible sales in DTA). They can import inputs and capital goods without payment of customs duty.

STP/EHTP/BTP schemes are similar to EOU schemes and provisions are more/ less identical. EOU scheme is administered by the Ministry of Commerce and Industry, while STP/EHTP/BTP schemes are administered by their respective administrative ministries.

Software Technology Park (STP) is set up for the development of software exports. Electronic Hardware Technology Parks (EHTP) are for the export of electronics hardware and software. STP/EHTP Scheme is administered by the Ministry of Information Technology. Bio Technology Park (BTP) is established on the recommendation of the Department of Biotechnology.

(I) ELIGIBILITY

- Such units may be set up for the manufacture of goods, including repair, re-making, reconditioning, re-engineering, rendering of services, development of software, agriculture.
- Trading units are not covered under these schemes.
- Only projects having a minimum investment of ₹ 1 crore in plant & machinery shall be considered for the establishment of EOUs. However, this shall not apply to units in EHTP/ STP/ BTP, Handicrafts/ Agriculture/ Floriculture/ Aquaculture/ Animal Husbandry/ Information Technology Services, Brass Hardware and Handmade jewellery sectors. The Board of Approvals may also allow the establishment of EOUs with a lower investment criteria.

(II) PROCEDURE FOR SETTING UP NEW EOU, EHTP, STP AND BTP

(a) Approval for setting up of units under the EOU scheme shall be granted by the Units Approval Committee within 15 days as per the prescribed criteria. In other cases, approval may be granted by the Board of Approval set up for this purpose.

(b) On approval, the concerned authority will issue a Letter of Permission (LoP)/ Letter of Intent (LoI) which will have an initial validity of 2 years (extendable by 2 years and further extension, if necessary, by the BoA), by which time the unit should have commenced production.

(III) NET FOREIGN EXCHANGE EARNINGS

- EOU/ EHTP/ STP/ BTP unit must be a positive net foreign exchange earner. However, a higher value addition is specified for some sectors.
- How to compute NFE earnings- NFE Earnings shall be calculated cumulatively in blocks of 5 years, starting from the commencement of production.

  In case a unit is not able to achieve NFE due to:

  (i) prohibition/ restriction imposed on export of any product, the 5 year block period may be extended suitably by the BoA.

  (ii) adverse market condition or any ground of genuine hardship having adverse impact on functioning of the unit, the 5 year block is extendable up to 1 year.

Who monitors NFE? The performance of EOU/ EHTP/ STP/ BTP units shall be monitored by the Units Approval Committee as per the prescribed guidelines.

Which supplies to DTA can be counted for positive NFE? The following supplies effected from EOU/ EHTP/ STP/ BTP units to DTA (Domestic Tariff Area) will be counted for fulfillment of positive NFE:

(a) Supplies in DTA to holders of Advance Authorization/ Advance Authorization for annual requirement/ DFIA under duty exemption/ remission scheme/ EPCG scheme subject to certain exceptions.

(b) Supplies affected in DTA against foreign exchange remittance received from overseas.

(c) Supplies to other EOU/ EHTP/ STP/ BTP/ SEZ units, provided that such goods are permissible for procurement in terms of relevant provisions of the FTP.

(d) Supplies made to bonded warehouses set up under the FTP and/ or under section 65 of the Customs Act and free trade and warehousing zones, where payment is received in foreign exchange.

(e) Supplies of goods and services to such organizations which are entitled for duty free import of such items in terms of general exemption notification issued by the MoF.

(f) Supplies of the Information Technology Agreement (ITA-1) items and notified zero duty telecom/ electronics items.

(g) Supplies of items like tags, labels, printed bags, stickers, belts, buttons or hangers to the DTA unit for export.

(IV) ENTITLEMENTS TO UNITS UNDER EOU, EHTP, STP AND BTP SCHEMES

(a) Entitlements for supplies from DTA

- Supplies from DTA to EOU/ EHTP/ STP/ BTP units will be regarded as "deemed exports" and DTA supplier shall be eligible for relevant entitlements for deemed exports, besides the discharge of export obligation, if any, on the supplier.
- Notwithstanding the above, EOU/ EHTP/ STP/ BTP units shall, on production of a suitable disclaimer from DTA supplier, be eligible for obtaining entitlements specified under the provisions relating to deemed exports in the FTP. For claiming deemed export duty drawback, they shall get brand rates fixed by the DC wherever All Industry Rates of Drawback are not available.

In addition, EOU / EHTP / STP / BTP units shall be entitled to the following:

- Reimbursement of Central Sales Tax (CST) on goods manufactured in India. Interest @ 6% p.a. will be payable on delay in the refund of CST, if the case is not settled within 30 days of receipt of complete application.
- Exemption from payment of Central Excise Duty on goods procured from DTA on goods manufactured in India.
- Reimbursement of duty paid on fuel procured from domestic oil companies/ Depots of domestic oil Public Sector Undertakings as per the drawback rate notified by the DGFT from time to time. Reimbursement of additional duty of excise levied on fuel under the Finance Acts would also be admissible.
- CENVAT credit on service tax paid.

(b) Other Entitlements

- Exemption from industrial licensing for manufacture of items reserved for the SSI sector.
- Export proceeds will be realized within 9 months.
- Units will be allowed to retain 100% of their export earnings in the EEFC account.
- Units will not be required to furnish bank guarantee at the time of import or going for job work in DTA, subject to the fulfillment of required conditions.
- 100% FDI investment permitted through automatic route similar to the SEZ units.
- Units shall pay duty on the goods produced or manufactured and cleared into DTA on monthly basis in the manner prescribed in the Central Excise Rules.

(V) EXPORT AND IMPORT OF GOODS

Export: The following exports are permitted:

- all kinds of goods and services, except items that are prohibited in ITC(HS),
- Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET) subject to fulfillment of the conditions indicated in ITC (HS).

Import: The following imports are permitted:

- Export promotion material up to a maximum value limit of 1.5% of FOB value of previous year's exports.
- All types of goods, including capital goods, required for its activities, from DTA/ bonded warehouses in DTA/ International exhibition held in India, without payment of duty subject to the 'Actual User' condition, provided such goods are not prohibited items of import.
- Goods including capital goods (on a self-certification basis) required for approved activity, free of cost or on loan/ lease from clients, subject to the 'Actual User' condition.
- Certain specified goods from DTA, without payment of duty, for creating a central facility.
- Second hand capital goods, without any age limit, duty free.

Procurement and export of spares/ components up to 5% of FOB value of exports, may be allowed to the same consignee/ buyer of the export article, subject to the condition that it shall not count for NFE and direct tax benefits.

(VI) LEASING OF CAPITAL GOODS

An EOU/ EHTP/ STP/ BTP unit may:

- source capital goods from a domestic/ foreign leasing company without payment of excise/ customs duty, on the basis of a firm contract between parties.
- sell capital goods and lease back the same from a Non-Banking Financial Company (NBFC) subject to the fulfillment of specified conditions.

(VII) INTER UNIT TRANSFER

- Transfer of manufactured goods from one EOU/ EHTP/ STP/ BTP unit to another EOU/ EHTP/ STP/ BTP unit is allowed with prior intimation to the concerned DC and Customs authorities, following the procedure of in-bond movement of goods.
- Transfer of manufactured goods shall also be allowed from EOU/ EHTP/ STP/ BTP unit to a SEZ developer or unit following the procedure prescribed in the SEZ Rules, 2006.
- Capital goods may be transferred or given on loan to other EOU/ EHTP/ STP/ BTP/ SEZ units, with prior intimation to the concerned DC and Customs authorities.

Note: Goods supplied by one unit of EOU/ EHTP/ STP/ BTP to another unit shall be treated as imported goods for the second unit for payment of duty, on DTA.

(VIII) SALE OF UNUTILIZED MATERIAL

- In case an EOU/ EHTP/ STP/ BTP unit is unable to utilize goods (including capital goods) and services, imported or procured from DTA, it may be
  - transferred to another EOU/ EHTP/ STP/ BTP/ SEZ unit; or
  - disposed of in DTA with the approval of Customs authorities on payment of applicable duties and submission of import authorization; or
  - exported.

  Such transfer from EOU/ EHTP/ STP/ BTP unit to another such unit would be treated as import for the receiving unit.

- In case of capital goods, benefit of depreciation, as applicable, will be available in case of disposal in DTA only when the unit has achieved positive NFE taking into consideration the permissible depreciation.
- No duty shall be payable if capital goods, raw materials, consumables, spares, goods manufactured, processed or packaged, and scrap/ waste/ remnants/ rejects are destroyed within the unit after intimation to the Customs authorities or destroyed outside the unit with permission of the Customs authorities.
- Disposal of used packing material will be allowed on payment of duty on transaction value.

(IX) DTA SALE OF FINISHED PRODUCTS/ REJECTS/ WASTE/ SCRAP/ REMNANTS AND BY-PRODUCTS

The Entire production of EOU/ EHTP/ STP/ BTP units must be exported. However, the following DTA sales are permissible:

(1) Sale of goods in DTA: Units* may sell goods in DTA

- Up to 50% of FOB value of exports (including sales made to the SEZ unit, from its Foreign Exchange Account of such unit),
- subject to the fulfilment of positive NFE,
- on the payment of concessional duties.

*other than gems and jewellery units

However, the sale at concessional duty is not permitted:

(i) in respect of motor cars, alcoholic liquors, books, tea (except instant tea), pepper and pepper products, marble and other notified items or

(ii) to units engaged in activities of packaging/ labeling/ segregation/ refrigeration/ compacting/ micronisation/ pulverization/ granulation/ conversion of monohydrate form of chemical to anhydrous form or vice-versa.

An amount equal to Anti-Dumping duty under section 9A of the Customs Tariff Act, 1975 leviable at the time of import shall be payable on the goods used for the purpose of manufacturing or processing of goods cleared into DTA from the unit.

In case of units manufacturing and exporting more than one product, the sale of any of these products into DTA, upto 90% of FOB value of export of the specific products is permitted, provided total the DTA sales do not exceed the overall entitlement of 50% of FOB value of exports for the unit.

(2) **Services provided in DTA:** For services, sale in DTA shall also be permissible up to 50% of FOB value of exports and/ or 50% of foreign exchange earned, where payment of such services is received in foreign exchange.

(3) **Sale of rejects in DTA:** Rejects within an overall limit of 50% may be sold in DTA on the payment of applicable duties (concessional or otherwise), on prior intimation to Customs authorities. Such sales shall be counted against DTA sale entitlement.

The sale of rejects up to 5% of FOB value of exports shall not be subject to the achievement of NFE.

(4) **Sale of scrap/ waste/ remnants, arising out of production, in DTA:** Scrap/ waste/ remnants arising out of production process or in connection therewith may be sold in DTA, as per SION notified under the Duty Exemption Scheme, on payment of concessional duties as applicable, within the overall ceiling of 50% of FOB value of exports. Such sales of scrap/ waste/ remnants shall not be subject to the achievement of positive NFE. Sale of waste/scraps/remnants by units not entitled to DTA sale or sales beyond DTA sales entitlement, shall be on payment of full duties. Scrap/waste/remnants may also be exported.

In case scrap/ waste/ remnants are destroyed with the permission of Customs authorities, no duties/ taxes are payable on the same.

(5) **Sale of by-products in DTA:** By-products may also be sold in DTA subject to the achievement of positive NFE, on payment of applicable duties, within the overall entitlement of 50% of FOB value of exports. Sale of by-products by units not entitled to DTA sales, or beyond entitlements shall also be permissible on payment of full duties.

(6) Procurement of spares / components, up to 2% of the value of manufactured articles, cleared into DTA, during the preceding year, may be allowed for supply to the same consignee / buyer for the purpose of after-sale-service.

Note:

1. In case of DTA sale of goods manufactured by EOU/ EHTP/ STP/ BTP, where basic duty and CVD is nil, such goods may be considered as non-excisable for payment of duty.

2. In case of new EOUs, advance DTA sale will be allowed but not exceeding 50% of its estimated exports for the first year (2 years for pharmaceutical units).

(X) EXPORT THROUGH OTHER EXPORTERS

An EOU/ EHTP/ STP/ BTP unit may export goods manufactured/ software developed by it through another exporter or any other EOU/ EHTP/ STP/ SEZ unit subject to the specified conditions

(XI) EXIT FROM EOU SCHEME

With the approval of DC, an EOU may opt out of the scheme. Such exit shall be subject to the payment of excise and customs duties and industrial policy in force. If the unit has not achieved obligations, it shall also be liable to penalty at the time of exit.

(XII) CONVERSION

Existing DTA units may also apply for conversion into an EOU/ EHTP/ STP/ BTP unit. Existing EHTP/ STP units may also apply for conversion/ merger to EOU unit and vice-versa. In such cases, units will remain in bond and avail exemptions in duties and taxes, as applicable.

Deemed Exports

Deemed Exports refer to those transactions in which goods manufactured in India are supplied to specified projects or to specific categories of consumers. In deemed exports, goods supplied do not leave the country and payment for such supplies is received either in Indian rupees or in free foreign exchange by the recipients of the goods.

The objective of deemed exports is to ensure that the domestic suppliers are not in dis-advantageous position *vis-à-vis* foreign suppliers in terms of the fiscal concessions. The underlying theory is that foreign exchange saved must be treated at par with foreign exchange earned by placing Indian manufacturers at par with foreign suppliers. Deemed exports broadly cover three areas.

(a) Supplies to domestic entities who can import their requirements duty free or at reduced rates of duty.

(b) Supplies to projects/ purposes that involve international competitive bidding.

(c) Supplies to infrastructure projects of national importance.

(I) CATEGORIES OF SUPPLIES CONSIDERED AS 'DEEMED EXPORT'

Supply by manufacturer	Supply by main/sub-contractors(s)
Supply of goods against Advance Authorization/ Advance Authorization for Annual Requirement/ DFIA	Supply of goods to projects or turnkey contracts financed by multilateral or bilateral agencies/Funds notified by Department of Economic Affairs (DEA), under International Competitive Bidding.
Supply of goods to units located in EOU/ STP/BTP/EHTP	Supply of goods to any project where import is permitted at zero customs duty as per customs *Notification No. 12/2012-Cus dated 17.03.2012* and supply is made against International Competitive Bidding.
Supply of capital goods against EPCG authorization	Supply of goods to mega power projects against International Competitive Bidding (even if customs duty on imports made by such project is not zero). The ICB procedures should be followed. Supplier is eligible for benefits as specified. International Competitive Bidding (ICB) is not mandatory for mega power projects if requisite quantum of power has been tied up through tariff based competitive bidding or if project has been awarded through tariff based competitive bidding.
Supply of marine freight containers by 100% EOU provided said containers are exported within 6 months	Supply of goods to the UN or international organizations for their official use or to projects financed by them.
	Supply of goods to nuclear projects through competitive bidding (need not be international competitive bidding).

(II) BENEFITS FOR DEEMED EXPORTS

Deemed exports shall be eligible for any / all of the following benefits in respect of manufacture and supply of goods, qualifying as deemed exports, subject to specified terms and conditions:

a. Advance Authorization/ Advance Authorization for Annual requirement/ DFIA

b. Deemed Export Drawback

c. Refund of terminal excise duty if exemption is not available.

(III) ELIGIBILITY FOR REFUND OF TERMINAL EXCISE DUTY/ DEEMED EXPORT DRAWBACK

Refund of Terminal Excise duty or Central Excise duty paid on inputs/ components will be available only when CENVAT credit/ rebate of the same have not been availed by the recipient of such goods. Similarly, supplies will be eligible for deemed export drawback on Central Excise paid on inputs and service tax paid on input services, provided CENVAT credit facility/ rebate has not been availed by the applicant. However, in such cases, basic customs duty paid can be claimed as brand rate of duty drawback.

(IV) COMMON CONDITIONS FOR DEEMED EXPORT BENEFITS

(i) Supplies shall be made directly to entities listed in the point (I) above. Third party supply shall not be eligible for benefits/exemption.

(ii) In all cases, supplies shall be made directly to the designated Projects/Agencies/Units/ Advance Authorization/ EPCG Authorization holder. Sub-contractors may, however, make supplies to the main contractor instead of supplying directly to designated Projects/ Agencies. Payments in such cases shall be made to the sub-contractor by the main-contractor and not by the project Authority.

(iii) Supply of domestically manufactured goods by an Indian Sub-contractor to any Indian or foreign main contractor, directly at the designated project's/ Agency's site, shall also be eligible for deemed export benefit provided the name of the sub-contractor is indicated either initially or subsequently (but before the date of supply of such goods) in the main contract. In such cases, payment shall be made directly to the sub-contractor by the Project Authority.

Special Economic Zone (SEZ)

(a) Introduction

A Special Economic Zone (SEZ) is a geographically bound zone where the economic laws in matters related to export and import are more liberal as compared to other parts of the country. The SEZ is like a separate island within the territory of India and outside the customs territory of India. SEZs are duty free areas for the purpose of trade, operations, duty, and tariffs.

SEZ means Special Economic Zone which may be specified by the Central Government. Sections 7 and 26 of the SEZ Act provide that any goods procured by a developer or the SEZ unit from the domestic market shall be exempt from taxes subject to the fulfillment of prescribed conditions. Such duty free procurement is provided *vide* Rule 27 of SEZ Rules which state that the SEZ unit and developers are entitled to procure from the DTA their requirement of goods and materials without payment of duty for their authorized operations.

SEZ units are self-contained and integrated, with their own infrastructure and support services. Within SEZs, a unit may be set up for the manufacture of goods and other activities including processing, assembling, trading, repairing, reconditioning, making of gold/ silver, platinum jewellery, etc.

Goods supplied to SEZs from DTA are treated as exports from India and goods supplied from the SEZ to the DTA are treated as imports into India.

The provisions relating to the SEZ are contained in the Special Economic Zone Act, 2005 and Special Economic Zone Rules, 2006.

State Governments are expected to play a very active role in the establishment of SEZ units. Any proposal for setting up an SEZ unit in the Private/ Joint/ State Sector is routed through the concerned State, which in turn forwards the same to the Department of Commerce with its recommendations for consideration.

The main objectives of the SEZ Act are:

(a) Export of goods and services without taxes

(b) Generation of additional economic activity

(c) Promotion of exports of goods and services

(d) Promotion of investment from domestic and foreign sources

(e) Creation of employment opportunities

(f) Development of infrastructure facilities

(g) Providing exemption from duties and taxes on procurement

(h) Single window clearance: It is expected that this will trigger a large flow of foreign and domestic investment in SEZs, in infrastructure and productive capacity, leading to the generation of additional economic activity and creation of employment opportunities.

The SEZ Rules provide for:

(a) Simplified procedures for development, operation, and maintenance of the Special Economic Zones and for setting up units and conducting business in SEZs

(b) Single window clearance for setting up of an SEZ

(c) Single window clearance for setting up a unit in a Special Economic Zone

(d) Single Window clearance on matters relating to Central as well as State Governments

(e) Simplified compliance procedures

(f) Maintenance of documents with self-certification

(g) Simplified compliance procedures and documentation with emphasis on self-certification

The incentives and facilities offered to the units in SEZs for attracting investments, including foreign investment are:

(a) Duty free import/ domestic procurement of goods for development, operation and maintenance of SEZ units.

(b) Exemption from Central Sales Tax.

(c) Exemption from Service Tax.

(d) Single window clearance for Central and State level approvals.

Exemption from State sales tax and other levies as extended by the respective State Governments.

What are the benefits of clearing goods to a SEZ Unit?

A unit in Domestic Tariff Area, (units within the country other than EOU and SEZ are referred to as DTA in the Foreign Trade Policy), can also clear excisable goods without payment of duty to the Special Economic Zone. The unit can also avail the CENVAT Credits on the inputs and input services used in the manufacture of goods cleared to such SEZ. The DTA unit can clear the excisable goods without payment of duty under bond/ letter of undertaking in lieu of a bond by raising an ARE 1 to a unit in SEZ. Goods can also be cleared on payment of duty by filing a rebate claim.

What is the procedure for the clearance of excisable goods without payment of duty to a unit/ developer in SEZ?

1. The DTA unit should raise a bond/ letter of undertaking in lieu of a bond as in the case of exports and raise an ARE 1 form having a pre-printed serial number, in quintuplicate along with an invoice for clearance.

2. The procedure laid down under Notification 19/2004-CE (NT) for export under claim for rebate can be followed with regard to the distribution of ARE 1 copies.

3. The DTA unit shall coordinate with the SEZ unit/ developer for the purpose of raising a Bill of Export in addition to the ARE 1 where the clearance is under claim for export entitlements.

4. The DTA unit should see that within 45 days from the date of clearance, a copy of the ARE 1 form and/or Bill of Export endorsed by the Authorized Officer of the SEZ for receipt of goods into the SEZ is received/ submitted to the SCE having jurisdiction over his factory.

5. If the jurisdictional SCE of the DTA unit does not receive the proof of export (ARE-1) within 45 days from the date of removal of goods from the factory or warehouse, he shall raise a demand of duty against the DTA unit.

6. The DTA unit should confirm that where export entitlements are to be claimed, the receipt for supply is from the Foreign Currency Account of the SEZ unit/ developer

Where any export entitlement in the nature of Duty Drawback is to be claimed by the DTA unit, the same can be claimed once a disclaimer is received from the SEZ unit/developer as to the non-availment of such benefits at their end.

Landmark Cases Relevant to Service Tax

(a) Section 2 (j) – "Turnover" and Section 13(3) –

"Power to make Rules" Mahim Patram Private Ltd. vs. Union of India & others (and another appeal) [2007] 6 VST 248 (SC)

Background of the Case: The dealer was engaged in the business of printing question papers for various examination boards. The dealer does works contract of printing question papers for examination boards within and outside the State. The papers printed for the examination boards located outside the State are liable to CST, as these are Inter-State sales.

Issues involved in the Case: The dealer contends that there is no provision in the CST law with regard to the computation of turnover or valuation of goods and hence the value of goods cannot be determined to make the transaction liable to CST. The department contended that the value of the goods can be determined by applying the rules made by the State government in this regard.

Conclusion: The court held that the opinion of the department is right. The CST law gives power to make rules in this regard. Section 13(3) of the CST act specifies that the State government can make rules for assessment which are not inconsistent with the Act. The determination of turnover, allowing deductions and computation of taxes form part of the assessment exercise.

The Valuation of transfer of property in goods in an Inter-State WCT by applying the rules made by the State government in this regard is legally valid. The act of assessing authority by allowing deduction from the total turnover as per the rules made by the State government in this regard is right.

Section 3 – Principles for determining when a sale or purchase of goods takes place in the course of Inter-State trade

(a) Bharat Heavy Electricals Limited (BHEL) vs. the Union of India and Others [1996] 102 STC 373 (SC)

Background of the Case: BHEL, a public sector corporation, had its manufacturing units in several places, each of which specialized in the manufacture of a particular type or class of machinery in the interest of avoiding duplication and enhancing efficiency. There was an agreement between BHEL and NALCO for installation and erection of five captive power plants for the aluminum smelter complex at Angul, Orissa. There were two contracts: a supply contract and a service contract. The supply was executed by Tiruchi branch of BHEL. Further,

certain goods were also manufactured by the Hyderabad branch of BHEL and were directly transferred to Angul Orissa, and certain goods manufactured were transferred to Tiruchi for ultimate use in the smelter complex at Angul, Orissa.

Issues involved in the Case: The matter was decided by the AP tribunal that the goods sent from Hyderabad to Angul Pursuant to a letter of intent (PO) from NALCO, constituted an Inter-State sale and not a stock transfer. BHEL filed a writ against the decision before the HC, respondents in the writ petition being the States of UP, Karnataka, Maharashtra and others, asking for a direction to transfer/remit the taxes to the respective States which were legally eligible to receive the taxes. The HC didn't respond because the matter of stock transfer was before the SC. Hence, the matter was taken up by the SC, which held that the transaction was an Inter-State sale and further held that *BHEL was entitled to a direction to the States for the adjustment of the tax amounts collected by the various States in such a manner that the appropriate tax was collected in the State in which it was lawfully leviable and the State which was not entitled to collect the tax and yet collected it unlawfully had to refund the same to BHEL or send it to the State, wherein, it was lawfully due and payable*. One more issue was whether some of the items required for the smelter complex, being manufactured and sent from Hyderabad to Tiruchi which were ultimately sent to Angul were also Inter-State sales.

Conclusion: The court observed that some of the parts and components manufactured by the other units of BHEL [i.e., Unit situated in Andhra Pradesh] were sent directly to the executing unit for being incorporated into the main machinery/ system. Therefore, the said movement is occasioned by the supply contract entered into by BHEL which is in truth a contract for supply. The direct dispatch of goods by the Hyderabad Unit to Angul or Farakka constitutes an inter-State sale within the meaning of Section 3(a) of the CST Act and that tax thereon is leviable in the State of Andhra Pradesh according to section 9(1) of the CST Act. As per this provision, tax on sale of goods falling under section 3(a) or 3(b) shall be levied and collected by the State from which the movement of the goods commenced. In several cases, the courts have held that, sale falling under section 3(a) of the Act, the levy should be from the State where the goods have moved as per section 9(1) of the CST Act. Applying the principles laid down in the case of works contract passing of property or delivery of property is not material, It is sufficient if the goods have been moved in pursuance of the existing contract . Article 286 of the Constitution of India states that for the purpose of clause(a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State; Associated Cement V. C.S.T.,(1991) Supp (1) SCC 251, paragraphs 6-9. The transfer of ownership of purchased goods would happen only on accretion and not on endorsement and delivery of documents of the title. The definition of sale includes the deemed sale and works contract or normal sale,

and there is no change in applying the principles for determining the inter-State sale. The principles for determining when a sale takes place in the course of inter-State trade or commerce laid down in section 3 of the CST Act, 1956 would equally apply to transfer of property in goods involved in the execution of the works contract.

(b) Section 3 (a) – Inter-State Sales - Sale occasioning movement of goods from one State to another

Sahney Steel and Press Works Ltd. and Another vs. Commercial Tax Officer and Others [1985] 60 STC 301 (SC)

Background of the Case: The petitioner-company, engaged in the manufacture and sale of stampings and laminations made out of steel sheets which were utilized as raw material for making electric motors, transformers, etc., had its registered office and factory at Hyderabad. Its branches at Bombay, Calcutta and Coimbatore were mainly engaged in effecting sales and looking after sales promotion and liaison work. Those branches received orders from customers within and outside their respective States for the supply of goods conforming to definite specifications and drawings and advised the registered office at Hyderabad. This company manufactured goods according to the designs and specifications supplied by customers at its factory at Hyderabad and dispatched them to the respective branches by way of transfer of stock. The branches raised the bills and received the sale price. They also furnished 'Form F' to the registered office at Hyderabad u/s 6A of the CST Act, 1956 in the case of stock transfers to the branches. The petitioner-company was assessed to State sales tax in Maharashtra, West Bengal and Tamil Nadu in respect of those goods.

Issues involved in the Case: The petitioner company claimed that there was only a transfer of stock from Hyderabad to the branches outside the State of A.P. and that the sales effected to the customers by the branches were local sales in the respective States. The Commercial Tax Officer, Hyderabad, held the sales to be sales in the course of inter-State trade and made an assessment accordingly for the year. The petitioner-company filed a writ petition in the Supreme Court:

Conclusion: The Court held that even if the customer placed an order with the branch office and the branch office communicated the terms and specifications of the order to the registered office and the branch office itself was concerned with dispatching, billing and receiving of the sale price, the order placed by the customer was an order placed with the company, and for the purpose of fulfilling that order the manufactured goods commenced their journey from the registered office in the State of Andhra Pradesh to the branch outside the State for delivery of the goods to the customer. Such movements of goods from Hyderabad to Maharashtra and

WB in pursuance of pre-determined purchase orders amount to Inter-State sale, even if, they are first transferred to the branch (thereafter billing, collection and other procedures are followed by branch.

(c) Section 3 (a) – Inter-State sales - Sale occasioning movement of goods from one State to another

Hyderabad Engineering Industries vs. State of Andhra Pradesh [2011] 39 VST 257 (SC)

Background of the Case: In the present case the assesse had an agreement with Usha International Ltd. According to the agreement, Usha International would purchase the items manufactured by the assesse. Further, both the Assesse and the Usha International had godowns/ warehouses in all the States. The purchase/ sale agreement specified the arrangement that Usha International would raise the monthly purchase indents on the assesse. As per the indents the goods had to be delivered at the various godowns of Usha International. For this purpose the assesse would send the goods to its own branches located at various States, and from there the goods were moved to Usha International godowns charging local taxes. For this purpose, the assesse claimed exemption in respect of turnover of stocks transferred to the depot outside the State. The State rejected the exemption, terming it as Inter-State sale.

Issues involved in the Case: The assesse contends that the value of goods as per indent is different from the value of goods delivered to its branches (the stock transfers included both goods to be delivered to Usha International and for local sales).

However, the Department contended that goods were delivered to the branch office which just acted as a conduit pipe before goods ultimately reached the purchaser. All that mattered was that the movement of goods was in pursuance of the contract of sale or as a necessary incident to the sale itself. In other words, the movement of goods from the assesse factory to its various godowns situated in different parts of the country was pursuant to the sales agreement coupled with forecasts which were nothing but indents or firm orders. Therefore, the transaction between the assesse and its branch offices was a clear case of inter-State sales and not branch transfers.

Conclusion: The Court held that sale occasioning a movement of goods from one State to another is an Inter-State sale, even if the purchase agreement doesn't provide that movement shall take place from one State to another. The purchase order may be raised on one company's branch by another company's branch both situated in the same State. But pursuant to such orders if the selling branch procures goods from its head office situated in a different State then the stock transferred by the Head office to the branches will be an Inter-State sale. When the sale or agreement for sale causes or has the effect of occasioning the movement of

goods from one State to another, irrespective of whether the movement of goods is provided for in the contract of sale or not, or when the order is placed with any branch office or head office, which resulted in the movement of goods, irrespective of whether the property in the goods passed in one State or the other, if the effect of such sale is to have the movement of goods from one State to another, an inter-State sale would ensue and would result in exigibility to tax under section 3(a) of the Central Sales Tax Act, 1956, on the turnover of such transaction.

Ghatge Karkera Power Industries V. Additional Commissioner of Commercial Taxes, Zone I, Bangalore and another (2013) 57 VST 255(Karn):

The issue before the Honorable High Court pertains to the State in which the sales tax is payable for the transaction under question. Brief facts of the case are that the appellants entered into a contract for the execution of works contract with a party located in the State of Karnataka. For this purpose, goods were procured from its branch office located in the State of Goa. The contention of the appellants is that as the goods were procured from the branch office located in Goa raising the invoice in the name of the customer located in the State of Karnataka and as the goods have moved from the State of Goa to the State of Karnataka, it is liable to pay sales tax in the State of Goa. The Honorable High Court, dismissing the appeal held that the contract was executed in the State of Karnataka, and consideration for the contract was also paid in the State of Karnataka. The contract did not occasion the movement of goods from one State to another but it was only for the purpose of executing the contract that the goods were bought from the place located outside the State of Karnataka. Accordingly, it was held that the transaction under question is a local works contract and the appellant is liable to pay taxes in the State of Karnataka.

(d) Section 3 (a) – Inter-State sales - Sale occasioning movement of goods from one State to another

DCM Limited vs. Commissioner of Sales Tax, Delhi [2009] 21 VST 417 (SC)

Background of the Case: The assesse sold ex-works in Delhi chemicals to registered dealers who were under a contractual obligation to sell them in their assigned territory outside Delhi. Under the contract with the registered dealers, each dealer was assigned an exclusive territory and was obliged to take the chemicals outside Delhi where they were to be sold. On instructions from the dealers the assesse was required to transport the goods, and the freight was payable by the dealer. The dealers were required to submit monthly stock of sales and a market report to the assesse, which indicated the control of the assesse over the movement of goods.

Issues involved in the case: The question here is whether the sales to the dealers were inter-State sales or local sales.

Conclusion: The Court held that though the purchasers are *obliged by the contract* to take the delivery of the goods sold by the assesse outside the State and sell in those respective States. The transaction is an Inter-State sale.

(a) Projects and Services Centre and Another vs. State of Tripura and Others [1991] 82 STC 89 (Guj).

Background of the Case: In this case, the petitioner is a partnership firm having its place of business at Calcutta. The petitioner undertakes execution of works contracts for supply, erection and commissioning of electrical equipment in different States at various places in the State of Tripura. The petitioner purchased the materials from different States outside the State of Tripura as well as within the State of Tripura for use in the execution of the aforesaid contract. The Petitioner contended that goods purchased from outside the State of Tripura amount to inter-State sales exigible to tax under the Central Act. There was no intra-State sale in Tripura.

Issues involved in the Case: The Department rejected the contention on the ground that the actual transfer of property in the materials used in the contract took place in the State of Tripura.

Conclusion: The High Court ruled that the principles determining when a sale takes place in the course of inter-State trade or commerce laid down in Section 3 of the CST Act, 1956, would equally apply to the transfer of property in goods involved in the execution of a works contract.

(a) Indure Ltd. and Another vs. Commercial Tax Officer and others [2010] 34 VST 509 (SC)

Background of the Case: The National Thermal Power Corporation (NTPC) invited tenders for bids for ash handling plant package at Farakka. The scope of work involved in such package, known as on turnkey basis, included designing and engineering, manufacturing, inspecting and testing, erecting and commissioning of the complete ash handling plant. The appellant company submitted its bid which was accepted. For the project, MS pipes were imported from South Korea and were sold to NTPC. After the MS pipes were received at the Calcutta port they were transported to Farakka. The company filed its return claiming the benefit of section 5(2) of the Central Sales Tax Act, 1956, in regard to the MS pipes. This claim was rejected by the Department, the Tribunal and the High Court.

Issues involved in the Case: The exemption towards sale in the course of Import can be taken in dual type of cases. If a contract of sale occasions import of goods into the territory of India or if the transfer of title to the property in goods is made in favour of the buyer before the goods reach the customs frontiers of India.

Conclusion: The Supreme Court held that the supply of pipes imported into India for executing a turnkey contract is a *"sale in the course of import"* under Section 5(2) of the CST Act, and not liable to tax. The import and subsequent sale would not be taxable by virtue of Article 286(1)(b) of the Constitution of India and the appellant would be entitled to claim the benefit of Section 5(2) of the CST Act. The Court further held that even though the project was based on two separate contracts between the parties, these would be considered a single contract due to the ***cross fall breach clause,*** wherein a default in one contract could render the other contract void, leading to the cancellation of the whole contract. The supplier of the pipes was specifically directed to emboss on each pipe a special marking to indicate the NTPC project details and thus the pipes were to be exclusively used as an integral component of the project. The special import license was granted on the specific condition that the goods supplied shall be exclusively used for the Plant and NTPC also issued an end use certificate for the pipes. When the benefit of the sales tax exemption was given by the State of UP for eleven other components there is no reason to deny the exemption to the pipes imported into West Bengal. The import of pipes was occasioned only on account of the covenant entered into between the taxpayer and the NTPC and the imported pipes were used exclusively for erection and commissioning of the Plant. The imported pipes were necessary components for the erection and commissioning of the Plant and were used in the same condition as they were imported without altering their original form. Reversing the decisions of the Department, the Tribunal and the High Court, the Supreme Court held that the appellant-company was entitled to claim the benefit of section 5(2) of the Act in relation to the import of MS pipes from South Korea.

(a) Larsen and Turbo Ltd and Other vs. the Union of India (2011) 45 VST 361 (Guj))

Background of the Case: The petitioner is a registered dealer under both local VAT Act and CST Act and engaged in the manufacture of engineering goods and execution of works contracts. The petitioner had entered into four contracts with the ONGC for indivisible turnkey projects consisting both of supply of goods and rendition of services. The petitioner arranged for the supply of certain parts, equipment and machinery from its plant at Hazira at Surat to the ONGC at Bombay high around 180kms off the baseline of the coast of India. The Assessing Authority of the State of Gujarat had held that the sale of machinery and equipment from Hazira plant at Surat to the ONGC at Bombay high is an inter-State sale.

Issues involved in the Case: The assessing authority assessed to tax under the CST Act, 1956 at ten percent, denying the claim of the petitioner that there was export of goods.

Conclusion: The petitioner filed a writ petition in the Gujarat High Court, which allowed the petition and held

(a) that there was no movement of goods from one State to another as *Bombay High* does not from part of any State (or of union territory) of India.

(b) that the Central Government had not issued any notification extending all or any of the provisions of the CST Act, 1956, to any of the designated areas *like Continental shelf or exclusive economic zone.* In the absence of such a notification the authorities could not demand tax under the CST Act, 1956. The above decision is also referred to in the case of the **Commissioner of sales tax, Maharashtra V/s Pure helium India (2012) 49 VST 14 (Bomb) (HC)**

(a) Piramal Health Care Ltd. In re (2000) 37 CLA 353 (MRTPC)

Sometimes Clearing & Forwarding Agents stock and sell goods on behalf of the principal. In the present case, it was observed that the C&F Agent does not have the right to property in the goods stocked with him by the manufacturer. His duties are limited to stocking the goods and forwarding them to persons and places as instructed by the manufacturer. The right to sell the goods does not vest in him.

Commercial Taxes Officer, Circle D, Jaipur vs. Rajasthan Electricity Board [1997] 104 STC 89 (SC)

Background of the Case: The respondent dealer was engaged in the business of generation and distribution of electricity. It purchased various goods/ products from outside the State for use in the generation of electricity. The goods were trucks, trolleys, trailers and their spare parts. It also purchased soaps, paints, varnishes for cleaning of boilers, etc. which were also used for generating electricity.

Issues involved in the case: A reference was made before the High Court to decide whether these items could be included in its registration certificate for claiming the benefit of concessional rate of tax on purchase of goods from outside the State. The High Court held

(i) that the respondent could purchase, ***in the course of inter-State trade, at concessional rate of tax*** under section 8(1) of the CST Act, 1956, ***trucks, trolleys, trailers and the like (but not passenger vehicles), as also their accessories and spare parts, tyres and tubes,*** and that the Board was entitled to have its certificate of

registration altered to include tools and plants, including vehicles and other transportable goods, including their spare parts, tubes and tyres;

(ii) that the purchase of soaps and paints and varnishes was permissible at concessional rate of tax only ***in so far as they were intended to be used for the purpose of cleaning boilers and machinery and other equipment and for the purpose of painting machinery and electrical goods***; and

(iii) that raincoats could be purchased at a concessional rate of tax ***so far as they were necessary for use by the linesmen working on transmission lines during the rainy season and winter and similarly battery cells to the extent they were necessary for use by the linesmen for working on transmission lines during the night***.

Conclusion: The Supreme Court, in its response to the appeal, held that the motor vehicles, etc., soaps, paints, raincoats and battery cells, to the extent mentioned by the High Court, were integrally related to the distribution of electricity and their non-use would make the distribution of electricity commercially inexpedient.

Mock Tribunal

Mock Tribunal or a Moot Court is a part of the curriculum of many law schools in which participants take part in simulated Tribunal / Court proceedings, which usually involves drafting briefs (or memorials) and participating in oral arguments. Mock Tribunal / Moot Court does not involve actual testimony by witnesses or the presentation of evidence, but is focused solely on the application of the law to a common set of evidentiary assumptions to which the competitors must be introduced.

Further, the Moot Court Association of Government Law College organizes **The Nani Palkhivala National Tax Moot Court Competition** in association with the **All India Federation of Tax Practitioners (AIFTP)** and the **Income Tax Appellate Tribunal Bar Association.** The competition gives platform to participants to show their understanding of law and skill of advocacy. All the participants belong to India's best law schools.

Similarly, The Institute of Chartered Accountant of India has taken an initiative for the members, and Mock Tribunal has been incorporated in their Continuing Professional Education Learning program and seminars. Accordingly, Study Circles also incorporated the same in their programs. Thus our Institute provides a good training ground for young professionals with its informal atmosphere and less cumbersome procedures.

The main purpose of a Mock Tribunal is to train Members in the art of advocacy and representation and compete with other professionals like advocates in this field. Further, it motivates the members of the Institute to represent their clients at various Appellate Authorities. In a Mock Tribunal, arguments on legal issues related to a hypothetical case takes place in an imaginary setting. The arguments are highly stylized, since they the presenters follow the conventions of argument used in a real Tribunal as closely as possible. There are usually five or six participants in the Mock Tribunal. Two participants represent one party and two more represent the other party. The fifth and sixth participants act as the *judge/member of the Mock Tribunal*. The two participants representing one party form one *team*, while the two participants representing the other party form the other team. Each of the four participants representing the parties is usually a newly qualified member or less experienced member, while the fifth and sixth is usually a more experienced member or lawyer or the retired Judge of a court. The number of team members and Judges/members may vary. .

The parties are fictional characters, being represented by each of the two teams. Two of the four members of the teams act as *Appellants* and the other two are *Respondents*. One of the Appellants is called the *Lead Appellant*, while the other is called the *Junior Appellant*. In the

same way, one of the Respondents is the *Lead Respondent* and the other the *Junior Respondent*. Naturally, where a real judge occasionally sits as a Mock judge/member, he or she is acting in the capacity of a Mock judge/member, rather than as a judge of the court to which he or she belongs.

The hypothetical case which raises the legal issues argued by the participants is devised to highlight particular issues of doubt in the law. They may arise from the case law or statute and, where the moot is set in an appellate court, are referred to as *grounds of appeal*. Most moot problems contain two grounds of appeal. Each member of each team argues one side of each ground of appeal. In doing so, they are described as making *submissions* on the relevant ground of appeal. Thus, the Lead Appellant and the Lead Respondent make submissions on opposing sides of *the first ground of appeal*, while the Junior Appellant and the Junior Respondent make submissions on opposing sides of the *second ground of appeal*.

The hypothetical case, which is the *moot problem*, may require the participants to imagine, for example, a combination of facts which are subtly different from the leading case in the relevant area of law. The participants will therefore be required, by the grounds of appeal, to argue whether the legal rule applicable to the facts of the moot problem is different from, or the same as, the rule which was applied by the judges in that leading case.

Once the arguments are completed, say after about an hour, the Mock Tribunal judge/member usually gives a short judgment, in which he or she not only reaches a conclusion as to the legal issues of doubt raised by the grounds of appeal but also decides which of the teams of participants has mooted better than the other. Thus, a member of each moot team has to pay careful attention not only to the law, but also to the presentational and interpersonal skills involved in persuading the moot judge of the correctness of the submissions made by him or her.

For example, greater weight may be given to analysis of *law* in your submissions, than to your presentational and interpersonal skills. Since the mock is a part of your coursework assessment, your mock presentation will be assessed on an individual basis. Again in this context, no judgment is likely to be given by the mock judge/member, an assessment being made afterwards as to whether you have given a satisfactory moot presentation.

1. Introduction of the Tribunal

The Customs, Excise and Service Tax Appellate Tribunal (in short 'CESTAT'), formerly known as Customs, Excise & Gold (Control) Appellate Tribunal (in short 'CEGAT'), was constituted on 11th October 1982 in terms of the powers vested in the Central Government under Section 129 of the Customs Act, 1962. The Tribunal has been working for more than 25 years now.

CESTAT is the second level appellate authority, the first appellate authority being the Commissioner (Appeals). CESTAT, as the name suggests, deals with matters arising from the Customs Act, 1962, Central Excise Act, 1944 and Service Tax Law contained in the Finance Act 1994.

The Tribunal sits in Benches. Bench means the Bench of the Tribunal and even a member sitting singly is also referred to as Bench. The Tribunal has one principal bench and zonal benches. The Principal Bench is at the Principal seat of the Tribunal, at Delhi, whereas Zonal Benches are at different zones The Principal Bench could be assigned cases arising anywhere in India whereas the Zonal Benches are assigned matters falling in the jurisdiction of the concerned zone. The Tribunal at present has benches in Delhi, Mumbai Kolkata, Chennai, Bangalore, Ahmedabad, Allahabad, Chandigarh and Hyderabad.

A Bench ordinarily consists of two members, a Judicial Member and a Technical Member. Special or Larger Benches are sometimes constituted of three or five members), when there is difference of opinion between two members. Small cases (currently of duty amount not exceeding Rs. 50 lakhs) are assigned to single member benches.

2. Statutory Provisions

The statutory provisions with regard to appeal to the Appellate Tribunal in relation to service tax matters are contained in Section 86 of the Finance Act, 1994 (32 of 1994). Further, the reference to form numbers and other procedures are contained in Rule 9 of the Service Tax Rules, 1994.

The procedure to be followed in this regard is contained in Customs, Excise and Service tax Appellate Tribunal (Procedure) Rules, 1982.

3. Appealable Orders

Appeals to the CESTAT can be made by the assesse and the Revenue (Service Tax Department).

(a) Appeals by Assesse

Appeals to the CESTAT lie against orders ("appealable orders") passed by a Commissioner of Central Excise & Service Tax or the Commissioner of Central Excise & Service Tax (Appeals).

1. An order passed by the Commissioner of Central Excise & Service Tax

   - under Section 73 (recovery of service tax not levied or not paid or short levied or short paid or erroneously refunded) or

- under Section 83A (adjudication of penalty) or
- under Section 84 (revision order passed by the Commissioner of Central Excise).

It is important to note here that the erstwhile Section 84 dealing with revision has been substituted with new Section 84 with effect from 19.08.2009 where the power of revision by the Commissioner has been divested from him and the Department is permitted to file first appeal before the Commissioner (Appeal) against the order passed by an authority subordinate to the Commissioner.

2. An order passed by the Commissioner of Central Excise (Appeals) u/s 85.

(b) Appeals by the Department

The Department of Revenue can also file an appeal against orders passed by the Commissioner or Commissioner (Appeals).

4. Procedure for Filing Appeal

(i) Procedure for the Assessee:

(a) Form for the Appeal

Appeal before CESTAT is required to be in Form ST-5.

(b) Filling up the Form

The Form starts with Appeal No. This number is given by the Tribunal. Thereafter, the name of the appellant and respondent are required to be specified. The Appellant is the person who prefers the appeal, and the Respondent is the Commissioner concerned. Reference may be made to Rule 12 of Customs, Excise and Service tax Appellate Tribunal (Procedure) Rules, 1982 which contains provisions with regard to persons who may be joined as Respondents.

The Form, besides various factual data, requires mention of the address where the notices may be sent to the appellant and the respondent. The address to be mentioned here is the address at which the assessee would like to receive notices. It is important that the permanent address is mentioned here since the notices for hearing or any other matter e.g. defect in appeal are sent to this address. The Form also requires a mention of the deposit of tax, penalty, interest, as the case may be, and if the same is not deposited whether application for stay of demand is filed or not. Thus, if the duty, interest, or penalty, as the case may be, has been paid, appropriate documentary evidence is required to be furnished. However, if the same are not paid, specific mention of stay application is required to be made.

Ordinarily, up to 05.08.14, an appellant was required to deposit tax, interest or penalty demanded in the order appealed against, u/s. 35F of the Central Excise Act, 1944. However, the appellant could seek stay of such demand on the ground that such deposit would cause undue financial hardship, and could file an application for stay of demand. If such an application was being filed, reference to the same was required to be mentioned in the appeal form. Section 35F of the Central Excise Act had been made applicable to Service tax as well.

This section has been substituted by the Finance (No. 2) Act, 2014 w.e.f 06.08.2014. The new provision provides for a mandatory fixed pre-deposit of 7.5% of the tax (where tax or tax and penalty are under dispute), or penalty (where such penalty is in dispute), for filing of appeal before the Commissioner (Appeal) or Tribunal at the first stage, and 10% of the same as above, for filing of appeal before the Tribunal at the second stage. The amount of pre-deposit payable would be subject to a ceiling of Rs. 10 crore.

It is imperative to refer to the decision of the Hon'ble High Court of Kerala in the matter of *Muthoot Finance Ltd. v. UOI 2015 (56) taxmann.com 122 (Kerala)*. The Hon'ble High Court held that the institution of a suit carries with it an implication that all rights of appeal then in force are preserved to parties thereto till rest of career of suit; hence, the right of appeal is governed by law that prevails at date of institution of suit or proceeding, and not by law that prevails at date of its decision or at date of filing of appeal.

Given the above, it could be said that the requirements of mandatory pre-deposit would not apply to all the cases instituted prior to 06.08.2014, despite the fact that appeal is filed before the CESTAT after 06.08.2014[10].

The appeal form also requires the appellant to specifically mention whether the appellant wishes to be heard in person. Ordinarily, while filing an appeal, one always states 'yes' unless the appellant is certain that it would not like to be heard in person and that CESTAT may decide the matter without hearing.

The Form further requires mention of the relief which is sought through the appeal, such as the deletion of tax demand, deletion of tax penalty, quashing of the order and like. Ordinarily, the relief is stated in the grounds of appeal and, therefore, in this section 'relief claimed as per grounds of appeal' may be specified.

(c) Grounds of Appeal

Here, specific grounds on which appeal is filed and the relief sought for are set out. The grounds could be objecting to the specific observations in the order appealed against (if that observation is incorrect) or it could relate to the confirmation of tax demand. Separate grounds

[10] However, conflicting views have been expressed by other Courts.

of appeal are ordinarily taken in respect of tax demanded, interest levied or penalty imposed, as the case may be.

Each ground of appeal could have a specific prayer seeking the specific relief sought for. For example, if the appeal seeks to quash the order appealed against and if the order is without jurisdiction, the following would be the prayer:

"The appellant prays that the order passed by ……………………..be quashed as being without jurisdiction."

If the appeal seeks relief in terms of tax demand, the prayer could be as under:

"The appellant prays that tax demand confirmed, as aforesaid, be deleted."

These are just examples and the actual draft of the grounds of appeal as also the prayer would depend on the specific facts of each case.

Specific request seeking permission to add, amend, or alter any grounds taken in the grounds of appeal is also added.

The appeal form states that the grounds of appeal should be without any argument and narrative and grounds should be numbered consecutively.

The Form also requires mention of **statement of facts**. This is generally added as a separate annexure.

(d) Statement of facts

In this statement, the facts are set out sequentially. Ordinarily, to begin with, the background relevant to the case under consideration is provided, which is to assist the Tribunal in understanding and appreciating the appeal issues. Thereafter, the date on which the show cause notice is issued together with reference to the show cause notice and the key points raised in the show cause notice to the extent they are relevant to the appeal is given.

The next point ordinarily is the response of the appellant to the show cause notice and the key grounds on which the appellant responded to the show cause notice.

The next point is the decision of the Commissioner or Assistant Commissioner, as the case may be, again briefly setting out the key findings (to the extent relevant).

Thereafter, the grounds taken in appeal before the first appellate authority are set out in brief, to the extent relevant to the appeal. After that, the decision of the first Appellate Authority setting out key findings on the basis of which the order is passed to the extent it is relevant to the appeal matter are set out.

Lastly, the facts of the current appeal are mentioned.

(e) Stay Petition

With the enactment of the Finance Bill 2014 on 06.08.2014, there is now a requirement of compulsory pre-deposit of tax (as discussed above) in case where tax or tax and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against. The amount of pre-deposit payable would be subject to a ceiling of Rs. 10 crore.

However, compulsory pre-deposit is not applicable to the stay application and appeals pending before appellate authority prior to 06.08.2014. Refer para 4 (b) mentioned above dealing with filing of appeal for contrary views of the Kerala High Court on mandatory pre-deposit for all appeals filed after 06.08.2014.

Hon'ble CESTAT in the matter of *Sridhar Metal v. CCE, Aurangabad 2015-TIOL-654-CESTAT-MUM* while answering the question of the timing of mandatory pre-deposit held that in the appeal procedure in CESTAT, the moment appeal is filed, it attains the stage of entertaining the appeal by the Tribunal. Unlike the procedure in the High Court and Supreme Court, there is no procedure in CESTAT for motion hearing on admission of appeal.

Given the above, the mandatory pre-deposit has to be made before filing the appeal.

(f) More than one SCN adjudicated in one adjudication order

In such cases, a single appeal filed by the assessee is considered sufficient by the Larger Bench (5 members) of CEGAT, Delhi in case of Eicher Motors Ltd. Vs. Collector of Central Excise, *Indore 2000 (116) E.L.T. 306 (Tribunal).* It has been held that a single appeal filed by assessee is sufficient where common and consolidated order passed by the Commissioner (Appeals) in respect of demands arising out of 32 show cause notices.

Further in the case of *Escorts Ltd. Vs. Commissioner of Central Excise, Faridabad 2008 (11) S.T.R. 532 (Tri. - Del.)* aforesaid judgment of larger bench of CEGAT was relied upon and followed by the principal bench of Delhi CESTAT.

(g) Documents to be filed with the appeal form

The appeal form together with the grounds of appeal and statement of facts and all other relevant documents like copies of the order appealed against (of which at least one is required to be a certified copy) are required to be filed in quadruplicate.

(h) Place and manner of filing appeal

The appeal can be filed by the appellant in person or through an agent. The appeal is to be filed with the concerned officer of the jurisdictional bench. The appeal can also be sent through registered post. In case of urgency or any other sufficient reason, the appeal can also be sent to the concerned officer of the Bench nearest to the appellant, even though the matter may relate to a different Bench. In such a case, the concerned officer receiving the appeal then forwards it to the concerned officer of the appropriate Bench. **Addresses of various benches of the Tribunal are given in Annexure I.**

(i) Time Limit for filing the Appeal

Every appeal before the Appellate Tribunal is to be filed within 3 months from the date on which the order sought to be appealed against is received by the assessee - Section 86(1) of the Finance Act, 1994. The Revenue (Department) can file an appeal before the Tribunal against the Order of the Commissioner or Commissioner (Appeals) within four months from the date of receipt of the impugned order by the Committee of Chief Commissioners or Principal Chief Commissioners – Section 86(3) of Finance Act, 1994

(j) Admission of Appeal after the relevant period

The Tribunal may admit the appeal after the expiry of the time period for filing, if it is satisfied that there was sufficient cause for not filing the same within the stipulated period (Section 86(5) of the Finance Act, 1994).

(k) Fees for preferring Appeal to the CESTAT

Order against which appeal is filed	Fees (Rs.)
Where the service tax and interest demanded along with penalty imposed is Rs.5 Lakh or less	1000
Where the service tax and interest demanded along with penalty imposed is more than Rs.5 lakh but not exceeding Rs.50 Lakh	5,000
Where the service tax and interest demanded along with penalty imposed is more than Rs.50 Lakh	10,000

(l) Procedure for payment of fee

The prescribed fee is to be paid by a crossed demand draft in favour of *"Assistant Registrar, CESTAT"* on a branch of any nationalized bank payable at New Delhi. The demand draft should be attached to the form of the appeal.

(ii) Procedure for the Department

Appeal at the instance of Committee of Chief Commissioners of Central Excise / Commissioners of Central Excise or Principal Chief Commissioners of Central Excise or Principal Commissioners of Central Excise:

This appeal is to be in Form ST-7 in quadruplicate and has to be accompanied by equal number of copies of the order of the Commissioner of Central Excise passed under section 73 or 83A / section 85 (one of which shall be a certified copy) i.e. the order appealed against.

The Departmental appeal is also to be filed along with a Statement of Facts and Grounds of Appeal within 4 months from the date on which the order sought to be appealed against is received by the Committee or within such extended time as may be allowed by the Tribunal. No fees is payable in case of departmental appeals. The dress code applicable for the assessee's Counsel also applies for the department.

Committee of Chief Commissioners or Commissioners in relation to service tax matters:

Power of the Board to constitute Committee of Chief/Principal Chief Commissioners or Commissioners/Principal Commissioners: Section 86 of Finance Act, 1994 empowers the Board to constitute committee by notification in the Official Gazette. *[The words "by notification in the Official Gazette" have been substituted with "by order" by Finance (No.2) Act 2014].* Every such committee constituted by the Board shall consist of two Chief/Principal Chief Commissioners of Central Excise or two Commissioners/Principal Commissioners of Central Excise, as the case may be. Further power has been granted to such a committee with effect from 11.05.2007 to direct Commissioner of Central Excise to appeal to the Appellate Tribunal against the order of Commissioner passed under Section 73 or Section 83A or Section 84 which was earlier exercised by the Board.

(iii) Other common points

(a) Language

The official language of the Tribunal is English. However, the assessee may file documents drawn up in Hindi before the Tribunal, if it so desires. The final order passed by the Tribunal is in English. However, the Tribunal is also empowered to pass the order in Hindi. The orders in Hindi are accompanied by a translation in English of the same, duly attested by the concerned Bench.

(b) Hearing

The date and place of hearing of the appeal is notified to the parties by the Tribunal. The notices are sent at the address in the form of appeal. On the fixed day, the appellant is heard in support of the appeal. The arguments of the respondent are also heard simultaneously.

If the appellant does not appear on the day fixed for the hearing, the Tribunal may either dismiss the appeal for default or hear and decide it on merits, ex parte.

(c) Production of Additional Evidence before CESTAT

Rule 23 of CESTAT (Procedure) Rules, 1982 deals with the subject. A reading of this rule indicates that the parties to the appeal are not entitled to produce any additional evidence, either oral or documentary, before the Tribunal. However, the Tribunal is vested with wide powers in this regard to meet the ends of justice.

(d) Additional Legal Ground

Additional legal ground can be raised at Tribunal level for the first time. Additional ground raised is a legal issue and the same is admitted in view of the decision of Hon'ble SC in case of NTPC reported in 2009 ITR 383.

(e) Persons who can appear before CESTAT

The appellant may appear in person or through an "authorized representative". An authorized representative, as per (Section 35Q (2) of the Central Excise Act, 1944), can be

(a) his relative or regular employee;

(b) any legal practitioner entitled to practice in any civil court in India;

(c) any person having the following qualifications, namely,

- a chartered accountant within the meaning of the Chartered Accountants Act, 1949; or;
- a cost accountant within the meaning of the Cost and Works Accountants Act, 1959; or
- a company secretary within the meaning the Company Secretaries Act, 1980 who has obtained a certificate of practice under Section6 of that Act; or
- a post-graduate or an 'Honours' degree holder in commerce or a

postgraduate degree or diploma holder in business administration from any recognised university; or

- a person formerly employed in the Department of Customs and Central Excise or Narcotics and has retired or resigned from such employment after having provided service in any capacity in one or more of the said departments for not less than ten years in the aggregate.

(f) Dress Code

The assessee or his authorized representative has to appear before the Tribunal in his professional dress, if any. However, where no professional dress is specified, the following dress code should be adhered to for appearing before the CESTAT:

Males	Close-collared black coat, or an open collared black coat, with white shirt and black tie
Females	Black coat over a white sari or any other white dress

(g) Cross Objections

An assessee or the Department may itself not have preferred appeal against orders passed by the Commissioner or Commissioner (Appeals) even though it might have been aggrieved by the said order for any reason. It gets an opportunity to contest the matter on which it is aggrieved if the other party files appeal in the Tribunal through cross objections.

The relevant provisions with regard to the memorandum of cross objections are contained in Section 86(4) of the Finance Act, 1994. The same is required to be filed in Form ST-6. The Form is given at Annexure V for ready reference. Instead of the grounds of appeal and statement of facts, this form requires mention of grounds of cross objections. Such cross objections are required to be filed within 45 days of the receipt of notice that an appeal against specified order has been filed.

All other requirements as specified for filing grounds of appeal are applicable and relevant for filing of cross objections as well, except that no fee is payable for filing cross objections.

(h) Other applications before CESTAT

Beside appeals and stay petitions, other applications are also sometimes required to be filed before the CESTAT; for example, where an appeal is dismissed for non-appearance and the appellant has a genuine reason (the notice of hearing was not served) for not appearing before the Tribunal, an application would be required to be made to the Tribunal for restoration

of appeal. Applications would also be required to be made to the CESTAT in case of rectification of a mistake in the order of the Tribunal or for seeking early hearing.

(i) Fees for other applications

A fee of Rs. 500 is prescribed for every application made before the CESTAT

(a) in an appeal for rectification of mistake or for any other purpose; or

(b) for restoration of an appeal or an application,

filed by an assessee.

No fee is payable if the application is field by the Department.

5. Appeal before the CESTAT by Government Companies of the Central/State Government

Earlier, an appeal could be filed before the CESTAT after the approval by the Committee on Disputes (**"COD"**). The COD was constituted in compliance with the directions of the Hon'ble Supreme Court, given on 11-10-1991 in the case between the ONGC and Collector of Central Excise and a subsequent order passed on 07-01-1994.

The prime objective of the COD was to reduce litigation between two arms of the Union Government by ensuring that no litigation of unnecessary and frivolous nature or involving petty matters and issues between the Central Government,. Departments or Central Public Sector Undertakings or between a Central Government Department and a Central Public Sector Undertaking reached a Court or a Tribunal without the matter having been first examined by it.

In a judgment dated 17.02.2011, the Constitution Bench of the Hon'ble Supreme Court, while deciding the S.L.P. No. 2538 of 2009 in the case of Electronics Corporation of India Ltd. Vs. the Union of India and other matters reported in 2011 (265) ELT 11 (S.C.), has recalled the directions referred to above. Accordingly, the CBEC issued a circular under F No. 390/R/262/09-JC dated 24.03.11, stating that there is no need for obtaining the approval of the Committee on Disputes for pursuing litigation, as was being done earlier. It has been further clarified that the field formations may now pursue their appeals in the respective Tribunals/ Courts without obtaining clearance from the Committee on Disputes. Proposals which have already been sent to the Committee and on which no decisions have been taken till 17.02.2011 shall be deemed to be covered by the decision of the Hon'ble Court dated 17.02.2011. That is, COD permission is not required in those cases.

Annexure -I

BENCHES OF CESTAT

Appeal which falls under the jurisdiction of the CESTAT is to be made at the addresses mentioned below:

1. Customs, Excise & Service Tax Appellate Tribunal

   West Block No. 2,

   R. K. Puram

   New Delhi - 110066

   Website: www.cestat.gov.in.

   E-mail: cestatdelhi@indiatimes.com

2. Customs, Excise & Service Tax Appellate Tribunal,

   26, Haddows Road,

   Shastri Bhavan Annexe, 1st Floor,

   Chennai - 600006

   E-mail: cestatchennai@indiatimes.com

3. Customs, Excise & Service Tax Appellate Tribunal,

   3rd Floor, Jai Centre,

   34, P'Dmello Road, Masjid (East),

   Mumbai - 400 009.

   E-mail: cestatmumbai@indiatimes.com

4. Customs, Excise & Service Tax Appellate Tribunal,

   169, A.J.C. Road, Bamboo Villa, 7th Floor,

   Kolkata - 700 014.

   E-mail: cestatkolkata@indiatimes.com

5. Customs, Excise & Service Tax Appellate Tribunal,

   1st Floor, WTC Building, FKCCI Complex, K.G. Road,

   Bangalore – 560009.

   E-mail: cestatbangalore@indiatimes.com

6. Customs, Excise & Service Tax Appellate Tribunal,

   O-20, Meghani Nagar,

   New Mental Compound,

   Ahmedabad - 380 016.

7. The Customs, Excise and Service Tax Appellate Tribunal

   Room No. 210 & 220, 2nd Floor,

   Office of the Commissioner of Central Excise

   Customs & Service Tax, 38, M.G. Marg,

   Allahabad-211001

8. Customs, Excise and Service Tax Appellate Tribunal

   1-III Floor, SCO No.147-148,

   Section 17C, Chandigarh – 160 017.

9. Customs, Excise and Service Tax Appellate Tribunal

   1st Floor, HMWSSB Building, Rear Portion

   Khairatabad, Hyderabad – 500 004