VALATUION OF GOODS & SERVICE – SECTION 15 GST MODEL ACT & GST (DETERMINATION OF THE VALUE OF SUPPLY OF GOODS AND SERVICES) RULES, 2016.

By

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In this Article, an attempt has been made to explain "Transaction Value" as appearing in Section 15 of GST Act and more particularly in relation to "Goods". The "Transaction Value", as appearing in Section 15 of the Goods and Service Act, 2016 is, more or less, a replica of Section 4 of the Central Excise Act, 1944. Therefore, the judgments appearing in this Article, are the result of interpretation rendered by the Hon'ble Supreme Court, High Courts and Customs Excise & Service Tax Appellate Tribunal (hereinafter called CESTAT) in relation to Section 4 and other related rules under Central Excise Act, 1944.

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2: Before I deal with the valuation of Goods or Service, it would be prudent to understand certain basic principles of valuation and

more particularly, in relation to goods, which have developed over decades under the Central Excise Act, 1944.

GENERAL PRINCIPLE OF VALUATION

3: Sale at depot or place of consignment agent – If goods are sold from depot or place of consignment agent, that will be 'place of removal' as per section 4(3)(c)(iii). This is pertinent in view of the provisions of Section 12(2)(a)(i) of Act – here also the word used is"removed". In such case, transport, handling and insurance charges upto depot or place of consignment agent will be includible in assessable value as depot/place of consignment agent is 'place of removal'. In **Escorts JCB Ltd. v. CCE (2003) 1 SCC 281 = 53 RLT = 146 ELT 31 (SC),** the contract was for sale ex-factory. Goods were handed over to the carrier/transporter. However, insurance was arranged by assessee, though charged separately. It was contended by department that since insurance is arranged by seller, the property in good passes to buyer only when goods reach the destination. Hence, buyer's place will be the 'place of removal' and hence insurance and freight will be includible in the price. This view was rejected by SC. It was held that as per section 39 of Sale of Goods Act, delivery of goods to carrier is prima facie delivery of goods to buyer. This judgment was f**ollowed in CCE v. Indian Carbon Ltd. (2011) 269 ELT 6 (SC).**

5: The factory can be "place of removal" even if insurance taken by assessee as service to customers – **In Blue Star Ltd. vs. CCE (2008) 224 ELT 258 (CESTAT),** transport was arranged by assessee since individual customer cannot arrange for transportation. Insurance was taken for safe transport of goods, as a service to customers. It was held that insurance cover cannot be

taken as criteria for determining ownership of goods. It was held that there was sale at factory gate and freight is not includible in assessable value. CBE&C, vide its circular No.287/3/97-CX dated 14-1-1997 had advised that in case of multi-product multi-location factories, equalized freight/averaged freight may be worked out on above basis.

6: The Supreme Court in the case of **CCE Vs. Aggarwal Industries 2011 TIOL 102 SC** held as follows:-

> "It is well settled that the onus to prove under-valuation is on revenue, but once the revenue discharge the burden of proof by providing evidence of contemporaneous imports at a higher price, the onus shifts to the importer to establish that the price indicated in the invoice relied upon by him is correct"

7: The Larger Bench of the Tribunal in the case of **Walia Enterprises Vs. CCE MANU/CE/0438/1997** has observed as under:-

> The law is now well established that the burden of proving the charge of under valuation lies squarely on the department.

FUNDAMENTAL PRINCIPLE OF VALUATION:

8: Once the sale price is genuine, it is not open to revenue to investigate whether the assessee is making profit or loss in the manufacture and sale of goods. **CCE Vs. Mohan Crystal 2000(118) ELT 691 Tri.** Department cannot determine the extent to which a business entity should earn its profit. **CCE Vs. LimcaFlavours 2006 (198) ELT 106.** The goods are to be assessed in the form in which they are cleared from factory. **ICI India Vs. CCE 2003(151) ELT 629 Tri.; Sirpur Paper Mills Vs. CCE 2012(280) ELT 235 Tri.** If

the goods are removed in CKD/SKD condition at the time of removal and the said goods, for all purposes, finished goods, re-assembly of the same at the site of buyer, will not attract any further Excise Duty. **Gordhandas Desai Vs. CCE 2005(179) ELT 557 (Tri).** The form in which the goods have been delivered to the buyer is relevant – part of the goods have been sold in lump form and in the form of powder. Goods shall be assessed according to the form in which they were sold to the buyer. **DharamsiMorarji Chemicals Co Ltd Vs. CCE 1996(86) ELT 538**.

GST IS LEVIABLE ON PROFIT ?

9: The Supreme Court in the case of **Baroda Electric Meters Ltd Vs. CCE 1997 (94) ELT 13 SC** held that profits made by a Dealer on transportation was not include in the assessable value of the goods. The Supreme Court in the case of **Indian Oxygen Ltd Vs. CCE 1988(36) ELT 732 SC,** has held that Excise duty is a tax on manufacture and not a tax on the profits made by a Dealer on transportation.

EACH TRANSACTON IS A SEPARATE TRANSACTION:

10: Each transaction is a separate transaction and has to be valued separately. **Prakash Industries Limited Vs. CCE 2010(250) ELT 65 (Tri).** Thus, separate prices for same product to different buyers is permissible. In case of parts, prices could be different to OEM suppliers and different to Dealer when Dealers sells as a spare parts. **GNK Drive Shafts Vs. CCE 2003(154) ELT 177 (Tri). Goa Industrial Products Vs. CCE 2005(181) ELT 222.** Exports Sales can be treated as sale to different class of buyers and FOB Value can be adopted for valuation. **Vera Laboratories Vs. CCE 2004(173) ELT 43 (Tri).** The different price to different dealers in different

regions based on pure commercial consideration to face stiff competition is permissible. **Lime Chemicals Vs. CCE 2008(229) ELT 286 (Tri).** Dual pricing – one for internal accounting like inter-unit transfer, sale to related persons, manufacture on job work, free supply for marketing and one set of price for independent sale. **Bharat Petroleum Corporation Limited Vs. CCE 2009(242) ELT 242 (Tri).**

> Rule 2(d) of GST Valuation Rules -"Transaction Value" means the value of goods and/or services within the meaning of Section 15 (1) of the CGST Act.

Section 15 (1) – VALUE OF TAXABLE SUPPLY

11: Value of taxable supply:- The value of a supply of goods and/or services shall be the "Transaction Value" i.e. the price actually paid or payable for the said supply of goods and/or services where the supplier and recipient of the supply are not related and the price is the sole consideration for the supply.

MEANING OF WORD "ACTUALLY PAID OR PAYABLE

12: The Supreme Court in the case of **Puralator India Limited Vs. CCE MANU/SC/0988/2015,** while defining the words "actually paid or payable" has observed as under:-

> The expression 'actually paid or payable for the goods, when sold' only means that whatever is agreed to as the price for the goods forms the basis of value, whether such price has been paid, has been paid in part, or has not been paid at all. The basis of 'transaction value' is, therefore,

the agreed contractual price. Further, the expression 'when sold' is not meant to indicate the time at which such goods are sold, but is meant to indicate that goods are the subject matter of an agreement of sale.

TRANSACTION VALUE BELOW THE COST PRICE:

13: In **Gurunanak Refrigeration Corporation Vs. CCE 1996 (81) ELT 290,** the Tribunal has held that if there is no allegation of flow back of funds of money from buyer to the assessee, if the price is the sole consideration and if dealings between assessee and buyers are at arms' length, assessable value will be decided on the basis of selling price, even if it is below manufacturing costs. The above view has been upheld by the Supreme Court in the case of **CCE Vs. Gurunanak Refrigeration Corporation 2003 (153) ELT 249.** However, in the case of **CCE Vs. Fiat India (P) Ltd 2012(283) ELT 161 SC,** the Supreme Court has reversed its own judgment, which in my respectful submission, requires re-consideration.

PRICE INCREASE SUBSEQUENT TO REMOVAL:

14: Price relevant is 'at the time of removal. Thus, any subsequent increase or reduction in prices of such goods after goods are cleared from the factory is not relevant, provided the price is final at the time of removal. **Traco Cable Co. v. CCE 2004 (172) ELT 33 (CESTAT).**

15: Even if the Government has fixed maximum selling price under Drug Price Control Order (DPCO), it is price at which the goods were actually sold would be relevant for payment of excise duty. **CCE Vs. Vitara Chemicals 2008(232) ELT 374.** If the price was final at the

time clearance, any subsequent reduction in price cannot be considered and excess duty paid is not refundable. **Indian Explosives Ltd Vs. CCE 2012(284) ELT 259.**

16: The cost of materials supplied free by buyers has to be added to arrive at full intrinsic value of goods. The fact that the petitioners are not the owner is irrelevant. Taxable event is manufacture and not ownership. The Board in its **circular Letter F. No. 354/81/2000-TRU dated 30.06.2000** has viewed as follows:-

> 6....It may also be noted that where the Assessee charges an amount as price for his goods, the amount so charged and paid or payable for the goods will form the assessable value. If, however, in addition to the amount charged as price from the buyer, the Assessee also recovers any other amount by reason of sale or in connection with sale, then such amount shall also form part of the **transactionvalue** for valuation and assessment purposes. Thus if Assessee splits up his pricing system and charges a price for the goods and separately charges for packaging, the packaging charges will also form part of assessable value as it is a charge in connection with production and sale of the goods recovered from the buyer ...
>
> 7. It would be seen from the definition of '**transactionvalue**' that any amount which is paid or payable by the buyer to or on behalf of the Assessee, on account of the factum of sale of goods, then such amount cannot be claimed to be not part of the **transactionvalue**. In other words, if, for example, an Assessee recovers advertising charges or publicity charges from his buyers, either at the time of sale of goods or even subsequently, the Assessee cannot claim that such charges are not includable in the **transactionvalue**. The law recognizes such payment to be part of the **transactionvalue** that is assessable value for those particular transactions.

17: The Supreme Court in the case of **Steel Authority of India Limited Vs. CCE MANU/SC/1401/2015** has observed as under:-

> "It is undeniable that under Section 4 of the Act, the excise duty is to be paid on the '**transactionvalue**' and such a **transactionvalue** has to be seen at the time of clearance of the goods. Indubitably, when the goods were cleared, the excise duty was paid taking into consideration the price that was actually charged and was reflected in the invoices raised for the said purpose. The Department cannot plead that as on that date, this was not the price charged. No doubt, when the differential payment is made at a later date, further amount towards excise duty becomes payable as a result of said differential in price.

18: The Supreme Court in the case of **Purolator India Ltd Vs. CCE MANU/SC/0908/2015** has observed as under:-

> It can be seen that Section 4 as amended introduces the concept of "transaction value" so that on each removal of excisable goods, the "transaction value" of such goods becomes determinable. Whereas previously, the value of such excisable goods was the price at which such goods were ordinarily sold in the course of wholesale trade, post amendment each transaction is looked at by itself. However, "transaction value" as defined in Sub-clause (3)(d) of Section 4 has to be read along with the expression "for delivery at the time and place of removal". It is clear, therefore, that what is paramount is that the value of the excisable goods even on the basis of "transaction value" has only to be at the time of removal, that is, the time of clearance of the goods from the Appellant's factory or depot as the case may be. The expression "actually paid or payable for the goods, when sold" only means that whatever is agreed to as the price for the goods forms the basis of value, whether such price has been paid, has been paid in

part, or has not been paid at all. The basis of "transaction value" is therefore the agreed contractual price

EXCLUSION FROM TRANSACTION VALUE:

19: The Supreme Court in the case of **Gujarat Borosil Limited Vs. CCE MANU/SC/1554/2015** has held the amount towards "transit insurance" is liable to be excluded from the Transaction Value".

20: The Supreme Court in the case of **Castrol India Limited Vs. CCE MANU/SC/1504/2015** has observed that " interest on receivable" would be deductible from "Transaction Value".

TRANSACTION VALUE

Section 15 (2): The above transaction value shall include:

(a). Any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods and/or services;

21: The Supreme Court in the case of **CCE Vs. Ford India (P) Ltd MANU/SC/0179/2016** has ruled that the expenditure so incurred on any advertisement campaign was liable to be included as part of the T**ransaction Value** under the Act for purposes of levy of excise duty. However, in **CCE v. Surat Textile Mills 2004 AIR SCW 2868=2004(5)SCC 201=167 ELT 379** (SC 3 member bench), it was held that advertisement expenditure incurred by customer can be added to sale price for determining assessable value only if manufacturer has an enforceable legal right against customer to insist on incurring of such advertisement expenses by customer –

followed in **Alembic Glass Industries vs. CCE 2006 (201) ELT 161 (SC).**

22: Section 15(2)(b)- The value, apportioned as appropriate, of such of goods and/or services as supplied directly or indirectly by the recipient of the supply free of charge or at reduced cost for use in connection with the supply of goods and/or services being valued, to the extent that such value has not been included in the price actually paid or payable;

23: Section 15(2)(c)- Royalties and license fees related to the supply of goods and/or services being valued that the recipient of supply must pay, either directly or indirectly, as a condition of the said supply, to the extent that such royalties and fees are not included in the price actually paid or payable;

23.1: In franchise Agreement, royalty is charged for permission to use the brand name e.g. Pepsi and Coca Cola manufacture concentrate and supply the same to bottlers. The bottlers makes soft drink and sells it directly in the market. The bottlers have to pay royalty to Pepsi and Coca cola for use of the brand name. Since they are under obligation to buy concentrate only from Pepsi and Coca Cola, the royalty payable is includible in the price of concentrate sold by Pepsi and Coca Cola to the bottlers. When the royalty is charged separately, price is not the sole consideration. **Pepsi Food Ltd Vs. CCE 2003(158) ELT 552 SC.**

23.2: The Supreme Court in the case of **Commissioner of Customs Vs. Ferodo India (P) Ltd MANU/SC/0849/2008** has observed as under:-

"Royalties and licence fees related to the imported goods is the cost which is incurred by the buyer in addition to the price which the buyer has to pay as consideration for the purchase of the imported goods. In other words, in addition to the price for the imported goods the buyer incurs costs on account of royalty and licence fee which the buyer pays to the foreign supplier for using information, patent, trade mark and know-how in the manufacture of the licensed product in India."

23.3: The Product cannot be manufactured without design and pengineering charges and they are necessary to make the product marketable. **CCE Vs. Thermax (P) Ltd 1994 (70) ELT 247 followed in Servall Engineering Works Vs. CCE 1999 (105) ELT 296 Tri.**

23.4: The Technical Know-How charges relating to manufacture are includible in assessable value on amortization basis.**Ucal Fuel Systems Vs. CCE 2007(216) ELT 370 Tri.** Drawing, design charges, Art & Development Charges are includible on proportionate basis.**New Tech Packaging Vs. CCE 2003(156) ELT 74 Tri.**

23.5: The Engineering and Technical Know-How charges related entirely to setting up of plant, its layout, load of equipment at each stage etc. is not related to any activity prior to manufacture or activity relating to design of goods, are not includible in the value of light fittings. **NaranLala Metal Works Vs. CCE 2003(156) ELT 281 Tri.**

When Designing charges are said to be includible in Assessable Value?

24: In **Canara Lighting Industries v. CCE (2013) 287 ELT 310 (CESTAT), the Tribunal has** held as under-

> "Design charges for preparing layout designs for light fittings (i.e. where light fittings should be installed) do not in any way contribute to the value of light fittings charges for such designs and hence not includible in the value of light fittings."
>
> **Section 15(2)(d)**Any taxes, duties, fees and charges levied under any Statute other than SGST Act or the CGST Act or the 1GST Act would be includible in "Transaction Value"

25: The Tribunal in the case of **CCE Vs. Uttam Galva Steel Limited Vs. 2016(311) ELT 261 Tri,** has held that even if actual amount of tax paid has been less, the whole tax is deemed to have been paid and the assessee shall be entitled the abatement of full amount and not the amount actually paid. Some State Governments allow sales tax exemptions to new industries in the first few years as an Incentive. Since no tax is payable by such industries, they are not eligible for any deduction on account of sale tax. **Adhunik Detergents Vs. CCE 2000 (119) ELT 342 Tri.**

25.1: The CESTAT in the case of **Hindustan Unilever Limited Vs. CCE MANU/CB/0061/2016** has observed as under:-

> "In view of the above discussion, we hold that the appellants are entitled to claim the abatement of equalized sales tax from the **transactionvalue**. Accordingly, both the impugned orders are set aside and both the appeals are allowed with consequential relief."

25.2: The octroi, turnover tax, sales tax is allowable even when sale is through related person. **CCE Vs. Akay Cosmetics 2005(182) ELT 294 SC.** Additional Tax, Surcharge on Sales Tax, Turnover Tax will be allowed as deduction, if proved to have been paid. The deduction shall be admissible even proved to have been paid periodically. **Indian Oil Corporation Ltd Vs. CCE 2007(208) ELT 584.** Turnover Tax/Additional Tax is allowable as deduction even if not charged in invoice and borne by the seller.**CCE Vs. Mahindra & Mahindra 2011(273) ELT Tri. Pepsico India Vs. CCE 2005(187) ELT 382.**

25.3: In **Kisan Sahkari Chini Mills Ltd Vs. CCE 1999(111) ELT 762 Tri,** it was held that tax, levy and impost. The above view finally approved by Supreme Court in the case of **Chhata Sugar Co Ltd Vs. CCE 2004 AIR 1528 SC.**

> **Section 15(2)(e)** Incidental expenses such as commission and packing, charged by the supplier to the recipient of a supply, including any amount charged for anything done by the supplier in respect of the supply of goods and/or services at the time of, or before delivery of the goods or, as the case may be, provision of the services;

<u>CONTAINER SUPPLIED FREE OF COST BY BUYER, WHETHER COST OF CONTAINER IS LIABLE TO BE INCLUDED OR NOT ?</u>

26.1: The Hon'ble Supreme Court in the case of **Jauss Polymers Ltd Vs. CCE MANU/SC/0927/2003** has observed as under:-

> "In that decision it is clearly set out that if the manufacturer asks the customer to bring his own

container and does not charge anything therefore, packing cost cannot be added to the price at which the goods are sold by the manufacturer. This position was not detracted to in the decision in Government of India v. Madras Rubber Factory Ltd. (supra). In fact it was followed in:

26.2: The Supreme Court in the case of **CCE Vs. Superior Products MANU/SC/8007/2008** has observed as under:-

> "Insofar as packing charges are concerned, tribunal has held that this point stands concluded against the revenue by a judgment of this Court in the case of Hindustan Polymers v. CCE MANU/SC/0298/1990 : 1989(43)ELT165(SC) . After going through the judgment in the case of Hindustan Polymers (supra), we are satisfied that this point is squarely concluded against the revenue and in favour of the assessee. The judgment of this Court in Hindustan Polymers (supra) has been confirmed by a subsequent judgment of this Court in the case of Jauss Polymers Ltd. v. CCE, Meerut reported in MANU/SC/0927/2003 : 2003ECR5(SC) . We endorse the finding of the Tribunal on this point."

PACKING CHARGES: CONTAINER/CYLINDER/CATONS

27.2: The packing which is necessary for putting excisable article in condition in which it is generally sold is includible in assessable value – **Royal Enfield v. CCE (2011) 270 ELT 637 (SC).** Container/cylinder supplied by buyer – In **TCP Ltd. v. CCE (2008) 227 ELT 109 (CESTAT),** buyer was supplying cylinders in which gas (liquid Sulphur dioxide) manufactured by assessee was filled in and supplied to buyer. The buyer and assessee were not related

persons. It was held that value of such cylinders is not includible in assessable value of liquid Sulphur dioxide-relying on Grasim Industries v. CCE (2004) 164 ELT 257 (CESTAT).

SECONDARY/SPECIAL PACKING DONEAT THE INSTANCE OF BUYER NOT INCLUDIBLE:

28: The secondary packing done which is not in case of normal delivery of goods to customers is not required to be added – **National Leather Cloth Mfg v. UOI (2010) 256 ELT 321 (SC).** Rental charges to buyer for durable containers is not includible in assessable value – In **CCE v. Bisleri International Pvt. Ltd. (2005) 6 SCC 58=186 ELT 257 (SC),** it was held that rental charges for container (ROC) and interest charged for delayed return of container are not includible in assessable value of cold drink – followed in **Krishna Mohan Beverages v. CCE (2013) 289 ELT 197 (CESTAT).**

PRE-DELIVERY INSPECTION ANDSERVICE CHARGES:

29: PDI and after sales service charges incurred by dealers out of their own commission not includible – CBE&C, vide Circular No.643/34/2002-CX dated 1.07.2002 had stated that cost of after sales service and pre-delivery inspection (PDI) charges incurred by dealer out of his commission during warranty period are includible. This circular has been held as invalid in **Tata Motors Ltd. V. UOI (2012) 25 taxmann.com 497 = 286 ELT 161 (Bom HC DB).**

FURTHER PROCESSING/WORK/MODIFICATION NO DUTYPAYABLE:

30: It has been clarified by the Department if any value addition has been done by the assessee by processing the goods after removal from factory, cost of such processing is not to be added in assessable value, if such process does not amount to manufacture – CBEC Circular No.138/08/2000-CX-4 dated 3.1.2001. In the case of **IVRCL Infrastructure Ltd Vs. CCE 2004(169) ELT 194** it has been held that cost of coating done on pipes after its removal from factory is not includible in assessable value.

> **Section 15(2)(f)-**Subsidies provided in any form or manner, linked to the supply;

31: Needless to say the amount of subsidy or grant of any nature whatsoever, given to the assessee by the Government is liable to be included. However, CBEC vide Circular No.983/7/2014 CX- dated 10.07.2014 has confirmed that the fertilizer subsidy received from the Government is not additional consideration to individual manufacturer of Fertilizers. In **CCE Vs. Super Synotex India Ltd 2014)301) ELT 273 SC,** the position was that as per Sales Tax Incentive Scheme of the State, assessee was allowed to charge full sales tax in his invoice, however, he was allowed to retain 75% of sale tax amount to himself and balance 25% was required to be paid by him to the Government. Hence, it was held that the assessee shall be allowed the benefit of 25% and the balance 75% shall be included in the "Transaction Value".

31.1: In **Neyveli Lignite v. CTO(2001)9 SCC 648 (SC 3 member bench)** (a sales tax matter), it was held 'price' is an essential element of contract of sale. Any other sum received by seller for a different purpose and not as consideration for the sale is not part of 'sale price' and hence not part of turnover. In this case, it

was held that subsidy received from Government of India under Fertilizer (Control) Order is not part of taxable turnover. [Reversing Neyveli Lignite Corporation v. Dy. CTO (1999) 115 STC 51 (TNTST) (a sales tax case), where it was held that fertilizer subsidy received from Government by manufacturer on basis of retention price is includible in taxable turnover, as it is part of total consideration] – followed in COT v. Bongaigaon Refinery (2016) 147 STC 358 (SC).

Section 15(2)(g)-

"Any reimbursable expenditure or cost incurred by or on behalf of the supplier and charged in relation to the supply of goods and/or services;"

32: The assessee had incurred advertisement and sale promotion expenses. These were reimbursed by suppliers of concentrate of beverages – since there was no compulsion on the part of assessee to compulsorily advertise and promote and, therefore, the amount of advertisement and sale promotion is not required to be included as the same is not additional consideration. **CCE Vs. Surat Beverages 2008(232) ELT 830 Tri – followed CCE Vs. Bisleri International (P) Ltd 2005 (186) ELT 257 SC.**

ADVERTISEMENT, GIFT AND SALES PROMOTION EXPENSES. SECTION 15(2)(a), (g)

33: CBEC, vide its Circular No.643/34/2002-CX dated 01.07.2002, has clarified that even when advertisement and publicity charges are borne by dealers/buyers and dealings are on principal to principal basis, but if there is an agreement, either written or oral, that the buyer will incur certain expenditure for advertising the goods of the assessee, cost of such advertisement

will be added to the price of goods to determine assessable value, as price is not the sole consideration.

33.1: However, in **CCE v. Surat Textile Mills 2004 AIR SCW 2868=2004 (5)SCC201=167ELT 379 (SC 3 member bench)**, it was held that advertisement expenditure incurred by customer can be added to sale price for determining assessable value only if manufacturer has an enforceable legal right against customer to insist on incurring of such advertisement expenses by customer – followed in **Alembic Glass Industries v. CCE 2006 (201)ELT 161 (S.C) Honda Seils Power Products v. CCE (2015) 317 ELT 510 (CESTAT).** Advertisement expenses incurred by marketing company to advertise soft drinks (aerated waters) are not includible in assessable value of concentrate – **CCE v. Parle International Ltd. 2006 (198) ELT 486 (SC).**

33.2: Value of gifts given by dealers to their customers are not includible in assessable value of goods supplied by manufacturer, when the manufacturer did not supply and gifts but only facilitated procurement of gifts by the dealers. These are only sales promotion expenses incurred by dealers themselves - **Medico Labs v. CCE (2009) 236 ELT 574 (CESTAT).**

Section 15(2)(h)-

> "Any discount or incentive that may be allowed after the supply has been effected:"

Provided that such post-supply discount which is established as per the agreement and is known at or before the time of supply and specifically linked to relevant invoices shall not be included in the transaction value.

34: The Supreme Court, in the landmark judgment, in the case of **Government of India v. Madras Rubber Factory Ltd.MANU/SC/0725/1995 : 1995 (77) ELT 433 (SC),** has observed as follows:

> . "What is called 'Year-ending discount' is really a bonus given by Madras Rubber Factory to its dealers @ Rupees fifty per tyre in respect of a particular type of tyres. This discount is payable only where the payments are actually received within forty five days from the date of the invoice. Under this scheme, it appears that a declaration is to be received dealer-wise and thereafter provision is to be made at the head office of MRF for the bonus. The Assistant Collector has found that this discount was allowed by the Assessee not out of any extra-commercial considerations but that they were meant only to boost the sales particularly in the year 1981-82 in respect of Leader Tyre in order to achieve the target of sales for that year He has recorded a finding that "such a system of grant of discount is prevalent in normal trade practice and the only difference may be that MRF limited have granted the discount only at the end of the year and not at the time of actual sales".

34.1: Price reduction after removal from factory – **In Traco Cable Co. v. CCE 2004 (172) ELT 33 (CESTAT),** assessee gave price reduction subsequent to clearance from factory. The assessment was not made provisional. It was held that refund cannot be granted for subsequent reduction in price – same view in MauriaUdyog v. CCE 2007 (207) ELT 31 (P&H HC DB) * CCE v. CESTAT 2007 (207) ELT 33 (P&H HC DB). However, subsequently, in **IFB Industries Ltd. Vs. State of Kerala (2012) 4 SCC 618 = 49 VST 1 (SC),** it was held that trade discounts are allowable as deduction even if not shown in invoice but given separately by credit note (sales tax matter but principle applies here also).

VARIOUS TYPES OF DISCOUNTS

DISCOUNT – MEANING, NATURE AND SCOPE

34.2: The Supreme Court, in a landmark judgment, in the case of **Union of India v. BombayTyre International Limited MANU/SC/0538/1983: 1984 (17) ELT 329 (SC)** has observed as under:-

> **"Trade Discounts.**-Discounts allowed in the Trade (by whatever name such discount is described) should be allowed to be deducted from the sale price having regard to the nature of the goods, if established under agreements or under terms of sale or by established practice, the allowance and the nature of the discount being known at or prior to the removal of the goods. Such Trade Discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price."

QUANTITY DISCOUNT:

35.3: Under the scheme of Quantity Discount, a dealer receives from the assessee a stated extra quantity if he buys a certain other quantity - that this will happen is known and agreed at the time of transaction is entered into. It is, therefore, a trade discount and is allowable as deduction. – **CCE v. Hindustan Lever 2002 (142) ELT 513 (SC 3 member bench).** Even verbal communication through salesman is sufficient to give quantity discount and then it is eligible as deduction. What were norms and criteria for giving discount is not relevant. What is relevant for assessment is whether a discount

is allowed or not and not for what reason it is being allowed – **Hindustan Lever Ltd. v. CCE 2005 (189) ELT 434 (CESTAT).** Trade discount may be in form of cash discount or in the shape of goods. Quantity discount has precisely the same effect as money discount, as in both cases, there is reduction in price charged to customers and hence permissible. – **Queen's Chemists Mfg. Deptt. V.CCE – 1979 (4) ELT (J 454) (Bom HC)** – quoted with approval in **Guljag Chemical and Plastics Pvt. Ltd. v. CCE – 1993 (63)ELT 710 (CEGAT).**

35:4: In **Anglo French Drugs v. CCE (2005) 2 STT 120 (CESTAT),** a scheme of 'special trade bonus scheme' was announced which was in nature of quantity discount. Dealers were asked to sell their existing duty paid stock which was replenished by manufacturer later free of cost. It was held that such scheme is quantity discount scheme and is permissible. In **Pace Marketing Specialities v. CCE2003 (153) ELT 621 (CEGAT),** assessee was putting cash coin in his product I.e. adhesive. It was held that it is nothing but cash discount and is admissible as deduction for valuation – followed in CCE v. Pace Marketing Specialities 2004 (167) ELT 401 (CESTAT) and held that this is true in respect of new section 4 also.

35:5: The prompt payment discount is given if the buyer makes payment of bill within stipulated time. This is allowable even if it is limited to certain varieties of products. – **GOI v. MRF Ltd. 77 ELT 433 = 1995 AIR SCW 2654 = (1995) 4 SCC 349. p**rompt payment discount is allowable as deduction if nature of discount was known at the time of removal of goods and was in fact allowed – **CCE v. TFL Ouinn India (2011) 267 ELT 641 (CESTAT).**

35.6: However, in **CCE vs. Rishab Instruments (2008) 226 ELT 230 (CESTAT),** one buyer (L&T) was given higher discount that others, on condition that he will promote sale and marketing of asessee's products. The extra discount was to compensate advertisement and promotion activity undertaken by L&T. It was held that the additional discount cannot be allowed as deduction and the value of discount is liable to be included in the assessable value. Special discount for higher purchases is allowable as deduction for valuation – **Sri Ramdas Motor Transport v. CCE 2005 (190) ELT 266 (CESTAT).** Varying discount is permissible – **ElgiEquipments v. CCE (2007) 215 ELT 348 (SC).** What is relevant for assessment is whether a discount is allowed or not and not for what reason it is being allowed – **Hindustan Lever Ltd. V. CCE 2005 (189) ELT 434 (CESTAT).**

CASH DISCOUNT:

35.7: The Department has confirmed that cash discount is allowable deduction, if actually passed on to buyer, if transaction is on principal to principal basis. **CBE&C Circular No.643/34/2002-CX dated 1.7.2002.** The Supreme Court in the case of **Purolator India Limited Vs. CCE - MANU/SC/0908/2015** has observed " In view of what has been said above, it is clear that "cash discount" has therefore to be taken into account in arriving at "price" even under Section 4 as amended in 2000." In **IFB Industries Ltd. Vs. State of Kerala (2012) 4 SCC 618 = 49 VST 1 (SC),** it was held that trade discounts are allowable as deduction even if not shown in invoice but given separately by credit note (sales tax matter but principle applies here also).

Section 15(2)(h) proviso:

35.8: Trade Discount paid later is allowable as deduction provided it is given under any trade practice or agreement (agreement can be oral agreement also) is allowable. **CCE Vs. DCM Textiles 2006 (195) ELT 129 SC.** Trade Discount not shown in the invoices but allowed under the trade practice or under agreement (both oral or written) by way of separate Credit Note, is allowable as a deduction even if not shown in the Invoice but given by way of separate credit note. **IFB Industries Ltd Vs. State of Kerala 2012(4) SCC 618.** (Sales Tax matter). Quantity Discount given later at Depot is permissible even if quantified on half year basis. **Glenmark Pharmaceuticals Vs. CCE 2011(272) ELT 385. The c**ommission paid to Selling Agent for services rendered by them as Agents cannot be regarded as a Trade Discount. **Seshasayee Paper and Boards Limited Vs. CCE 1990(47) ELT 202 SC.**

36: Section 15 (3)-The transaction value under sub-section (1) shall not include any discount allowed before or at the time of supply provided such discount is allowed in the course of normal trade practice and has been duly recorded in the invoice issued in respect of the supply.

37: Section 15(4)- The value of the supply of goods and/or services in the following situations which cannot be valued under sub-section (1), shall be determined in such manner as may be prescribed in the rules.

(i) the consideration, whether paid or payable, is not money, wholly or partly;

(ii) the supplier and the recipient of the supply are related;

(iii) there is reason to doubt the truth or accuracy of the transaction value declared by the supplier;
(iv) business transactions undertaken by a pure agent, money changer, insurer, air travel agent and distributor or selling agent of lottery;
(v) such other supplies as be notified by the Central or a State Government in this behalf on the recommendation of the Council.

JUDGMENT ON RELATED PERSON SECTION 15 (4)(ii) and RULE 3(4)

38.1:In **Alembic Glass Industries vs. CCE-2002 (143)ELT 244 (S.C), the Supreme Court has** held as observed "The shareholder of a public limited company do not by reason only of their shareholding have an interest in the business of the company. Similarly two public limited companies having common Directors do not have an interest in the business of each other." Further, the Supreme Court once again in **Flash Laboratories Ltd. v. CCE – 2003 (151) ELT 241 (SC) has observed** "it appears that the shareholding test which held the forte since Atic Industries case has now been given a go by. The interpretation placed is probably correct given the wide expressions used in the Section. Mutuality of interest in each other business is satisfied where assessee Company

selling 60% of its products to its holding Co. and the remaining 40% to another subsidiary of its holding Co., further, holding Co. also incurring expenses for sales promotion." In **Ceam Electronics P.Ltd. vs. UOI – 1991 (51) ELT. 309 (Bom.) has observed** "Merely because, goods are manufactured with customer's brand name and entire production sold to customer, does not mean that sales are to related persons."

Section 15(4)(iii) –Rule 7

Mis-declaration- Under what circumstances the charges of under-valuation could be proved and under what circumstances such charge could not be proved?

- Cases where charge of undervaluation could be proved:

39: The Supreme.Court in the case of **LanEseda Industries v. CC (2010) 258 ELT 3 (SC) has observed that** "Transaction value cannot be accepted when similar goods were imported at a higher by applicant himself, import was from dealer and invoice of original manufacturer was not produced." Similarly, in **RadheyShyamRatanlal v. CC (2009) 238 ELT 14 (SC),** it was observed that "Increase in value on the basis of contemporaneous price (prevailing market price) like weekly bulletin of spices market and public ledger was accepted as importer did not produce contract but only a certificate in his favour." In **Vimal Enterprises v. CC, 2001 (129) ELT 123 (CEGAT)- "**it was held that when declared value is almost one-fifth of the price shown in the foreign manufacturer's price list, burden to prove that there was no under valuation shifts to the importer. If he does not discharge the burden, declared value can be rejected." In **HCL Ltd. v. CC, 2000 (126) ELT**

808 (CEGAT),it was held that "Valuation based on quotation was held valid when it was found that invoice present is suspect." In **Plast Fab v. CC, 1993 (66) ELT 441 (CEGAT).** "When there was wide difference between invoice price and price in international trade, the invoice price cannot be accepted."

- **Cases where charge of undervaluation could not be proved:**

39.1: In **Konia Trading Co. v. CC, 2006 (199) ELT 644 (CESTAT), the Tribunal has observed that** "Where one value is indicated in invoice and the other in export declaration, customs authorities are justified in holding that invoice value is not the transaction value." In **Big Apple Manufacturing v. CCE, (2008) 226 ELT 270(CEGAT), it was observed that** "Computer items are subject to wide fluctuations due to due to rapid growth. Rejection of value only on that ground is not justified when there is no evidence that invoice is fake or amount is not remitted through banking channels." In **Basant Industries v. CC, 1993 (66) ELT 93 (CEGAT)**, the Tribunal has observed that ""Quotation/price available for small quantity while actual imports are of large quantity." In **Finolex Industries v. CCE, 2004 (174) ELT 341 (CESTAT)**"It was held that transaction value cannot be rejected just because another person is importing at higher price."

GST Valuation (Determination of the Value of Supply of Goods and Services) Rules, 2016.

Short title, commencement and application.

(1) These rules may be called the GST Valuation (Determination of Value of Supply of Goods and Services) Rules, 2016.

(2) These Rules shall come into force on the day the Act comes into force.

(3)They shall apply to the supply of goods and/or services under the IGST/CGST/SGST Act.

2. **DEFINITIONS**.(1) In these rules, unless the context otherwise requires:

(a) "Act" means the IGST Act or the CGST Act or, as the case may be, the SGST Act:

(b) **"goods" of like kind and quality**" means goods which are identical or similar in physical characteristics, quality and reputation as the goods being valued and perform the same functions or are commercially interchangeable with the goods being valued and supplied by the same person or by a different person:

INTERPRETATION ON **"GOODS OF LIKE KIND AND QUALITY"**

- The CESTAT in the case of **Ashwin Vanaspati Industries (P) Ltd Vs. CCE MANU/CE/0156/1987.**

(vi) Goods of **like kind and quality** would imply necessarily goods of the same brand or of the same supplier. It has, necessarily, to be for imported rather than indigenous goods. If, however, the market price for goods of like kind and quality is not ascertainable, the price of comparable goods of foreign origin or Indian origin in that order is to be ascertained. Ascertainment of market rate of goods of like kind and quality or similar goods on any particular day or place is, doubtless, difficult but cannot, on that account, be shirked. It is a question requiring evidence to be adduced by either party and appreciation thereof;

- The Five Member Bench of the Tribunal in the case of **Omex India Vs. Collector of Customs MANU/CE/0357/1992** has observed as follows for the purpose of calculation of the redemption fine.

“In view of the majority view, we direct the adjudicating authority to recalculate redemption fine on the basis of the market price prevalent on the date of the importation of the goods in accordance with law.

- The Supreme Court in the case of **Union of India and Ors. v. Bombay Tyre International 1983 (14) E.L.T. 1896.** The Supreme Court observed :-

"28. In every case the fundamental criterion for computing the value of an excisable article is the price at which the excisable article or an article of the **like kind and quality** is sold or is capable of being sold by the manufacturer, and it is not the bare manufacturing cost and manufacturing profit which constitutes the basis for determining such value."

- 49...Now, the price of an article is related to its value (using this term in a general sense), and into that value how poured several component, including those which have enriched its value and given to the article its marketability in the trade. Therefore, the expenses incurred on account of the several factors which have contributed to its value up to the date of sale, which apparently would be the date of delivery, are liable to be included".

(c) "services of like kind and quality" means services which are identical or similar in nature, quality and reputation as the services being valued and supplied by the same person or by a different person; and

(d) "transaction value" means the value of goods and/or services within the meaning of Section 15 of the CGST Act.

(2) Words, expressions and terms not defined in these Rules shall have the same meaning as is assigned to them in the Act.

(3) METHOD OF DETERMINATION OF VALUE

(1) Subject to rule 7, the value of goods and/or services shall be the transaction value.

(2) The "transaction value" shall be the value determined in monetary terms.

(3) Where the supply consists of both taxable and non-taxable supply, the taxable supply shall be deemed to be for such part of the monetary consideration as is attributable thereto.

(4) The transaction value shall be accepted even where the supplier and recipient of supply are related, provided that the relationship has not influenced the price.

(5) Where good are transferred from:-

(a) one place of business to another place of the same business,

(b) the principal to an agent or from an agent to the principal,

- Whether or not situated in the same State, the value of such supply shall be the transactions value.

(6) The value of supplies specified in sub-section (4) of section 15 of the determined by proceeding sequentially through rules 4 to 6.

DETERMINATION OF VALUE OF SUPPLY BY COMPARISON.

(1) Where the supply cannot be determined under rule 3, the value shall be determined on the transaction value of goods and/or services of like kind and quality supplied at or about the same time to other customers, adjusted in accordance with the provisions of sub-rule (2).

(2) In determining the value of goods and/or services under sub-rule (1), the proper officer shall make such adjustments as appear to him reasonable taking into consideration the relevant factors, including __

- (a) difference in the dates of supply,
- (b) difference in commercial levels and quantity levels,
- (c) difference in composition, quality and design between the goods and/or services being valued and the goods and/or services with which they are compared
- (d) difference in freight and insurance charges depending on the place of supply.

The Division Bench of the Tribunal in the case of **SRK Enterprises Vs. Commissioner of Customs MANU/CM/0389/2011** has observed " We further find that, in case the transaction value has to be rejected, the adjudicating authority has to first arrive at the reasoning for the rejection of the transaction value and, thereafter, they have to resort to the procedure prescribed in the Customs Valuation Rules. As per Rule 5 of the Customs (Valuation) Rules, 2008, the absence of data about the sale price of the imported goods is no excuse for the department to rely on incomparable goods as this would lead to absurd result. In this case, we have seen that the goods were assessed after loading the value and, thereafter, re-enhancement has been done. Section 14(1) of the Customs Act provides for determination of value of such goods or like goods ordinarily available for sale, at the time and place of importation". In this case, it is seen that the method of valuation and market survey is not proper and no opportunity to the appellant were given to cross-examine the persons who have given the data for the valuation.

The Supreme Court in the case of **Commissioner of Customs Vs. South India Television (P) Ltd MANU/SC/2966/2007** has observed "Under Section 2(41) of the Customs Act, the word "value" is defined in relation to any goods to mean the value determined in accordance with the provisions of Section 14(1). The value to be declared in the Bill of Entry is the value referred to above and not merely the invoice price. On a plain reading of Section 14(1) and Section 14(1A), it envisages that the value of any goods chargeable to *ad valorem* duty has to be deemed price as referred to in Section 14(1). Therefore, determination of such price has to be in

accordance with the relevant rules and subject to the provisions of Section 14(1).

(5):COMPUTED VALUE METHOD.

If the value cannot be determined under rule 4, it shall be based on a computed value which shall include the following:-

- (a) the cost of production, manufacture or processing of the goods or, the cost of provision of the services;
- (b) charges, if any, for the design or brand;
- (c) an amount towards profit and general expenses equal to that usually reflected in supply of goods and/or services of the same class or kind as the goods and/or services being valued which are made by other suppliers

WHAT IS THE MEANING OF JOB WORK

The Supreme Court in the case of Prestige Engineering International Ltd Vs. CCE MANU/SC/0863/1994, explained the meaning "Job Work" observed that negligible work would also constitute Job Work so long as there is a manufacture. "In this case, the respondent receives high density polythene fabric from its customers and prepares bags out of it. He also prints a logo or some other matter on the said bags as per the specification of the customer.

The Constitution Bench of the Supreme Court in the case of UjagarPrints, etc. etc. v. Union of India and Ors. [MANU/SC/0675/1988 : 1988 (38) ELT 535 (SC)] gave the following clarification was given by the Constitution Bench:

"In respect of the civil miscellaneous petition for clarification of this Court's judgment dated 4th November, 1988, it is made clear that the assessable value of the processed fabrics could be the value of the grey-cloth in the hands of the processor plus the value of the job work done plus manufacturing profit and manufacturing expenses deemed to be the price at the factory gate for the processed fabric. The factory gate here means the 'deemed' factory gate as if the processed fabric was sold by the processor. In order to explain the position it is made clear by the following illustration: if the value of the grey-cloth in the hands of the processor is ` 20/- and the value of the job work done is ` 5/- and the manufacturing profit and expenses for the processing be ` 35/-, then in such a case the value would be ` 30/-, being the value of the grey-cloth plus the value of the job work done plus manufacturing profit and expenses. That would be the correct assessable-value.

The Supreme Court in the case of **Pawan Biscuits Co (P) Ltd Vs. CCE MANU/SC/0044/2000** has observed "The present case is similar to Ujagar Prints' case. In Ujagar Prints' case, it was the grey cloth which was given to the processor whereas in the present case it was the raw material for the manufacture of biscuits given to the appellant. After the biscuits are made, they are given back to or are delivered under the instructions of Britannia. The Court further observed that "the appellant was entitled to receive processing charges which would include its expenses plus profits for the purpose of determining the excise value. However, the cost of the raw material supplied by Britannia will have to be included in addition to the appellant's manufacturing costs and profit. What cannot be included on the ratio of Ujagar Prints' case is any profit of

Britannia or expenses which are incurred after the manufacture of the biscuits by the appellant"

The Division Bench of Bombay High Court in the case **Hyva India (P) Ltd Vs. CCE MANU/MH/2540/2015,** while dealing with the Ujagar Prints, has observed as under:-

> "Since rule 174 of the Central Excise Rules, 1944 was referred, the hon'ble Supreme Court clarified that the price, at which the trader is selling the goods must be value of the grey-cloth or fabric plus the value of the deemed job work done plus the manufacturing **profit** and manufacturing expenses but not any other subsequent **profit** or expenses. Thus, the trader's **profits**, who gets the fabric processed, need not be included.

RESIDUAL METHOD: Where the value of the goods and/or services cannot be determined under the provisions of rule 5, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules.

In case the valuation cannot be made as per the above provisions, any reasonable basis that it consistent with the principles of comparisonor computed method may be used. The flexibility is given since there might be cases where goods or services are unique or not comparable data is available in the public domain.

RULE 6 OF GST VALUATIN RULE = RULE 8 OF CUSTOM VALUATION RULE

The Supreme Court in the case of **Eicher Tractors Limited Vs. CCE MANU/SC/0699/2000 has observed that "**When value of the

imported goods cannot be determined under any of these provisions, the value is required to be determined under Rule 8 "using reasonable means consistent with the principles and general provisions of these rules and sub Section 1 of Section 14 of the Customs Act, 1962 and on the basis of data available in India."

7. **REJECTION OF DECLARED VALUE**.

- (1) (a) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any good and/or services, he may ask the supplier to furnish further information, including documents or other evidence and if, after receiving such further information, or in the absence of any response from such supplier, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such goods and/or services cannot be determined under the provisions of sub-rule (1) of rule 3.

b) The reasons to doubt the truth or accuracy of the value of the supply declared by the supplier shall include, but not be limited to the following:

- (i) the significantly higher value at which goods and/or services of like kind or quality supplied at or about the same time in comparable quantities in a comparable commercial transaction were assessed;

- (ii) the significantly lower or higher value of the supply of goods and/or services compared to the market value of goods and/or services of like kind and quantity at the time of supply; or

- (iii) anymis-declaration of goods and/or services in parameters such as description, quality, quantity, year of manufacture or production
- (2) The proper officer shall intimate the supplier in writing the grounds for doubting the truth or accuracy of the value declared in relation to the supply of goods and/or services by such supplier and provide a reasonable opportunity of being heard, before making a final decision under sub-rule (1).
- (3) If after hearing the supplier as aforesaid, the proper officer is, for reasons to be recorded in writing, not satisfied with the value declared, he shall proceed to determine the value in accordance with the provisions of rule 4 or rule 5 or rule 6, proceeding sequentially.
- **Explanation:-** For removal of doubts, it is hereby declared that this rule by itself does not provide a method for determination of value. It provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value.

The Supreme Court in a landmark judgment, on Income Tax Act, in the case of **State of Kerala Vs. C Velukutty MANU/SC/0307/1965** has observed as under:-

> "Under section 12(2)(b) of the Act, power is conferred on the assessing authority in the circumstances mentioned thereunder to assess the dealer to the best of his judgment. The limits of the power are implicit in the expression "best of his judgment". Judgment is a faculty to decide matters with wisdom truly and legally. Judgment does not depend upon the

arbitrary caprice of a judge, but on settled and invariable principles of justice. Though there is an element of guess- work in a "best judgment assessment", it shall not be a wild one, but shall have a reasonable nexus to the available material and the circumstances of each case. Though sub-section (2) of section 12 of the Act provides for a summary method because of the default of the assessee, it does not enable the assessing authority to function capriciously without regard for the available material. "

The Division Bench of Kerala High Court in the case of **Flipkart Internet (P) Ltd Vs. State of Kerala MANU/KE/1919/2015**, while dealing the issue of "best judgment assessment" has observed" "In cases such as the present where there is an uncertainty with regard to the real nature of the transaction in question, for instance, whether the transaction is an intra-state sale or an interstate sale, the Intelligence Officers ought, ideally, to refer the matter to the assessing officers concerned to arrive at a finding regarding liability to tax before taking recourse to the penal provisions of the Act. The assessing officers can then proceed sequentially as per the provisions of Sections 22 to 25 of the K.V.A.T. Act to determine the tax liability, if any, of the dealer concerned. Revenue authorities must realise that tax administration is not just about collecting revenue from citizens. They have to bear in mind the fundamental constitutional precept under Article 265 that no tax shall be levied or collected except by authority of law."

The Allahabad High Court in the case of **KartikeyIspat (P) Ltd Vs. Commissioner of Trade Tax MANU/UP/1394/2016** has noted the principle of best judgment assessment laid down in the case of State of Orissa v. Maharaja Shri B.P. Singh

DeoMANU/SC/0237/1969 : (1971) 3 SCC 52 where in the Supreme Court has observed as follows:-

- "4. Apart from coming to the conclusion that the materials placed before him by the assessee were not reliable, the Assistant Collector has given no reason for enhancing the assessment. His order does not disclose the basis on which he has enhanced the assessment. The mere fact that the material placed by the assessee before the assessing authorities is unreliable does not empower those authorities to make an arbitrary order. The power to levy assessment on the basis of best judgment is not an arbitrary power; it is an assessment on the basis of best judgment. In other words that assessment must be based on some relevant material. It is not a power that can be exercised under the sweet-will and pleasure of the concerned authorities. The scope of that power has been explained over and over again by this Court."

The above judgments of Hon'ble Supreme Court, High Courts and CESTAT are in relation to the provisions of Central Excise Act, Finance Act, 1994 and Customs Act and these judgments have to be applied keep in view the facts of each of the case.

VERY IMPORTANT PRINCIPLE FOR PROVING UNDER VALUATION BY DEPARTEMENT:

- 6.3 The Hon'ble Supreme Court in **MohteshamMohd. Ismail, MANU/SC/4019/2007 : 2007 (220) E.L.T. 3 (S.C.) : 2009 (13) S.T.R. 433 (S.C.),** held that confession of a co-accused person cannot be treated as substantive evidence while observing in Para 16 of the said judgment as under:--
- "We may, however, notice that recently in Francis Stanly @ Stalin v. Intelligence Officer, Narcotic Control Bureau, Thiruvananthapuram [MANU/SC/8783/2006 : 2006 (13) SCALE 386], this Court has emphasized that confession only if found to be voluntary and free from pressure, can be accepted. A confession purported to have been made before an authority would require a closure scrutiny. It is furthermore now well-settled that the court must seek corroboration of the purported confession from independent sources."

- In the case of **Vinod Solanki, MANU/SC/8446/2008 : 2009 (233) E.L.T. 157 (S.C.) : 2009 (13) S.T.R. 337 (S.C.)** the Hon'ble Supreme Court has inter alia held that the burden to prove that confession was voluntary is on the department. Court must bear in mind the time of retraction, nature and manner and other relevant factors to arrive at a finding.
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- 8.**VALUATION IN CERTAIN CASES.**
- **(**1) Pure Agent
- (a) Notwithstanding anything contained in these rules, the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service if all the following conditions are satisfied namely:-
- (i) the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods and/or services procured;
- (ii) the recipient of service receives and uses the goods and/or services so procured by the service provider in his capacity as pure agent of the recipient of service;
- (iii) the recipient of service is liable to make payment to the third party;
- (iv) the recipient of service authorizes the service provider to make payment on his behalf;

- (v) the recipient of service knows that the goods and/or services for which payment has been made by the service provider shall be provided by the third party;
- (vi) the payment made by the service provider on behalf of recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;
- (vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and
- (viii) the goods and/or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.
- Explanation: For the purposes of this sub-rule, "pure agent" means a person who _
- enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service:
- neither intends to hold nor holds any title to the goods and/or services so procured or provided as pure agent of the recipient of service
- does not use such goods and/or services so procured; and

  receives only the actual amount incurred to procure such goods and/or services
- (2) **<u>MONEY CHANGER:</u>**

- The value of taxable service provided for the services in so far as it pertains to purchase or sale of foreign currency, including money changing, shall be determined by the service provider in the following manner:-
-
- For a currency, when exchanged from, or to, Indian Rupees (INR), the value shall be equal to the difference in the buying rate or the selling rate, as the case may be, and the Reserve Bank of India (RBI) reference rate for that currency at that time, multiplied by the total units of currency:
- Provided that in case where the RBI reference rate for a currency is not available, the value shall be 1% of the gross amount of Indian Rupees provided or received, by the person changing the money.
- Provided further that in case where number of the currencies exchanged is Indian Rupee, the value shall be equal to 1% of the lesser of the two amounts the person changing the money would have received by converting any of the two currencies into Indian Rupee on that day at the reference rate provided by RBI.
- **PURE AGENT PROVISIONS**
- The definition of 'pure agent' for the purpose of this provision is given under Rule 8(1) of the Valuation Rules.
-

- enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;
- neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;
- does not use such goods or services so procured; and
- receives only the actual amount incurred to procure such goods or services.
- The expenditure or cost incurred by the service provider as a pure agent (satisfying the above conditions) shall be excluded from the value of supply if the following conditions are satisfied:
- the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;
- the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;
- the recipient of service is liable to make payment to the third party;
- the recipient of service authorizes the service provider to make payment on his behalf;

- the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;
- the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;
- the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and
- the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.
- It may be noted pure agent expenses are distinct from out-of-pocket expenses incurred by the service provider. No deduction from the value is given in case of out-of-pocket expenses. Similar provisions existed under the service tax law, where deduction was given to pure agent expenses and not to out-of-pocket expenses. However, assesses under service tax sought to avoid paying tax on out-of-pocket expenses as well claiming that such expenses did not form part of consideration for provision of the service. The High Court case of Intercontinental Consultants and Technocrats Pvt.Ltd. Vs. Union of India is relevant from the service tax perspective. It was claimed by the assesses that the valuation rules providing for charge of tax on out-of-pocket expenses was ultra vires the service tax legislation since the legislation provided for charge of tax on consideration for services only and out-of-pocket expenses cannot be said to be consideration for services. The High Court accepted this argument and provided relief to the

assessee. An appeal is pending before the Supreme Court in this case. The position regarding the fate of out-of-pocket expenses is thus, expected to be settled by the Supreme Court in due course. This same position would also apply to the GST since the law under GST is same as the law under Service Tax. Also refer to the section on industry issues for more on reimbursement and out-of-pocket expenses.

- . The High Court accepted this argument and provided relief to the assessee. An appeal is pending before the Supreme Court in this case. The position regarding the fate of out-of-pocket expenses is thus, expected to be settled by the Supreme Court in due course. This same position would also apply to the GST since the law under GST is same as the law under Service Tax. Also refer to the section on industry issues for more on reimbursement and out-of-pocket expenses.

- **MONEY CHANGER SERVICES**

- In services of money changing including sale and purchase of foreign currency the problem of valuation arises on account of the fact that as per normal trade practice in such services the consideration is inbuilt in the difference between the selling/buying rates and the Reserve Bank of India (RBI) reference rate for that currency at that time. Accordingly, a separate rule is expected to provide for the manner of determination of value of service in relation to money changing.

- E-COMMERCE

- The field of e-commerce is fast emerging as one of the most important sectors in today's business world. The pervasiveness of the internet has led to emergence of e-commerce sector throughout India. Given the nature of business carried out, the business models employed by e-commerce players are unique. Some of these models are described below:

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- Direct sales Model: This business model is followed by e-commerce companies selling goods to customers. This is the simplest model in use, whereby the e-commerce players sets up a website to act as a platform to get orders from customers. Thus, the internet is merely a medium employed for business.

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- Inventory model:- This model is also used by e-commerce players selling goods to consumers. Two entities generally operate – one owning and managing an online portal while the other actually buys goods from vendors and sells them to consumers. The online portal earns a commission from the trading entity, whereas the trading entity earns a margin on the purchase and sale of goods.

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- Marketplace model: Considering the high working capital requirements of the inventory model, several e-commerce players are turning to the marketplace model. In this model, the e-commerce player merely owns and operates the online portal listing products offered for sale by third party vendors.

Orders received on the portal are forwarded to the vendors who in turn dispatch good directly to the customers.

- Warehouse model: This model aims at combining the advantages of both the inventory and marketplace models. The e-commerce player maintains a warehouse of its own (known commonly as a 'fulfilment centre' where good are received from vendors before despatch to consumers. By maintaining a warehouse, the e-commerce player gets some control over the physical inventory of goods are thereby can aim at reducing or eliminating non-fulfilment or delayed fulfilment of orders. Similar to the marketplace model, title in goods is never transferred to the e-commerce player during the entire transaction.

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- Models used by online classified (C2C business): Certain e-commerce players such as Quikr and OLX facilitate C2C trade in goods. These e-commerce players earn premium listing fees from sellers or advertising revenue from advertisements displayed on their online portals.

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- Aggregators: The e-commerce player acts as an intermediary between a service provider and service recipient. Travel portals (such as MakeMyTrip acting as an intermediary between travellers and airline companies), cab companies (such as Meru, Uber, etc., acting as intermediaries between commuters and cab drivers) and financial services (such as

PaisaBazar and PolicyBazar which acts as an intermediary between consumers and banks, insurance companies) fall under this category earning commission from the service providers. The definition of 'aggregator' introduced in service tax regulations is discussed in the previous paragraph.

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- Provision for E-Commerce Players:

- Section 43B provides the definitions relevant in this regard. These definitions are listed below:-

- 'Aggregator' means a person, who owns and manages an electronic platform enable a potential customer to connect with the persons providing service of a particular kind under the brand name or trade name of the said aggregator. This definition is akin to the definition currently under the service tax law. The 'aggregator's own brand name or trade name

which is used in the provision of service. Ola and Uber cabs are classic example of an aggregator.

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- 'Brand name or trade name' means, a brand name or a trade name, whether registered or not, that it to say, a name or a mark, such as an invented word or writing, or a symbol, monogram, logo, label, signature, which is used for the purpose of indicating, or so as to indicate a connection, in the course of trade, between a service and some other person using name or mark with or without any indication of the identity of that person.

- 'Electronic commerce' shall mean the supply or receipt of goods and/or services, or transmitting of funds or data, over an electronic network, primarily the internet, by using any of the application that rely on the internet, like but not limited to e-mail, instant messaging, shopping carts, Web services, Universal Description, Discovery and Integration (UDDI), File Transfer Protocol (FTP), and Electronic Data Interchange (EDI), whether or not the payment is conducted online and whether or not the ultimate delivery of the goods and/or services is done by the operator.

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- Electronic commerce operator' shall include every person who, directly or indirectly, owns, operates or manages an electronic platform that is engaged in facilitating the supply of any goods and/or services or in providing any information or any other services incidental to or in connection there with but shall not

include persons engaged in supply of such goods and/or services on their own behalf. Unlike an aggregator, an electronic commerce operator does not use his own brand name in the provision of services or sale of goods. Amazon, where the brand name of the supplier is retained on the goods, is a good example of an electronic commerce operator.

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- **Tax Collection at source**

- Section 43C provides for tax collection at source. These provisions are summarized below:-

- Notwithstanding anything to the contrary contained in the Act or in any contract, arrangement or memorandum of understanding, every electronic commerce operator ("operator") shall, at the time of credit of any amount to the account of supplier of goods and/or services or at the time of payment of any amount in cash or by any other mode, whichever is earlier, collect an amount, out of the amount payable or paid to the supplier, representing consideration towards the supply of goods and/or services made through it, calculated at such rate as may be notified in this behalf by the Central/State Government on the recommendation of the Council.

- The power to collect the amount specified above shall be without prejudice to any other mode of recovery from the operator.

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- The amount collected shall be paid to the credit of the appropriate Government by the operator within ten days after the end of the month in which such collection is made, in the manner prescribed.

- Every operator shall, furnish a statement, electronically, of all amounts collected, towards outward supplies of goods and/or services effeted through it, during a calendar month, in such form and manner as may be prescribed, within ten days after the end of such calendar month.

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- The statement mentioned above shall contain, inter-alia, the details of the amount collected on behalf of each supplier in respect of all supplies of goods and/or services effected through the operator and the details of such supplies during the said calendar month.

- Any amount collected in accordance with the provisions of this section and paid to the credit of the appropriate Government shall be deemed to be a payment of tax on behalf of the concerned supplier and the supplier shall claim credit, in his electronic cash ledger, of the tax collected and reflected in the statement of the operator filed under the above provisions, in the manner prescribed.

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- The details of supplies and the amount collected during a calendar month and furnished by every operator, shall, in the manner and with the period prescribed, be matched with the corresponding details of outward supplies furnished by the concerned supplier in his valid return for the same calendar month or any proceeding calendar month.
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- Where the details of outward supply, on which the tax has been collected, as declared by the operator do not match with the corresponding details declared by the supplier under the statement of outward supplies under Section 25 (discussed in detail in Chapter 12), the discrepancy shall be communicated to both persons in the manner and within the time as may be prescribed.
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- The value of a supply relating to any payment in respect of which any discrepancy is communicated and which is not rectified by the supplier in his valid return for the month in which discrepancy is communicated shall be added to the output liability of the said supplier, in the manner as may be prescribed, for the calendar month succeeding the calendar month in which the discrepancy is communicated.
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- The concerned supplier shall, in whose output tax liability any amount has been added, be liable to pay the tax payable in respect of such supply along with interest on the amount so

added from the date such tax was due till the date of its payment.

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- Any authority not below the rank of Joint Commissioner may, by notice, either before or during the course of any proceeding under this Act, require the operator to furnish such details relating to –

- Supplies of goods and/or services effected through such operator during any period, or

- Stock of goods held by the supplier making supplies through such operator in the godowns or warehouse, by whatever name called, managed by such operators and declared as additional place of business by such supplier

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- Every operator on whom a notice has been served under the above provisions shall furnish the required information within five working days of the date of service of such notice.

- Any person who fails to furnish the information required by the notice served under the above provision shall, without prejudice to any action that is or may be taken under Section 66 (pertaining to offences and penalties discussed in detail in Chapter 15), be liable to a penalty which may extend to rupees twenty-five thousand.

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- It may be noted that only provisions pertaining to tax collection at source have been drafted in respect of the e-commerce sector. The industry was hopeful that further specific provisions would be drafted in relation to time and place of supply, etc. Considering the size and complexity of this sector, a detailed set of guidelines should have been drafted. Considering that the definition of 'aggregator' has been introduced without any specific provisions governing aggregators, one can only hope that detailed regulations would be incorporated in the next draft GST law or the law introduced in the Parliament/State Assemblies.