

# News Flash - Service Tax & WTO

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Udyog Software (India) Ltd.  
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### **Service tax: Kerala HC strikes down service tax on restaurants**

The Kerala High Court has again struck down the service tax on service of food in restaurant, holding that Parliament had no legislative competence to enact such a tax. The High Court points to the deeming provision in Article 366(29A) of the Constitution according to which a tax on sale of goods shall include:

*“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.”*

In terms of this, the Court held that supply of food and drink in a restaurant, including the service portion, is deemed to be a sale of goods, and cannot be taxed by the union government. This judgment in the case of Kerala Bar Hotels Association and Lake Palace Hotel (WA no. 1125/2013 in WP(C)15938/2011) can be accessed at [http://judis.nic.in/judis\\_kerala/grydisp.aspx?filename=376353](http://judis.nic.in/judis_kerala/grydisp.aspx?filename=376353) or at the website of the Kerala High Court under judis.nic.in. It may be noted that, in the meantime, the Bombay High Court has upheld the levy. Final resolution of this issue will have to await the outcome of the inevitable appeal to the Supreme Court.

### **Cenvat credit: controversy over Rule 6(3A) formula: Thyssenkrupp case**

It is only a prima facie view taken by the CESTAT, but has evoked much discussion. In an appeal filed by Thyssenkrupp Industries (I) Private Limited the CESTAT ordered pre-deposit, holding (in effect) that, right or wrong, the formula under Rule 6(3A) of the Cenvat Credit Rules had to be literally followed for apportioning service tax credit on common services to taxable and exempted services. The formula is used when credit is taken on incoming invoices for services that are used in common for both taxable / dutiable as well exempt supplies. It is meant to work out the credit pertaining to the services used in exempted supplies, for reversal of the same at the close of each month. The formula is  $M/N$  multiplied by  $P$ , where  $M$  is the total value of exempted supplies,  $N$  is the total value of all supplies, and  $P$  is the total credit taken.

The point of dispute in the Thyssenkrupp case was that certain input services were exclusively used in dutiable goods and taxable services; the appellant left these out in arriving at the figure ‘P’ which represents total credit in the formula. The appellant argued that this figure was known and was not in dispute and need not enter the calculation. However the CESTAT observed that the formula required P to represent the total value of credit pertaining to all the services, not the total value of credit used in common services. This is reported in [http://www.taxindiaonline.com/RC2/inside2.php3?filename=bnews\\_detail.php3&newsid=21585](http://www.taxindiaonline.com/RC2/inside2.php3?filename=bnews_detail.php3&newsid=21585).

### **WTO: Dispute with US on ban of certain products on account of avian flu**

India had banned the import of certain agricultural products from the USA on account of avian influenza in that country. The USA raised a dispute on this recently, saying that there was no longer any need for the ban, and the WTO found India’s measures to be inconsistent with the Agreement on Phytosanitary Measures. Now India and the USA have jointly informed the WTO that they will inform it before 26 January 2015 on whether they have accepted the WTO panel report or will be appealing. A report on this can be seen at [http://www.wto.org/english/news\\_e/news14\\_e/dsb\\_18nov14\\_e.htm](http://www.wto.org/english/news_e/news14_e/dsb_18nov14_e.htm).

### **WTO: Impasse on Bali TFA broken by Indo-US deal**

The trade facilitation agreement signed under the aegis of the World Trade Organisation at Bali has been in an impasse since India declined to meet a July deadline to ratify it. India was supported by some other members of the WTO. India’s wider contention was that the Doha Development Agenda was being neglected in favour of trade facilitation programs that were the pet agenda of the developed countries. The specific issue that was a spoiler for the Bali agreement was agricultural subsidy caps, which India sees as hampering its food security programs. The WTO had agreed on a “peace clause” by which the caps would not be enforced for four years; India wants an indefinite extension.

Now, reportedly, the USA has agreed that food security programs will not be challenged under the WTO’s dispute resolution mechanisms until a permanent solution is found. The way is open, with US support, to take up the matter at the General Council of the WTO.

See a report at <http://indianexpress.com/article/business/economy/india-us-resolve-impasse-over-food-security-clears-way-for-wto-deal/>.

### **WTO: Members are negotiating ways around the Bali impasse**

Robert Azevedo, Director-General of the World Trade Organization, informed a ministerial committee meeting of the Asia Pacific Economic Cooperation (APEC) at Beijing on 8 November 2014 that members are actively negotiating for ways around the Bali impasse on the trade facilitation agreement (stalled essentially by India and some others who are seeking action on the development agenda of the WTO). Azevedo said that members are seeking to implement the trade facilitation agenda among themselves as a series of MFN (most favoured nation) agreements. He gave the example of the Information Technology Agreement, which was earlier signed among some members, as an example of how such an approach can work. See the report and text of his speech at [http://www.wto.org/english/news\\_e/spra\\_e/spra41\\_e.htm](http://www.wto.org/english/news_e/spra_e/spra41_e.htm).

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