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Contents

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Article

Exporting under GST – A Boon or Bane?

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The COVID-19 pandemic has majorly hit the trade and industry, slowing down economies around the globe. The businesses in India have also been severely impacted by the recent lockdown which has created a fear of recession in the economy.

Exporters are important pillars of the Indian economy on whom the Government relies upon for earning foreign currency. To give boost and respite to the 'exporters' the Central Government has announced various relief measures such as waiver of interest, penalty, extension in statutory due dates, etc. The Foreign Trade Policy has also been extended by a year. Further, the RBI has extended the time for realization of export proceeds from nine months to fifteen months.

However, the woes under GST for the exporters seem to be increasing. The set of amendments and clarifications announced in the last week of March 2020 show that the Government is tightening the grant of refunds for exports, especially in cases of export of goods under LUT/Bond.

The amendments detrimental for the exporters are summarised in the table below, due to which the exporters are deprived of their substantive right of refund of full amount of unutilised ITC and are also put into a situation of "struggle for survival".

Amendments	**Applicability for exports made under LUT/Bond**	**Applicability for exports made on payment of IGST**
Insertion of Rule 96B in the CGST Rules which provides for recovery of refund in case of non-realisation of export proceeds	✓	✓
Amendment in definition of the "*Turnover of zero-rate supplies of goods*" in Rule 89(4) to the CGST Rules, restricting the turnover to 1.5 times the value of similar domestically supplied goods	✓	Not to be impacted
Para 5 of Circular 135/2020 - Restriction of refund of Input Tax Credit (ITC) to the extent of ITC reflecting in GSTR-2A ***only***	✓	Not to be impacted

On perusal of the above table, it is clear that ***'exporters' clearing the goods for export under Bond / LUT,*** without payment of GST, will be hit hard financially as the amount of refund sanctioned to them may come down drastically in view of the new definition of "*Turnover of zero-rate supplies of goods*" and the clarifications issued in Para 5 of Circular 135/2020-GST, dated 31-3-2020.

In this article, we focus on the difficulties that will be faced by exporters exporting under LUT/Bond due to the clarifications contained in Para 5 of Circular dated 31-3-2020 pertaining to refund of unutilised ITC which is *inter alia* granted to exporters by virtue of Section 54 of the CGST Act read with Rule 89 of the CGST Rules.

So far, the refund of ITC availed in respect of invoices of inputs/input services which were ***not*** reflected in Form GSTR-2A was also admissible with the condition that copies of such invoices were required to be uploaded by the claimant in the GST refund portal.

However, keeping in mind the introduction of Rule 36(4) of the CGST Rules *vide* Notification No. 49/2019-CT dated 09-10-2019, the Central Government in Para 5 of the above Circular has clarified that 'refund' of unutilized ITC of inputs and input services used in zero-rated supplies will be ***restricted to the extent of ITC which is reflected in Form GSTR-2A only.*** The relevant portion of the Circular is reproduced below for easy reference.

> *"5.* ***Guidelines for refunds of Input Tax Credit under Section 54(3)***
>
> *5.1 In terms of para 36 of circular No. 125/44/2019-GST dated 18.11.2019, the refund of ITC availed in respect of invoices not reflected in FORM GSTR-2A was also admissible and copies of such invoices were required to be uploaded. However, in wake of insertion of sub-rule (4) to rule 36 of the CGST Rules, 2017 vide notification No. 49/2019-GST dated 09.10.2019, various references have been received from the field formations regarding admissibility of refund of the ITC availed on the invoices which are not reflecting in the FORM GSTR-2A of the applicant.*
>
> *5.2 The matter has been examined and it has been decided that the refund of accumulated ITC shall be restricted to the ITC as per those invoices, the details of which are uploaded by the supplier in FORM GSTR-1 and are reflected in the FORM GSTR-2A of the applicant. Accordingly, para 36 of the circular No. 125/44/2019-GST, dated 18.11.2019 stands modified to that extent."*

The circular would appear to put a condition which is not found in the Statute. In this regard, let us look at the definition of 'refund' under Section 54 which reads as under:

> ***"Explanation.*** *— For the purposes of this section, —*
>
> *(1) "refund" includes refund of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies, or refund of tax on the supply of goods regarded as deemed exports, or refund of unutilised input tax credit as provided under sub-section (3)."*

On a perusal of the above, it may be noted that the definition of 'refund' does not restrict the refund only to the input tax credit as reflected / ought to have reflected in Form GSTR-2A.

Further, Rule 89 of the CGST Rules specifies the procedure to claim the refund of unutilized input tax credit in case of zero-rated supplies.

The definition of "Net ITC" in Rule 89(4) reads as "*Net ITC means input tax credit availed on inputs and input services during the relevant*

period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both".

However, the said definition has also not been amended to restrict the input tax credit only to the extent of ITC reflecting in Form GSTR-2A only for the purpose of claiming refund under Rule 89 of the CGST Rules.

Section 168 of the CGST Act, which empowers the Government to issue clarifications/circulars, cannot empower issue of circulars that are contrary to the Act or the Rules. Clarifications such as those issued by para 5 of 135/2020-GST dated 31-3-2020 would only add to the difficulties and disappointments of the export trade and industry.

In view of the above, it would not be surprising to see writ petitions being filed before the High Courts, challenging the validity of Para 5 of the Circular.

Other possible issues:

Also, another question that remains to be answered is what would be the position of the 'refund claims' already filed after enactment of Rule 36(4) but pending before the issuance of this Circular?

Will the Department treat this Circular as retrospective and deny the refund claims for the input tax credit not reported in the GSTR-2A for the interim period (i.e. period between date of introduction of Rule 36(4) and the date of this circular), for refund claims which have been filed for the said period but not yet granted?

What will happen to the refund of ITC already sanctioned and received by the exporters who have exported under Bond/LUT?

Way forward:

The timing of the above amendments is quite questionable given the overall sentiment prevailing regarding providing maximum relief to the trade in view of the coronavirus outbreak. Representations may be filed by export councils to highlight the problems before the GST Council and it is hoped that the grievances of the exporter community are addressed at the earliest.

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Goods and Services Tax (GST)

Notifications and Circulars

TRAN-1 – Time limit for filing – CGST Section 140 amended with effect from 01-07-2017: Section 128 of Finance Act, 2020 had proposed to amend Section 140 of the Central Goods and Services Tax Act, 2017 with effect from 01-07-2017. The said amendment which was not brought into force immediately on the enactment of the Finance Act, has now been notified. As per Notification No. 43/2020-Central Tax, dated 16-05-2020, 18-05-2020 is the date from which

provisions of Section 128, making such retrospective amendments, have come into force. Section 140 of the CGST Act relates to transitional arrangements for input tax credit and the amendment prescribes the time limit and the manner for availing input tax credit against certain un-availed credit under the 'existing law'.

IBC – Special procedure for corporate debtors – Relaxations: Corporate debtors undergoing the corporate insolvency resolution process and the management of whose affairs are being undertaken by Interim Resolution Professionals (IRP) or Resolution Professionals (RP), but who have furnished the statements under Section 37 (GSTR-1) and the returns under Section 39 (GSTR-3B) for all the tax periods prior to the appointment of IRP/RP, are not required to follow the special procedure as prescribed under Notification No. 11/2020-Central Tax. Further, the time limit required for obtaining registration by the IRP/RP in terms of the special procedure prescribed *vide* said notification has also been revised. As per amendments by Notification No. 39/2020-Central Tax, dated 05-05-2020, the registration must be taken within thirty days of the appointment of the IRP/RP or by 30-06-2020, whichever is later. The earlier notification has been amended in this regard with effect from 21-03-2020. Also, Circular No. 138/08/2020-GST, dated 06-05-2020 clarifies that in cases where the RP is not the same as IRP, or in cases a different IRP/RP is appointed midway during the insolvency process, the change in the GST system may be carried out by an amendment in the registration form by the authorized signatory of the Company or by the concerned jurisdictional officer on request by IRP/RP.

COVID-19 related relaxations in various time lines: CBIC has clarified that the requirement of exporting the goods by the merchant exporter within 90 days from the date of issue of tax invoice by the registered supplier, as prescribed under Notification No. 40/2017-Central Tax, will get extended to 30-06-2020, provided the completion of such 90 days period falls within 20-03-2020 to 29-06-2020. Further, as per Circular No. 138/08/2020-GST, dated 06-05-2020, the due date of furnishing of FORM GST ITC-04 for the quarter ending March, 2020 also stands extended up to 30-06-2020. Reliance in this regard is placed on Notification No. 35/2020-Central Tax.

E-way Bill – Extension of validity: Validity period of E-Way Bill generated on or before 24-03-2020 where its validity expired during the period from 20-03-2020 to 15-04-2020, has been extended till 31-05-2020. Amendment has been made in Notification No. 35/2020-Central Tax by Notification No. 40/2020-Central Tax, dated 05-05-2020 to provide for such deemed extension.

Return related changes – CGST (Fifth Amendment) Rules, 2020 notified: Central Goods and Services Tax Rules, 2017 have been amended to insert a proviso in Rule 26(1) of the CGST Rules, 2017 and, from a date to be notified later, a new Rule 67A. As per the new proviso in Rule 26(1), a Registered Person registered under the Companies Act, 2013 can furnish GSTR-3B, verified through an electronic verification code ("EVC") during the period from 21-04-2020 to 30-06-2020. Further, as per new Rule 67A, Nil return GSTR-3B can be filed through a short messaging service ("SMS") using the registered mobile number and the said return shall be verified by a registered mobile number based One Time Password facility. Meaning of Nil return has also been provided in the new Rule.

Annual return for Financial Year 2018-19 – Time limit extended again: Time limit for furnishing of the annual return specified under Section 44 of the CGST Act, 2017 read with Rule 80 of the CGST Rules, 2017, electronically through the common portal, for the financial year 2018-2019 has been extended till the 30-09-

2020. Earlier Notification No. 15/2020-Central Tax prescribing the last date as 30-06-2020 has now been superseded by Notification No. 41/2020-Central Tax, dated 05-05-2020 for the purpose.

Ratio decidendi

Rectification of previously filed Form GSTR-3B, in the period to which it relates, permissible: The Delhi High Court has allowed a writ petition for rectification of previously filed Form GSTR-3B in the period to which it was related. It held that Para 4 of the Circular No. 26/26/2017-GST, dated 29-12-2017, which stated that Form GSTR-3B can be corrected only in the month in which the errors were noticed (by filing return for that subsequent month), was not in consonance with the provisions of the CGST Act. The Court was also of the view that since the Department could not operationalize the statutory forms (GSTR-2A) envisaged under the CGST Act, resulting in depriving the Petitioner to accurately reconcile its input tax credit, the Department cannot deprive the Petitioner of the benefits that would have accrued in favour of the Petitioner, if such forms would have been enforced. The petitioner in its monthly returns GSTR-3B from July till September 2017 recorded the ITC based on estimate and the exact ITC was discovered only in October 2018 when GSTR-2A was operationalised. [*Bharti Airtel Limited* v. *Union of India* – 2020 VIL 197 DEL]

Transportation by own vehicle – Issuance or not of consignment note, not material for GST liability: Rejecting an appeal against an advance ruling holding that non-issue of a consignment note for transportation by own vehicles on the basis of invoice(s) and e-way bill will not be an exempt supply, the Rajasthan Appellate AAR has held that if the lien of the goods is transferred and the appellant becomes responsible for the goods till its safe delivery to the consignee, the services will be classifiable as goods transport agency services and issuance of consignment note or not does not make any difference. It was ruled, however, that if the vehicles are provided to the client on rental for use as per their requirement, the services will be classifiable as 'rental services of transport vehicles'. The services to be provided by the appellant was held liable to GST under Notification No. 11/2017-Central Tax (Rate), under the services relating to transportation of goods or rental services of transport vehicle including supporting service, depending upon the exact nature of the activity to be carried out by them. [In RE: *K M Trans Logistics Private Limited* – 2020 VIL 22 AAAR]

Valuation – Partial amount received from Government on behalf of farmers not excludible as 'subsidy': Karnataka AAR has held that the amount of assistance received by the farmer or on account of the farmer, from the Government Department, by the applicant-supplier of goods, has no bearing on the price and hence on the value of supply made to the farmer and was not covered under Section 15(2)(e) of the CGST Act, 2017 as 'subsidy'. The applicant was supplying micro irrigation system, and the government departments were to sanction subsidy to eligible farmers who install such system. The disbursement of the subsidy was made to the supplier post supply of micro-irrigation system and receipt of consent from the farmers. The payment towards the price of micro irrigation system was partially received from farmers and partly from government departments on behalf of the farmers. The Authority observed that the financial assistance received by the farmer had no bearing on the price of the contract and the farmer was liable to pay the consideration irrespective of the receipt of financial assistance. It noted that the consideration of the contract was not fixed taking

into the account the amount receivable by the farmer as financial assistance and the entire amount was invoiced. It was held that the amount received from the Government was received by the farmer. [In RE: *Megha Agrotech Private Limited* - 2020-VIL-106-AAR]

Pre-developed and pre-designed software is 'goods' – Benefit under Notification No. 45/2017-Central Tax available: Observing that the software sold by the applicant was a pre-developed or pre-designed software and made available through the use of encryption keys, AAR Karnataka has held that the product satisfies all the conditions under the definition of 'goods'. The AAR held that supply of software which was not designed and developed specific to any customer and sold without any customisation, qualified as 'supply of goods'. Further, noting that such goods could not be used without the aid of the computer and had to be loaded on a computer and then after activation would become usable, it was held that the goods supplied was 'computer software', more specifically covered under 'Application Software'. The AAR also held that the benefits of Notifications No. 45/2017-Central Tax are available subject to conditions. [In RE: *Solize India Technologies Private Limited* - 2020-VIL-108-AAR]

Supply of powerpacks and commissioning/installation service when not a 'composite supply': AAR Karnataka has held that the supply of powerpacks, freight and insurance service and commissioning/ installation services is not to be treated as 'Composite Supply' under GST law. It was however held that the freight and insurance charges were part of the value of supply of power packs, since the contract was for supply of power packs and the value of the contract was the sum total of the value of the power pack plus all charges charged to the recipient for anything done till the goods are delivered to the recipient. Supply of goods along with freight and insurance was held as 'composite supply'. Further, the Authority was of the view that the supply of commissioning and installation services were independent services supplied by the applicant and were independent of the supply of power packs. It was noted that there was a separate value for 'supply of power packs' and 'installation and commissioning service' and invoices were required to be raised separately on completion of supplies. The applicant did not advertise such 'supply of power pack' and 'installation and commissioning service' as package. [In RE: *San Engineering & Locomotive Company Limited* - 2020-VIL-113-AAR]

Valuation – Inclusion/exclusion of various types of income in aggregate turnover: AAR Karnataka has held that the income received towards salary/remuneration as a Non-Executive Director of a private limited company; renting of commercial property and the values of amounts extended as deposits/loans/advances out of which interest is being received, are to be included in the aggregate turnover, for registration. It also held that the income received from renting of residential property is to be included in the aggregate turnover, though it is an exempted supply. The Authority, however, was of the view that Partner's salary or share of profit, received as partner, from applicant's partnership firm; maturity proceeds of life insurance policy and dividend Income on shares and capital gain/loss on sale of shares, were not includible. [In RE: *Anil Kumar Agrawal* - 2020-VIL-118-AAR]

Supply of software in DVDs/CDs when not covered as 'E-Books': AAR Tamil Nadu has held that the supply of DVDs/CDs with 'The Law Weekly Desktop' software along with end user license and the supply of access to the on-line database on the applicant's website is not eligible

to the benefit of Sl. No. 22 of Notification No. 13/2018-C.T. (Rate) in respect of 'E-book'. It was held that the DVD/CDs did not contain electronic versions of the journals but an executable software application and therefore, did not fall under the explanation of 'E-book' given in the Notification and was rather covered under supply of access to an online database or online text-based information. The Authority noted that the contents supplied in the form of DVD/CD was a software used to access content containing the judgments of various fora, case law, Acts, etc. which provides for searching using a particular case number/period/Act/Court or a combination of the above. [In RE: *Venbakkam Commandur Janardhanan, Propreitor, Law Weekly Journal* - 2020-VIL-120-AAR]

Customs

Notifications and Circulars

Validity of existing Export Performance Certificates for FY 2019-20 extended up to 30-09-2020: CBIC has made amendments in various conditions under Notification No. 50/2017-Cus. (Jumbo exemption notification) to extend the validity of existing Export Performance Certificates for the financial year 2019-20, up to 30-09-2020. Notification No. 23/2020-Cus., dated 14-05-2020 issued in this regard amends Condition Nos. 10, 21, 28, 32, 33, 36 and 101 of the basic notification. Accordingly, Export Performance Certificates issued for the FY 2019-20 and valid till 31-03-2020 will now be eligible for import of unutilised value and quantity of goods specified in the certificate, till 30-09-2020.

Relaxation from submitting Bonds extended till 30-05-2020: *Vide* Circular No. 17/2020-Cus., dated 03-04-2020, the CBIC had relaxed requirement to submit bonds prescribed under Sections 18, 59 and 143, and under notifications issued under Section 25 of the Customs Act, 1962 in order to expedite Customs clearance of goods during the COVID-19 pandemic. The aforesaid relaxation is available against submission of an undertaking having the same contents as those of a prescribed bond. Earlier, the requirement from submission of bond was relaxed till 15-05-2020 *vide* Circular No. 21/2020-Cus., dated 21-04-2020 and the undertaking submitted in lieu of bond was required to be replaced with a proper bond by 30-05-2020. However, in light of extension in the lockdown period, the CBIC has by Circular No. 23/2020-Cus., dated 11-05-2020 extended the period of relaxation till 30-05-2020. Now, the undertaking submitted in lieu of bond will have to be replaced with a proper bond by 15-06-2020.

Advance authorisations/DFIAs - Procedure for extension in import validity period and export obligation period, prescribed: *Vide* Notification No. 57/2015-20, dated 31-03-2020 and Public Notice No. 67/2015-20, dated 31-03-2020, the DGFT had extended the import validity period and the export obligation period for existing Advance Authorizations (AAs) / DFIA expiring during 01-02-2020 to 31-07-2020 by a period of six (6) months. Now, the DGFT has prescribed procedural formalities and timelines which should be followed by Regional Authorities (RAs) while

considering extension of import validity period and the export obligation period for existing AAs/DFIAs.

Accordingly, the RAs have been instructed to grant automatic extension of six (6) months in case of AAs/DFIAs where no revalidation or export obligation period extension has been granted till date. In case of AAs/DFIAs where revalidation or export obligation extension has previously been granted, automatic extension will not be possible due to architectural issues in the DGFT / ICEGATE system. In such cases, the authorisation holders will be required to file an amendment request with the RA, who in turn, will grant the extension after verifying the eligibility of the amendment request. The procedure for filing of amendment request will also have to followed in cases where the AAs/ DFIAs are physical (non-EDI) in nature. Policy Circular No. 35/2015-20, dated 23-04-2020 has been issued for the purpose.

Interest Equalisation Scheme (IES) for Pre and Post shipment Rupee Export Credit extended by one year: The IES for Pre and Post shipment Rupee Export Credit has been further extended for one year, i.e., up to 31-03-2021 with the same scope and coverage. DGFT Trade Notice 11/2020-21, dated 14-05-2020 in this regard reiterates notification issued by Reserve Bank of India on 13-05-2020.

Transport and Marketing Assistance on Specified Agriculture Products (TMA) - Claims for air shipment to be made on per kilogram basis: The DGFT has amended the basis of claim of freight charges under TMA in case of shipment by air. Consequent to this amendment, the fresh applications made on or after 28-04-2020 for the claim for freight charges under TMA shall be in multiple of per kilograms basis (ignoring any fraction), instead of per ton basis. DGFT Public Notice No. 05/2015-20 dated 12-05-2020 has been issued for the purpose.

Sanitizers - Export policy of sanitizers, other than alcohol-based hand sanitizers, relaxed: *Vide* Notification No. 53/2015-20, dated 24-03-2020 export of sanitizers [Sr. No. 207D of Schedule 2 of ITC (HS)] with HS Codes 3401, 3402, 30049087 and 380894 was prohibited. However, said notification has now been amended by DGFT Notification No. 4/2015-20, dated 06-05-2020 to prohibit export of only alcohol-based hand sanitizers falling under HS codes 3004, 3401, 3402 and 380894.

Masks - Export policy revised: DGFT Notification No. 44, dated 31-01-2020 and Notification No. 52 dated 19-03-2020 have been amended by the DGFT *vide* Notification No. 6/2015-20, dated 16-05-2020 to allow the export of non-surgical and non-medical masks of all types (cotton, skill, wool and knitted) falling under ITC (HS) Codes 392690, 621790, 630790, 901890 and 9020. It may be noted that export of all other masks, falling under any ITC(HS) Code including the abovementioned, continues to remain prohibited.

Paper import – Prohibitions for 'stock lot' of paper under HSN 4810 clarified: *Vide* Notification No. 45/2015-2020, dated 31-01-2020 the import of stock lot of paper under HSN Code 4810 of Chapter 48 of ITC (HS), Schedule -1 (Import Policy) was 'Prohibited'. It has now been clarified that import of different kinds of paper description under all the 22 Tariff Lines covered under ITC(HS) 4810 is 'Free'. Further, according to Trade Notice No. 8/2020-21, dated 04-05-2020, the importers should clearly mention the correct description and quantity under each 8-digit ITC(HS) Code separately and if the whole imported paper consignment is without description of each category of paper, the same will be regarded as a stock lot and be prohibited. It has been further clarified that Customs would not allow consignment where paper of different description is intended to be imported and is

bundled together under ITC (HS) 4810 as a stock lot. In this regard, the trade may request the Department of Revenue for creation of a new tariff line with proper justification if the paper proposed to be imported is not covered under existing 8-digit code.

Registrar of Newspapers of India included for e-SANCHIT application: *Vide* Circular No. 44/2018-Cus., dated 13-11-2018 and subsequent related circulars, the CBIC had notified 50 Participating Government Agencies (PGAs) which are required to digitally upload signed Licenses/Permits/Certificates/Other Authorizations (LPCOs) on e-SANCHIT application at all ICES locations across India. The CBIC has now prescribed one more PGA, namely, Registrar of Newspapers of India, which will be required to digitally upload Certificate of Registration and authenticated Self Declaration Certificate for Import, on e-SANCHIT w.e.f. 31-05-2020. Circular No. 24/2020-Cus., dated 14-05-2020 has been issued for the purpose.

Metallic scrap and waste - Submission of scanned copy of Pre-shipment Inspection Certificate: Scanned copy of Pre-shipment Inspection Certificate (PSIC) along with an undertaking in a specified format is now acceptable till 30-06-2020, in place of a physical copy, for Customs clearance of metallic scrap and waste. According to Trade Notice No. 9/2020-21, dated 06-05-2020, which also specifies the undertaking, the original PSIC needs to be submitted to the Customs within 60 days of the clearance.

Silver - Import policy revised: Import of silver under HS codes 7106000, 71069100, 70169210 and 71069290 is restricted and was permitted only through agencies nominated by either the Reserve Bank of India (in case of banks) or DGFT (for other agencies). However, the revised policy for import of silver, in addition to the above agencies, now allows import of silver under Advance Authorisation and supply of silver directly by foreign buyers to exporters under Para 4.45 of the FTP against export orders. DGFT Notification No.05/2015-2020, dated 13-05-2020 in this regard amends entries in Chapter 71 of Schedule I to the ITC(HS), 2017.

Ratio decidendi

Valuation – Turnkey contracts – Value of drawings and designs for post importation activities when not includible: Supreme Court has upheld the CESTAT decision accepting the importer's plea for segregating the value of equipments and the other fees on services covered by the same contracts, where the latter charges were meant for post-importation phase of the arrangement between the contracting parties. Revenue's contention that these were turnkey contracts and hence import of designs and drawings, etc., even for post-importation activities should be treated as condition of import of the equipments as those intangible items formed an integral part of the arrangement, was thus rejected. The Court observed that an importer of equipments of a plant could always choose to obtain drawings and designs for undertaking post importation activities from an overseas supplier of the equipments and it may confer on such arrangements attributes of a turnkey contract, but that fact by itself would not automatically attract the "condition" clause contained in Rule 9(1)(e) of the Valuation Rules, 1988. The Apex Court also noted that the Revenue had not made out a case that the disputed items of contract did not relate to post-importation activities. The Court was of the view that just because different components of a contract or multiple contracts gave the shape of turnkey project to the imported items, without specific finding on existence of "condition" as

contemplated in Rule 9(1)(e), value of all these components could not be added to arrive at the assessable value of equipment. [*Commissioner* v. *Steel Authority of India Ltd.* – Judgement dated 27-04-2020 in Civil Appeal No. 6398 of 2009, Supreme Court]

MEIS – Omission of declaration of intent in shipping bill when not fatal: The Gujarat High Court has held that omission to file 'declaration of intent' in the shipping bill when all other relevant material is available, is not fatal. The petitioner had not declared its intention to claim rewards under the MEIS while filing the shipping bills, however, on realising the mistake, the petitioner approached the concerned authorities for amending the shipping bills, but it was not considered on the ground of delay. Allowing the petition to convert the shipping bills from free to MEIS, the Court noted that it was ascertainable that the goods conformed to the description in the shipping documents and the value, etc., as the concerned bills, invoices and other shipping documents were available with the Customs authorities. In respect of delay, the Court observed that it was only after a lot of *inter se* communication on jurisdiction, that the petitioner was advised to get the shipping bills amended, and hence the same cannot be turned down as violative of Circular No. 36/2010-Cus. [*Gokul Overseas* v. *Union of India* – 2020 VIL 191 GUJ CU]

CA certificate not conclusive to overcome unjust enrichment: CESTAT Ahmedabad has held that a CA Certificate alone cannot be a conclusive document to overcome the aspect of unjust enrichment, where the assessee could not submit the books of accounts. The Tribunal in this regard noted that even though the CA certificate can be taken as support for establishing unjust-enrichment, but in the present case both the CA certificates were of very old period. It held that for the purpose of unjust-enrichment the present position is relevant for which neither any CA certificate nor any books of account were produced. [*Varsha Plastics Pvt. Ltd.* v. *Commissioner* - 2020 (1) TMI 360 CESTAT Ahmedabad]

Samples can be drawn only before imported goods are cleared/removed from Customs area: The Punjab and Haryana High Court has held that after the release of imported goods from the Customs area, there was no power with the authorities, much less under Section 144 of the Customs Act, 1962 to draw samples at a subsequent stage from the factory premises. The petitioner had argued that once the goods were cleared and had reached the premises of the petitioner, they got mixed with the other goods and therefore, once all the transactions/goods cleared from customs area, were between January 2016 to April 2016, the action to draw fresh samples on/after 11-08-2016 from the factory premises, was without jurisdiction, unwarranted and in violation of Section 144. [*Raghav Woollen Mills Pvt. Ltd.* v. *Union of India* - 2020 (1) TMI 411 Punjab & Haryana High Court]

TED refund for supplies to power projects under ICB: In a case where supplies were made to a power project under International Competitive Bidding (ICB), in terms of para 8.2(g) of the Foreign Trade Policy, the Delhi High Court has set aside the denial of refund of Terminal Excise duty for supplies made during the period 15-12-2009 to 10-02-2011. The department had denied refund relying upon Policy Circular No. 16, dated 15-03-2013, observing that the goods were *ab initio* exempted from payment of excise duty and hence the refund of TED does not arise. The Court in this regard observed that para 8.2(g) applied to those cases where there was no notification for import of goods at zero customs duty and effectively were not exempted. It held erroneous the assumption that since the supplies were made under ICB, they were not eligible for

TED refund and noted that the Petitioner had demonstrated that there can be several supplies which may qualify to be supplies under ICB, yet not be eligible for excise duty exemption on account of the fact that they are not eligible for customs duty exemption. [*Multitex Filtration Engineers Ltd*. v. *Union of India* - 2020 TIOL 670 HC DEL CUS]

Neutral substances to be considered while determining small/commercial quantity: Supreme Court has held that when mixture of Narcotic Drugs or Psychotropic Substances with neutral substances is seized, the quantity of neutral substances is not to be excluded but be considered along with the actual content by weight of the offending drug, while determining the "small or commercial quantity" of the Narcotic Drugs or Psychotropic Substances. It was further held that Section 21 of the NDPS Act is not a stand-alone provision and must be construed along with other provisions in the statute including relevant Notifications. The Court was of the view that the Notification adding "Note 4" to specify the "small quantity and commercial quantity" of the narcotic drugs or psychotropic substances was not *ultra vires* to the various provisions of the NDPS Act. The notification was held as clarificatory in nature and issued by way of abundant caution only. [*Hira Singh* v. *Union of India* – 2020 TIOL 84 SC NDPS-LB]

Central Excise, Service Tax and VAT

Ratio decidendi

Sabka Vishwas Legacy Dispute Resolution Scheme – Non-mention of penalty in application form not fatal: Guwahati High Court has allowed the petitioner-assessee to make necessary corrections in their application earlier filed in respect of Sabka Vishwas Legacy Dispute Resolution Scheme 2019. The Revenue department had earlier rejected the application as assessee had not mentioned about the penalty imposed. The Court was of the view that the mistake made by the petitioner by not stating about the penalty, in Form SVLDRS-1, cannot be said to be a mistake by which the petitioner claimed an undue benefit which they otherwise were not entitled under the law, and hence was a curable mistake. It observed that the assessee may be more benefited and would be entitled to a greater exemption if the amount of penalty was mentioned. [*Assam Cricket Association* v. *Union of India* – 2020 VIL 219 GAU ST]

Manufacture – Fixing hologram/barcode and placing outer cover on bottles of medicines is not manufacture: Fixing the hologram and the barcode to avoid duplicity and placing outer cover to ensure safe transportation does not amount to 'manufacture'. Dismissing Revenue's appeal, the Madhya Pradesh High Court in this regard observed that it is the same process which is being carried out by the companies like Flipkart, Amazon, etc., as they are also just putting a cover over the goods received from various companies who have paid the duty and are delivering to the consumers. The Court also noted that the goods received by the assessee were already in a prepacked form, bore necessary declaration including MRP and that it was nobody's case that the goods were sold above the MRP to the consumer. CBIC Circular

dated 08-12-2011 was relied upon. The department had relied upon Chapter Note 6 to Chapter 30 and Chapter Note 5 to Chapter 33 of the Central Excise Tariff to contend 'manufacture'. [*Commissioner* v. *Manish Singhal* – 2020 VIL 211 MP CE]

Demand of central excise duty from power plant in SEZ procuring HSD from DTA, not sustainable: The Madras High Court has quashed the Guideline dated 6-4-2015 bearing Reference No. P.613/2006-SEZ of the Ministry of Commerce, SEZ Section, which had altered the location of the power plant of the petitioner to a "Non-Processing Area" and made all the procurements dutiable for generation of electricity for supply to units located in the SEZ. As a result of the impugned Guideline issued under Section 5 of the SEZ Act, the petitioner was required to procure HSD on payment of central excise duty during the period between 1-4-2015 and 15-2-2016. Allowing the petition, the Court observed that a supplier in DTA could supply HSD without payment of duty as it came under 'exports' for the DTA unit. It held that mere withdrawal of the earlier Guideline *vide* the impugned Guideline of 2015 did not alter the position under the SEZ Act and therefore, the 2015 Guideline was neither sustainable nor enforceable. It also noted that the power to issue Guidelines under Section 5 cannot be in confused with the power to demarcate an area within a Special Economic Zone under Section 6 or the power to be exercised under Section 15(8)(b). The demand of central excise duty from the power plant, was set aside observing that liability to pay excise duty is on the manufacturer and not the buyer. [*DLF Utilities Ltd.* v. *Union of India* – 2020 VIL 222 MAD CE]

Commercial Training or Coaching service – Non-inclusion of profits from sale of books and provision of hostel facility: CESTAT Allahabad has rejected the contention of the department that profits from sale of books should be clubbed with provision of Commercial Training or Coaching service. The Tribunal in this regard noted that separate invoices were issued for books, anybody could have purchased them, and the department did not provide any information to conclude that there was 800% profit on sale of books. It was also of the view that the value of the books cannot be ascertained based on the cost of paper used and cost of printing. Further, relying on the 'Education Guide' issued by the then CBEC, the Tribunal held that it was not possible to bundle service of provisions of hostel facility with commercial training or coaching service. It noted that there was no evidence that large number of service recipients expected every provider of commercial training or coaching service to provide hostel facility or that majority of such service providers provided hostel facility. [*Major Kalshi Classes Pvt. Ltd.* v. *Commissioner* – 2020 TIOL 774 CESTAT ALL]

High Court cannot disregard statutory period of limitation, exercising power under Article 226: The Supreme Court has held that the High Court cannot disregard statutory period of limitation, while exercising power under Article 226 of the Constitution, if a petitioner approaches it after expiry of the statutory period for filing the appeal. The High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh, in its decision impugned before the Apex Court, had allowed the writ petition on the ground that the statutory remedy had become ineffective for the assessee due to expiry of 60 days from the date of service of the assessment order under Andhra Pradesh Value Added Tax Act, 2005. The Supreme Court in this regard observed that even while acting under Article 142 of the Constitution, the Supreme Court is required to bear in mind the legislative intent and not to render the statutory

provision otiose. [*Assistant Commissioner* v. *Glaxo Smith Kline Consumer Health Care Limited* – Judgment dated 06-05-2020 in Civil Appeal No. 2413/2020, Supreme Court]

Car mats are classifiable under TI 5703 90 90 and not under Heading 8708: Supreme Court has held that car mats are classifiable under Tariff Item 5703 90 90 and not under Heading 8708 of the Central Excise Tariff Act, 1985. It noted that HSN Explanatory Notes dealing with interpretation of the rules specifically exclude 'tufted textile carpets, identifiable for use in motor cars' from Heading 8708 and place them under Heading 5703. Revenue department's plea that Explanatory Notes have only persuasive value, was thus rejected observing that there was no reason to make a departure from the general trend of taking assistance of Explanatory Notes to resolve such disputes. Argument that since car mats are made specifically for cars and are used also in cars, they should be identified as parts and accessories of car, was also rejected. Dismissing department's appeal, the Court observed that there was no necessity to import the 'common parlance' test or any other similar device of construction for identifying the position of these goods against the relevant tariff entries. [*Commissioner* v. *Uni Products India Ltd*. – 2020 VIL 17 SC CE]

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