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## Contents



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Article

# The Social Welfare Surcharge conundrum

By **Nivedha Mohan**

The raging dispute on levy of piggy-back cesses such as education cesses, where duty payments were made by debit to the duty credit scrips such as DEPB scrips, is yet to settle down. The controversy has come back with a renewed vigor under the present MEIS duty credit regime and the Social Welfare Surcharge (SWS) levy.

The questions remain the same even now as they were viz.,

1. Whether SWS can be considered/said to be exempt in consequence to exemption from BCD provided under the MEIS Notification?
2. Whether the mode of exemption, viz. debit of duty in the scrips amounts to 'payment of duty' and not an exemption from duty?
3. Can the principles laid down by the courts under the DEPB scheme be applied in the context of SWS?

## *Arguments for and against collection of SWS*

### *The levy of SWS is sustainable:*

Para 3.02 of Foreign Trade Policy (FTP) indicates that the intention of the Government of India is to permit the utilization of duty credit scrips for making *'payment'* of customs duties and other fees payable under the FTP. Further, drawback is permissible for the BCD paid by way of debit to the scrip, and similarly, Cenvat credit is also available for the additional duty paid by way of debit to the scrip.

The charging section for the SWS levy is Section 110 of the Finance Act, 2018. Under this provision, SWS is calculated on the aggregate duties of customs ***"levied and collected"*** and any sum ***chargeable*** on such goods. It is important to note the usage of different expressions "levied" and "charged". The difference between the terms leviable and chargeable has been clearly brought out in Section 25 (3) of the Customs Act, 1962, with the duty leviable being the 'statutory duty or the standard rate of duty' and the duty 'chargeable' being the duty post exemption or concession provided under Section 25 ibid.

Applying this to Section 110(1) of the Finance Act, 2018, the position which emerges is that, so long as the imported goods attract a 'levy' of customs duty, such duty shall be reckoned for the purposes of computing the SWS levy. Further, while analysing the effect of an exemption notification, the Supreme Court in *Union of India v. Indian Charge Chrome,* (1999) 7 SCC 314 held that, *"An exemption notification issued under Section 25 of the Act had the effect of suspending the collection of customs duty. It does not make items which are subject to levy of customs duty etc. as items not leviable to such duty. **It only suspends the levy and collection of customs duty**, etc., wholly or partially and subject to such conditions as may be laid down in the notification by the Government in 'public interest'*."

Notification No 11/2018-Cus., dated 2-2-2018 exempts specified goods from SWS. The goods so exempted from SWS, either did not attract any statutory levy of customs duty, or were exempt from such levy. In other words, SWS levy will be attracted so long as the goods attracted a statutory levy of customs duty, unless specifically exempt. In fact, the interpretation that, when BCD is exempted, SWS should automatically be exempted will render the act of exempting the levy of SWS specifically, as under Notification No. 11/2018-Cus., dated 02-02-2018 null and void, or even otiose. Worse, it would mean extending the scope of SWS exemption beyond what is legislated under Notification No. 11/2018-Cus.

The Madras High Court in the case of *Tanfac Industries*, 2009 (240) ELT 341 (Mad), held that the debit to the scrip is only a mode of payment of duty and the imported goods cannot be treated as exempted goods. The SLP filed by the importer against this decision was also dismissed by the Supreme Court as reported in 2009 (244) ELT A121 (SC). A Division Bench of the Madras High Court, in *Commissioner of Central Excise, Chennai-I .v. SPIC Ltd.* [2014 (305) ELT 484 (Mad.)], placing reliance on the High Court decision in *Tanfac Industries* cited supra, also observed that the imported goods are not exempted from payment of duty in *stricto sensu.*

## *Arguments against - Levy of SWS is not sustainable:*

The position that emerges from the decisions of the Gujarat and Mumbai High Courts in 2013 (289) ELT 273 (Guj); 2013 (296) ELT 182 (Guj) and 2005 (188) ELT 449, one which had the approval of the Supreme Court also, is that, the DEPB scheme operates as an exemption, and when the BCD is exempt, the Education Cesses are also exempt.

Applying the same ratio to the SWS scenario, in a situation where exemption notification under Section 25 of the Customs Act has been issued providing full exemption to goods cleared against scrips under MEIS, such goods are not chargeable to customs duty. As already seen, Section 110 of the Finance Act, 2018 uses the expression “levied and collected”. During the existence of an exemption notification issued under section 25, no duty is “levied and collected”. When such is the case, SWS which is calculated at 10% of the duty that is “levied and collected” must also be nil.

## *Other issues requiring attention*

Interestingly, the question of education cess being computed on the customs duty ‘leviable’ and not ‘chargeable’, as required by the law, was not considered in any of the cases where the courts ruled that education cess would be exempt when BCD is paid by debit to the scrip. Nor was the significance of the exemption notification for education cesses considered while reaching such conclusions.

However, the final word on this issue has not been said yet, and the question is still open for debate. However, any demand from the Revenue department to pay the SWS by cash could be challenged by way of an appeal, after paying the duty under protest.

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# Goods and Services Tax (GST)

## Notifications and Circulars

**37th Meeting of the GST Council - GST rates set to be revised on various goods and services from 1-10-2019:** The GST Council in its 37th meeting held on 20th of September recommended revision of GST rates on various goods and services. The revised rates will come into effect from 1-10-2019 when notifications in this regard are also issued by the CBIC. While GST rates will be reduced on slide fasteners, marine fuel, wet grinder (containing stone as a grinder), dried tamarind, plates and cups made up of leaves/ flowers/bark, cut and polished semi-precious stones, GST rate is set to increase on railway wagons, coaches, rolling stock (without refund of accumulated ITC), and on caffeinated beverages. Exemption from GST has been recommended on imports of specified defence goods not being manufactured indigenously, supply of goods and services to specified persons for purpose of organizing Under-17 Women's Football World Cup in India, and on supply of goods and services to Food and Agriculture Organisation (FAO) for specified projects in India. Further, Compensation Cess will be reduced on passenger vehicles of engine capacity 1500 cc in case of diesel, 1200 cc in case of petrol and length not exceeding 4000mm designed for carrying upto 13 persons. The reduced rates were earlier available to passenger vehicles of such length and engine capacity but designed to carry upto 9 persons only. As per the Press Release of Ministry of Finance, aerated drink manufacturers will be excluded from composition scheme.

In respect of job work services, rate of GST will be reduced on supply of such services in relation to diamonds and on supply of machine job work such as in engineering industry, except supply of job work in relation to bus body building. Rates of GST on hotel accommodation service have also been recommended to be reduced, with the highest being 18% in case where the room tariff is Rs. 7501 or more/per day. GST on outdoor catering services other than in premises having daily tariff of unit of accommodation of Rs. 7501, is also set to be reduced. Further, exemptions have been recommended in respect of services by way of storage or warehousing of cereals, pulses, fruits, nuts and vegetables, etc. While GST exemption on export freight for transportation of goods by air or sea has been recommended to be extended till 30-9-2020, services provided by an intermediary to a supplier of goods or recipient of goods when both the supplier and recipient are located outside the taxable territory, have been exempted. The GST Council has also recommended certain clarifications on classification and rates of GST in respect of certain goods and services.

**37th Meeting of the GST Council – Changes proposed in law and procedures:** GST Council in its 37th meeting held on 20-9-2019 has also recommended many relaxations in various compliances and procedures. In respect of annual returns for the period 2017-18 and 2018-19, while requirement of filing Form GSTR-9A has been waived for composition taxpayers, taxpayers having aggregate turnover upto Rs. 2 crore will be given option not to file Form GSTR-9. The new monthly return system will now be introduced from April, 2020 and not from October 2019.

The GST Council has also recommended introduction of the integrated refund system with disbursal by single authority from 24th September, 2019. In principle decisions have been taken to prescribe reasonable restrictions on passing of credit by risky taxpayers including risky new taxpayers, and to link Aadhar with registration of taxpayers under GST. As per the Press Release, input tax credit to the recipients in cases where details of outward supplies are not furnished by the suppliers in the statement under Section 37 of the CGST Act, 2017, will be restricted. Further, Circular No.105/24/2019-GST, dated 28-6-2019, which was issued in respect of post-sales discount, will be rescinded.

**Job work – Finance Ministry waives GST Form ITC-04 for July 2017-March 2019:** CBIC has waived the requirement of filing GST Form ITC-04 provided under Rule 45(3) of the Central Goods and Services Tax Rules, 2017, for the period July 2017 till March 2019. In this form, suppliers are required to furnish details of challans in respect of goods sent to job worker or received back from him or sent from one job worker to another during a quarter. Such registered persons would, however, be required to furnish details of all challans in respect of goods dispatched to job worker during the said period but not received back or not supplied from the place of business of the job worker, as on the 31st of March, 2019. This information is required in serial number 4 of FORM ITC-04 for the quarter April-June, 2019. Notification No. 38/2019-Central Tax, dated 31-8-2019 has been issued for this purpose.

**Disbursement of refund of State tax by Central Government:**: Provisions of Section 103 of the Finance (No. 2) Act, 2019 which amends Section 54 of the Central GST Act, 2017 have come into effect from 1st of September, 2019. Section 103 introduces sub-section (8) to Section 54 in the CGST Act to provide for disbursement of the refund of SGST in such manner as may be prescribed. This amendment will empower the Central Government to grant refund of SGST also and will provide for single refund disbursing authority once similar amendments are also made in State GST Acts. Notification No. 39/2019-Central Tax, dated 31-8-2019 has been issued for this purpose.

**UK delays domestic reverse charge VAT for construction services:** United Kingdom has delayed implementation of VAT reverse charge on domestic transactions of construction services, for a period of 12 months, i.e., until 1st of October 2020. As per policy paper published on 6-9-2019, HMRC has stated that it remains committed to introduction of the reverse charge and has already increased compliance resource. It has put in place a robust compliance strategy for tackling fraud in the construction sector using tried and tested compliance tools. The UK Government had first confirmed this in Autumn Budget 2017 that it would take this measure.

## Ratio decidendi

**Transitional credit – Due date under Rule 117 of CGST Rules is procedural and not mandatory:** Gujarat High Court has held that the due date contemplated under Rule 117 of the CGST Rules, 2017, to claim transitional credit, is procedural in nature, and thus, merely directory and not a mandatory provision. The High Court observed that Section 140(3) of the CGST Act, 2017 which allows carry forward of eligible duties is a complete code in itself and substantive rights conferred by the Act cannot be curtailed by the Rules. It held that the entitlement to credit was vested right which cannot be taken away by Rule 117 with retrospective effect for failure to file GST Tran-1 within due date. It also noted that denial of carry forward of credit may lead to cascading effect and would offend the policy. The Court also held that discrimination in terms of time-limit for

availment of ITC with respect of purchases made prior to GST and those made after GST, was arbitrary, irrational and unreasonable. Violation of Articles 14 and 19(1)(g) of Constitution of India was noted. [*Siddharth Enterprises* v. *Nodal Officer* – 2019 VIL 442 GUJ]

**Power to attach assets is a drastic step and is to be used sparingly:** Gujarat High Court has held that the power under Section 83 of the Central GST Act, 2017 is a drastic power which should be used sparingly and only on substantive weighty grounds. It observed that attachment of bank accounts and trading assets should be the last resort, and that blockage of input tax credit by way of computer entry was illegal. The Court was of the view that subjective satisfaction, which is required for the purpose of Section 83, is not dependent on Section 67. It noted that just because a search has been undertaken resulting in seizure of goods, it by itself may not be sufficient to arrive at the subjective satisfaction that it is necessary to pass an order of provisional attachment to protect government revenue. The High Court also held that the order for attachment can only be passed by a Commissioner and not by subordinate officers. [*Valerius Industries* v. *UoI* – 2019 TIOL 2094 HC AHM GST]

**Seizure of documents – No justification required to get back copies:** Observing that Section 67(5) of the Central GST Act, 2017 creates a right to receive copies by a person from whose custody the documents are seized, the Bombay High Court has held that said person need not give justification why he needs the copies of seized documents. The Court in this regard observed that the documents or books should not be needlessly kept in custody which will otherwise gravely prejudice the person from whose custody said documents were seized. Rejecting the fears of the department, the High Court noted that there must be cogent reasons to withhold copies. [*High Ground Enterprises Ltd.* v. *UoI* – Judgement dated 14-8-2019 in Writ Petition No. 8075 of 2019, Bombay High Court]

**Interest/late fee/penalty when to be taxed as per principal supply:** Madhya Pradesh AAR has held that amount charged by the applicant, a stockbroker, on delay of payments while dealing in sale/purchase of securities on behalf of the clients is not interest. It held that to qualify for same, there must be specific percentage charged on periodic basis. Exemption under Notification No. 12/2017-CT(R) was denied observing that it cannot be said that the share broker had extended any deposit, loans or advances to its clients. The AAR held that said amount will qualify as penalty and shall be subjected to GST. It held that the same will take the colour of the principal supply which is facilitating transaction in securities. [In RE: *Indo Thai Securities Ltd.* – 2019 VIL 268 AAR]

**Interest/late fee/penalty is amount for tolerating an act – Liable to GST:** AAR Tamil Nadu has held that the amount received on or after 1-7-2017 towards interest, late fee or penalty relating to the services, other than continuous supply of services, rendered by the applicant before 1-7-2017 are liable to GST. Referring to provisions of Section 7 and Section 13 of the CGST Act, 2017, the Authority observed that the applicant had collected an amount of interest, late fee or penalty for the delayed payment of consideration for the original service after 1st July 2017 and separate invoices were raised by the applicant for the same. It held that it can be said that the said amount was a consideration for tolerating the delayed payment of consideration in respect of lease rent. [In RE: *Chennai Port Trust* – 2019 VIL 245 AAR]

**GST leviable on transportation in own vehicle with e-way bill:** Rajasthan AAR has rejected the plea that transportation by own vehicles based

on invoices and e-way bill without issuing the LR/GR will not be liable to GST. Observing that e-way bill cannot be generated without issuing LR/GR/consignment note, AAR classified the activity under GTA service. The AAR also held that in case of taxable and non-taxable supplies, ITC will be restricted to so much of input tax as is attributable to taxable supplies including zero-rate supplies as per Section 17(2) of the Central GST Act read with Rule 42 of the Central GST Rules, 2017. [In RE: *KM Trans Logistics* – 2019 VIL 264 AAR]

**Monetary value of providing refundable interest free deposit liable to GST:** AAR Gujarat has held that notional interest/monetary value of the act of providing refundable interest-free deposit is a 'consideration' as is covered in both the limbs of the definition. The said act was held as liable to GST. It also observed that refundable interest-free deposit is an additional commercial consideration to cover the risk. The AAR, however, held that first 10 free transactions allowed to Demat account holder are in the nature of discounts and will not attract GST, subject to conditions of Section 15(3) of the Central GST Act, 2017. [In RE: *Rajkot Nagarik Sahakari Bank Ltd.* – 2019 VIL 255 AAR]

**Lease agreement for 99 years is not sale of immovable property – GST leviable:** Rajasthan AAR has held that the lease agreement between the lessor and the lessee for a period of 99 years was not a 'sale of immovable property' and is liable to GST @ 18% under HSN 9972. The Authority referred to Section 7 of the CGST Act, 2017 and the definition of 'lease' as provided under Section 105 of the Transfer of Property Act, 1992 and observed that lease could be of perpetuity as quantum of time had no relation in determination of lease or sale. It also observed that the lessee in the lease deed had no right to further sell the allotted plot. Further, it held that merely charging of stamp duty does not change the status of the document from lease agreement to sale deed. Bombay High Court decision in the case of *Builders Association of India* was relied upon. [In RE: *Greentech Mega Food Park Pvt. Ltd.* – 2019 VIL 205 AAR]

**GST implication on lump-sum amount received before 1-7-2017:** The applicant received certain amount as mobilization advance in 2011. This lump-sum mobilization amount was recoverable as adjustment towards the payment due for the tax invoices that the applicant would raise as per the progress of the contract. The issue was whether GST would be leviable on the invoices issued post introduction of GST on the gross amount of the invoice or the net amount after adjusting the lump-sum amount outstanding as on 30-6-2017. AAR West Bengal held that the applicant was deemed to have supplied works contract service on 1-7-2017 to the extent covered by the lump-sum that stood credited to its account on that date as mobilization advance. It noted that unadjusted portion of the advance as on 1-7-2019 had not suffered tax under the pre-GST regime. It was held that the value of the supply of service in the subsequent invoices as and when raised would be reduced to the extent the advance is adjusted in such invoices. To avoid double taxation, GST would be charged on the net amount that remain after such adjustment. [In RE: *Siemens Limited* – 2019 VIL 250 AAR]

**Input Tax Credit not available on medicines provided to employees and pensioners:** Tamil Nadu AAR has denied ITC on medicines used for providing health and medical facilities to the employees and pensioners in the hospital maintained by assessee. The applicant was maintaining an in-house hospital under Chennai Port Trust Employees (Contributory Outdoor and Indoor Medical Benefit After Retirement) Regulations, 1989 and Chennai Port Trust Employees (Medical Attendance in the Trust's

Hospital and reimbursement of Hospital Charges) Regulations, 1994 for providing health and medical cover exclusively to their employees and pensioners. The AAR held that since the medicines and medical facilities were provided by the applicant to its employees for their personal use, ITC in respect of the same would not be available under Section 17(5)(g) of the CGST Act, 2017. Applicant's contention that the medicines were not the "goods for personal consumption" as the applicant-assessee had paid for the same, was rejected, observing that the fact as to who paid for the medicines was irrelevant to usage of the said medicines. [In RE: *Chennai Port Trust* – 2019 VIL 249 AAR]

# Customs

## Notifications and Circulars

**Bank guarantee under AA/DFIA/EPCG Schemes - Norms revised:** CBIC has revised norms for execution of bank guarantee (BG) under Advance Authorization, DFIA and EPCG Schemes. Manufacturer exporters/service providers registered under GST can claim exemption from furnishing BG if they have exported in previous two FYs and have minimum export of Rs.1 Crore in the preceding financial year, or have paid Rs.1 Crore GST in the preceding financial year, under different categories. As per Circular No. 31/2019-Cus., dated 13-9-2019, certificate of export performance or payment of GST for availing exemption must be procured from the Export Promotion Councils or authenticated by a CA registered with the GST department.

**Drawback when permissible on FOB value without deducting foreign bank charges:** Duty drawback may be permitted on FOB value without deducting foreign bank charges. CBIC has clarified that since agency commission up to the limit of 12.5% of the FOB value is allowed, deduction on account of foreign bank charges is available within this overall limit of 12.5% of the FOB value. Circular No. 33/2019-Cus., dated 19-9-2019 further clarifies that agency commission and foreign bank charges, separately or jointly, exceeding this limit is to be deducted from the FOB value for granting duty drawback.

**Steel Import Monitoring System to be effective from 1-11-2019:** Import policy for certain specified items classifiable under Ch. 72, 73 and 86 of ITC(HS) has been revised from free to 'free subject to compulsory registration under Steel Import Monitoring System'. Under SIMS, importers will be required to submit online advance information for import and obtain an automatic registration number by paying fee of Rs.1/thousand on CIF value. As per Notification No. 17/2015-20, dated 5-9-2019, SIMS will be effective for Bill of Entry filed on or after 1-11-2019. Registration facility will be available from 16-9-2019.

**Packing of Bottled in Origin beverages permissible under Customs Section 64(b):** Packing of Bottled in Origin alcoholic beverages in a mono carton and an outer carton to enable safe transport, is permissible in both public and private bonded warehouses under Section 64(b) of the Customs Act and not under Customs Section 65, as such activity is not processing. CBIC Circular No. 28/2019-Cus., dated 3-9-2019

clarifying so, observes that Section 64(b) allows the owner of warehoused goods to deal with the containers in such manner as necessary to prevent damage to goods. It notes that the original shipper's carton is removed to comply with the statutory labelling requirements.

**Mechanism for claiming additional MEIS:** DGFT has notified a mechanism for claiming additional MEIS benefit in respect of exports made on or after 1-11-2017 by exporters who are not able to claim the benefits at higher rates as notified by DGFT in 2017-2018 by way of four Public Notices, since scrips were issued to them as per the older rates. As per DGFT Trade Notice No. 28/2019-20, such exporters are required to submit an application to the RA with the relevant documents. The RA would open a supplementary file, check the eligibility of the claim and fill the differential rate. After approval at the level of Deputy DGFT, the RA would issue the scrip for supplementary file, which will be utilized like other MEIS scrips.

**Advance Authorisation – Exclusion of certain imports from compliance of FTP Para 4.12(iv):** The DGFT has modified Para 4.12(iv) of the HBP and also added a new Appendix 4P to the HBP. As per amendment by Public Notice No. 25/2015-20, 14-8-2019, certain items as specified in the new appendix like cashew (HS code 0801), all restricted/ prohibited items under the FTP, items covered under Para 4.11 of the FTP 2015-20 and items covered under Appendix 4J will not attract the provisions of Para 4.12(iv) of the FTP which provides for norms ratified by the norms committee in respect of advance authorization obtained under Para 4.07 of the FTP. Para 4.12(iv) provides that advance authorization will be valid for the entire period of the FTP i.e. 30.03.2020 or for period of three years from the date of ratification of norms by the norms committee.

**Motor vehicles - New policy condition inserted under Chapter 87 of ITC (HS):** A new condition has been inserted in Chapter 87 of the ITC(HS) by Notification No. 14/2015-20, dated 28-8-2019. Accordingly, registration of vehicles imported by a vehicle manufacturer, an organisation or a citizen for their personal use, demonstration, testing, research or scientific use, etc., should comply with the Standard Operating Procedure issued under the Central Motor Vehicles (Eleventh Amendment) Rules, 2018.

**Agarbatti import restricted:** The Central Government has revised the import policy condition for 'Agarbatti' and other odoriferous preparations which operate by burning, covered under Exim Code 3307 41 00, as also under Exim Code 3307 49 00, from 'free' to 'restricted'. DGFT Notification No. 15/2015-20, dated 31-8-2019 amends the import policy for specified items under Chapter 33 of Schedule I of ITC (HS) for this purpose.

## Ratio decidendi

**Refund claim not maintainable unless self-assessment order is modified though appeal:** 3-Judge Bench of the Supreme Court has held that unless the order of assessment or self-assessment is appealed, no refund application against the assessed duty can be entertained. The Apex Court observed that endorsement made on the Bill of Entry is an order of assessment, and that speaking order is not required to be passed in 'across the counter affair' when there is no *lis*. Setting aside the Delhi and Madras High Court Orders, the Supreme Court also noted that as self-assessment is nonetheless an order of assessment, no difference is made by deletion of the expression "in pursuance of an order of assessment" under Section 27(1)(i) of the Customs Act, 1962 (while introducing provisions of self-assessment) and no separate reasoned assessment order is required

to be passed in the case of self-assessment. Further, taking note of the fact that provisions of Section 128 make appealable any decision or order under the Customs Act, the Court opined that order of self-assessment is appealable in case any person is aggrieved by it. It observed that Section 128 has not provided for an appeal against a speaking order but against "any order". [*ITC Limited* v. *Commissioner* - Civil Appeal Nos. 293294 of 2009 and Ors., Supreme Court]

**Appeal against CESTAT Order on violation of exemption condition lies before High Court:** 3-Judge Bench of the Supreme Court has held that an appeal against the CESTAT Order, involving violation of conditions of Customs exemption notification, would lie before the High Court and not the Supreme Court. Remanding the matters back to the High Court, the Apex Court observed that the question involved was not related to determination of rate of duty, valuation, determination of classification of goods, or coverage under exemption notification. It also observed that the appeals did not involve any question of law of general public importance which would be applicable to a class or category of assessees as a whole. [*Commissioner* v. *Motorola India Ltd.* - Civil Appeal No. 10083 of 2011 and Ors., decided on 5-9-2019, Supreme Court]

**Valuation – Substantial mark-up in supply of imported goods to customers when not indicates undervaluation of imports:** Considering the nature of business of the appellant/importer and that the overheads involved in the business activity were bound to influence the price at which the imported goods were sold to the Indian customers, CESTAT Mumbai has held that the difference between the declared price at the time of import and the selling price cannot be designated as profit accruing to the importer. The Tribunal also held that the fact that importer/ appellant and the supplier being connected through a common holding company and being related parties, was not sufficient to reject the declared price if there was no evidence that the relationship between the supplier and importer (being related parties) had impacted the conditions of sale. [*Voith Turbo Pvt. Ltd.* v. *Commissioner* - Final Order No. A//86581/2019 dated 11-9-2019, CESTAT Mumbai]

**Customs duty increase – Effect of notification issued late after BE filed on same day:** Observing that the twin conditions of presentation of Bill of Entry and arrival of goods stood complied with on 16-2-2019, prior to the issue of notification dated 16-2-2019 at 8:45 pm raising Customs duty on imports from Pakistan, Punjab & Haryana High Court has allowed clearance while not considering the said notification. The Court in this regard observed that purport of the notification was to discourage imports from Pakistan and not to penalize the Indian importers. It also held that imposition of 200% duty amounted to prohibition of imports which could not be applied retrospectively. [*Rasrasna Food Pvt. Ltd.* v. *UoI* – 2019 VIL 408 P&H CU]

**EOU – CST refund when goods cleared in DTA – FTP to prevail over HoP Appendix:** Gujarat High Court has allowed a writ petition filed against denial of refund of Central Sales Tax (CST) to an EOU in a case when the inputs procured from the DTA were used in the production of goods cleared in the DTA during 2007-09. The Court observed that there was conflict between Para 6.11 of the Foreign Trade Policy and Appendix 14I-I of the Handbook of Procedures Vol. 1, during the relevant period. It held that FTP provisions govern the statutory scheme and Appendix cannot override FTP, which shall prevail in case of any conflict. [*Hubergroup India Pvt. Ltd.* v. *Union of India* – 2019 VIL 419 GUJ CU]

**No redemption fine when confiscation remains unchallenged:** CESTAT Chennai has held that redemption fine under Section 125 of the Customs Act, 1962 is an option in lieu of confiscation and hence, both (confiscation and redemption fine) cannot run simultaneously. It observed that when the order on confiscation remained unchallenged, and when even the exporter offered to willingly accept back the consignment, there cannot be any question of redemption fine. The Tribunal also held that penalty under Section 112(a) was imposable as mere importation rendering goods liable to confiscation, was sufficient to attract penalty. [*OMS Sivajothi Mills* v. *Commissioner* – 2019 TIOL 2607 CESTAT MAD]

**SAD refund – Generic description of imported goods in sale invoices when correct:** Observing that the adjudicating authority had not come to the conclusion that the product sold was entirely different and there was nothing on record to disbelief the Chartered Accountant's certificate stating that both the products were one and the same, Madras High Court has allowed the appeal against the CESTAT Order denying SAD refund. The refund was rejected by the department stating that the assessee had not adopted the same code while describing the product in the sale invoice. The Court noted that the Commissioner (Appeals) had in its order stated that the assessee had used the generic description of the imported goods in the sales invoices and non-mentioning of grade will not change the imported goods. [*P.P. Products Ltd.* v. *Commissioner* - 2019 (367) ELT 707 (Mad.)]

**Proof of exports for fulfilment of EO – Absence of Bill of Export not fatal:** The Bombay High Court has directed the DGFT to issue export obligation discharge certificate in a case where the Additional DGFT was satisfied that the petitioner had fulfilled the export obligation but denied the benefit of fulfilment of export obligation only on the ground of non-furnishing of bill of export,. The Court observed that the impugned order recorded a finding of fact of fulfilment of export obligation based on ARE-1, commercial invoices and certificate of payments of domestic supplies. Supreme Court's decision in the case of *Larsen & Toubro Ltd.* holding the view that non-availability of bill of export would not by itself lead to denial of the benefit of fulfillment of export obligation, if the export to SEZ can be evidenced by other contemporaneous documents, was relied upon. The department was directed to accept the hard copy of the application for MEIS as the exporter could not file it in-time as was placed under Denied Entity list before. [*Forbes Marshall Pvt. Ltd.* v. *Union of India* - 2019 (9) TMI 398 - Bombay High Court]

**Catalyst consumed in final product cannot be extended exemption available to goods for setting up, running, repair or maintenance of plant:** CESTAT Ahmedabad has had held that the catalyst "Petromax- MD", consumed in the final product and not required for setting up of the plant or required for running, repair and maintenance of the plant, was not eligible for the benefit of exemption which provided that the goods should be used in setting up of the crude petroleum refinery. The goods in question were hence denied benefit of Entry No. 45 of List 17 of Sl. No. 228 of Notification No. 21/2002-Cus. [*Nayara Energy Ltd.* v. *Commissioner* – 2019 VIL 580 CESTAT AHM CU]

**No fundamental right to import and quantitative restrictions can be imposed:** The Bombay High Court has held that there is no fundamental right to import poppy seeds and quantitative restrictions can be imposed as per the National Policy on Narcotic Drugs and Psychotropic Substances, controlled by the Narcotic Drugs & Psychotropic Substances Act, 1985 which can be traced to the Foreign Trade

(Development & Regulation) Act, 1992. The importer had challenged the Central Bureau of Narcotics guidelines which regulate import of poppy seeds, as an unconstitutional restriction on their right to trade and carry on business. The Court noted that there is no fundamental right to import anything without restrictions, or only on terms beneficial to a particular person and that the importer had not challenged the power to impose such restrictions. [*Chailbihari Trading Pvt Ltd*. v. *Union of India* - 2019 TIOL 2021 HC MUM NDPS]

# Central Excise, Service Tax and VAT

## Ratio decidendi

**Form-C to mining & power generation dealers for HSD procurement – Circular denying said form set aside:** Jharkhand High Court has set aside a circular issued by the Jharkhand Commercial Tax Department, denying Form-C for all the items in the amended definition of 'goods' (after introduction of GST) under Section 2(d) of the Central Sales Tax Act, to dealers engaged in the mining and power generation, and procuring HSD for operations. The Court in this regard relied on Punjab & Haryana High Court Order in the case of *Carpo Power Ltd.* as affirmed by the Supreme Court. It observed that the definition of goods is expansive and that 'goods' appearing in second half of Section 8(3)(b) may not necessarily mean 'goods' as defined under Section 2(d) of the CST Act. It also held that the registration of a dealer under Section 7(2) is not subject to any liability of the dealer to pay the tax. [*Tata Steel* v. *State of Jharkhand* – 2019 VIL 446 JHR]

**Business Auxiliary Services to foreign firm for development of business in India, whether exports – Issue referred to Larger Bench:** CESTAT Mumbai has referred to Larger Bench the question as to whether services rendered to foreign entity located outside India for development of its business in India will qualify as export of service in terms of specified phrases used in Export of Services Rules, 2005 from time to time. The Tribunal was of the view that if services rendered were for sale of goods of foreign entity in India, then same cannot be used/ consumed outside India. The matter was referred to LB noting CESTAT decisions to the contrary. [*Arcelor Mittal Projects India Pvt. Ltd.* v. *Commissioner* – 2019 TIOL 2582 CESTAT MUM]

**No VAT liability on transporter even when consignor and consignee details not given:** Allahabad High Court has held that tax liability cannot be fixed on the transporter merely because the assessee/transporter did not furnish the details of the consignor and the consignee of the completed transactions. The Court observed that merely because the Section 8A(5) of the U.P. Trade Tax Act, 1948 and Rule 84A of the U.P. Trade Tax Rules create certain obligations on transporter, it cannot be concluded that in the event of breach of the same, occurrence of taxing event at the hands of the transporter can be presumed. [*Prince Road Lines* v. *Commissioner* – 2019 VIL 383 ALH]

**EOU – Cenvat credit of duties paid on inputs at time of debonding:** Madras High Court has allowed Cenvat credit of duty paid on inputs/raw material at the time of debonding of an EOU into DTA. The Court observed that proviso in Rule 3

of the Cenvat Credit Rules, 2004 inserted in 2008 by Notification No. 35/2008-C.E. (N.T.), was more in the nature of an explanation clarifying about allowing of credit on capital goods and was not a stand-alone enabling provision to provide Cenvat credit. The High Court also held that the proviso was not only not happily worded but was placed at the wrong place in Rule 3(1). [*Stanadyne Amalgamations Pvt. Ltd.* v. *Commissioner* – 2019 VIL 384 MAD CE]

**Refund of excess amount paid by mistake as pre-deposit:** CESTAT Chennai has allowed refund of excess amount paid by mistake as pre-deposit by the assessee. It observed that when the legislature made it clear what is to be collected as pre-deposit, in the absence of any finding about non-satisfaction of conditions as to pre-deposit, the department cannot retain such excess amount remitted by mistake. The Tribunal observed that if one goes strictly by the requirements under Section 35FF of Central Excise Act, 1944 read with Circular No. 984/8/2014-CX, liability of assessee remains at 7.5%/10% and not a penny more. [*UR Options* v. *Commissioner* – 2019 VIL 576 CESTAT CHE ST]

**Cenvat credit on renting of crates for carrying goods to buyer's premises:** Observing that as per definition of 'input services' the restriction to avail credit up to the place of removal was applicable only for outward transportation of goods, CESTAT Chennai has allowed Cenvat credit of tax paid on renting of crates used in stacking of motor vehicle parts supplied to the customers. The Tribunal noted that input service was renting of crates and not GTA and that merely because the crates were used for supply of goods to buyer's premises, credit cannot be denied. [*Lucas TVS Ltd.* v. *Commissioner* – 2019 VIL 574 CESTAT CHE CE]

**Entry Tax on excavators treating them as motor vehicles, is illegal:** Gujarat High Court has held that levy of entry tax under Gujarat Tax on Entry of Specified Goods into the Local Areas Act, 2001 on excavators @ 12.5% is illegal, discriminatory, in violation of Article 304(a) of the Constitution and contrary to the object and purpose of enactment of the Entry Tax Act. The Court held that levy of entry tax on excavators treating them as motor vehicles, even though they were always covered by a separate entry under the Sales Tax Act and the VAT Act during - 2006-07, was *dehors* the scheme of entry tax. It held that the State cannot levy entry tax on excavators beyond the VAT rate of 4%. [*M H Khanusiya* v. *State of Gujarat* – 2019 VIL 435 GUJ]

**No service tax on surrender charges deducted from ULIP fund:** CESTAT Delhi has held that service tax was not payable on surrender charges deducted from the fund value of policy holder on pre-mature withdrawal, as it was not for asset management but a penalty. The Tribunal, considering clarification by CBEC Circular TRU No. 334/1/2010, observed that the charge pertaining to asset management alone formed the value in case of ULIP policy. It observed that surrender charges are permitted to be levied by IRDA by way of penal charges towards recovery of initial expenses. Clarification by substitution of clause (ii) in explanation to Section 65(105)(zzzzf) of Finance Act 1994, was relied upon. [*Max Life Insurance Co. India Ltd.* v. *Commissioner* – 2019 VIL 550 CESTAT DEL ST]

**Exemption to GTA services available for transportation of biscuits:** CESTAT Allahabad has held that exemption to GTA services for transportation of foodstuff will apply to biscuits as well. The Tribunal observed that the size and time of eating biscuits may change but nevertheless biscuit is a food item. Observing that the eatable biscuits would fall under the category of foodstuff, the Tribunal rejected the Revenue department's contention that biscuits cannot be foodstuff since foodstuff is only

relatable to those items which are to be further processed. [*Commissioner* v. *GlaxoSmithKline Consumer Healthcare Co. Ltd.* – 2019 TIOL 2630 CESTAT ALL]

**Export of Scientific and Technical Consultancy Service – POPS Rule 3 when applicable:** CESTAT Mumbai has allowed refund of Cenvat credit on export of Scientific & Technical Consultancy services. Considering the pricing method, it held that Rule 3 and not Rule 4 of the Place of Provision of Services Rules, 2012 was applicable. The Tribunal observed that from payment of material cost plus a markup by the service recipient, it cannot be concluded that goods were made physically available by the service recipient. Pricing method was also held as not a reimbursement. Absence of clause that service recipient was to provide material for R&D was also noted. [*Dow Chemical International Pvt. Ltd.* v. *Commissioner* – 2019 VIL 588 CESTAT MUM ST]

**Setting aside of penalty while remanding the matter when correct:** Madras High Court has dismissed an appeal against the CESTAT order wherein the Tribunal had set aside the penalty and allowed Cenvat credit on MS items used for fabrication of support structures, while remanding the matter for computation of credit. The Tribunal had held that since only the issue of interpretation was involved, imposition of penalty was unwarranted. The Department did not dispute the entitlement to such Cenvat credit before the High Court. The High Court held that the finding of the Tribunal relating to penalty were not beyond the scope of power of the Tribunal under Section 35C of the Central Excise Act, 1944. It noted that the words 'as it thinks fit' under Section 35C(1) are wide enough to confer such power upon the Tribunal to exercise its discretion, while remanding the case only for the purpose of computation of Cenvat credit, for which the assessee was found entitled. It also held that so long as entitlement to avail Cenvat credit was not validly disputed by the Department, it cannot insist on an open remand. [*Commissioner* v. *Madras Cements Ltd.* - 2019 (367) ELT 817 (Mad.)]

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