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Westinghouse Saxby Farmer Ltd. – The saga continues

By **Sai Prashanth and Krithika Jaganathan**

The Supreme Court's decision in *Westinghouse Saxby Farmer Ltd.* v. *CCE, Calcutta*[1] ('***Westinghouse* decision**') evoked an intriguing discussion on the classification of 'relays' used as part of Railway signalling systems. Recently, the Central Board of Indirect Taxes & Customs ('**CBIC**') issued Instruction No. 01/2022-Customs, dated 5 January 2022 ('**Instruction**'), respectfully recording their disagreement with the *Westinghouse* decision while responding to references from the trade over the classification of 'automobile parts' in the light of the *Westinghouse* decision. The authors explore the on-ground impact of the Instruction.

A debrief

The *Westinghouse* decision examined the classification of 'relays' meant for use as part of Railway signalling systems. The Revenue disputed the assessee's classification of the relays under Chapter Heading 8608 of the Central Excise Tariff Act, 1985 ('**Tariff Act**') and sought to re-classify them under sub-heading 8536.90. The Calcutta Bench of the CESTAT agreed with the Revenue to rule that relays were classifiable under sub-heading 8536.90.

The Apex Court applied the 'principal use test' embodied in Note 3 to Chapter XVII of the Tariff Act and held that the relays were more appropriately classifiable under CH 8608 in this specific case as they were manufactured and supplied to the Railways solely for use as part of railway signalling equipment.

The Supreme Court disagreed with the Revenue's classification of relays under CH 8536 in view of the settled principle that Rule 3(a) of the General Rules For Interpretation of this Schedule ('**Interpretative Rules**') in the First Schedule to the Tariff Act are invokable only when goods are classifiable under two or more Headings (either by application of Rule 2(b) of the Interpretative Rules or for any other reason). The Supreme Court also rejected the Revenue's plea that relays were excluded from CH 8608 per Note 2(f) in Section XVII of the Tariff Act by finding that Note 2(f) excluded only goods that were independently capable of being marketed as electrical equipment (for use other than as railway signalling equipment) and did not affect goods which were suitable for use principally with railway signalling equipment.

The Instruction: Import and impact

Emphasizing that classification of goods under Section XVII is a complex issue, the Instruction drew attention to prior decisions of the Apex Court where Note 2(f) was preferred over the 'principal use test' in Note 3 which had not been considered in the *Westinghouse* decision to indicate an apparent dissonance *vis-à-vis* classification of other parts of goods falling under Section XVII of the Tariff Act.

Responding to trade representations regarding classification of 'automobile parts' under CH 8608, the Instruction clarified that the *Westinghouse* decision was highly specific as it classified relays used in railway signalling systems under CH 8608 and did not extend to

[1] 2021 (3) TMI 291 - Supreme Court

goods falling under CH 87 or to any other case of a similar nature. The Instruction adverted to the valuable opinion of the Ld. Additional Solicitor General of India and advised field formations to factor in aspects such as the operative facts, HS Explanatory Notes[2], Section and Chapter Notes while classifying products for assessment. The Instruction also made passing mention to a Review Petition filed by the Revenue against the *Westinghouse* decision.

The decisions cited in the Instruction are stated to rank the exclusions in Note 2 above the 'principal use' test. The authors analyse the decisions quoted to assess the situation.

- In *Intel Design Systems*[3], the controversy centred on classification of contractors, switches, control box, etc. when used in 'parts of tanks, armoured fighting vehicles' for the Defence Ministry, GOI. The Apex Court considered the competing entries of Heading 8710 (Vehicles other than Railway or Tramway Rolling Stock and Parts and Accessories) against the Revenue's claim for classification under sub-heading 8536.90 (Electricals) and held that the accurate classification would be sub-heading 8536.90 on a combined reading of Rule 1 of the General Interpretive Rules, Note 2 (f) to Section XVII (which also governs Chapter 87) and the HSN Explanatory Notes. Significantly, the goods under consideration were specifically covered under Csub-heading 8536.90 and were not addressed in CH 8710 though they were used as part of goods that would fall under CH 87. It was in this specific context that the Apex Court preferred the exclusions in Note 2 over the 'principal use' of the goods, to seal the classification of the goods under Heading 85.36.
- In *Uni Products*[4], 'car matting/carpets' were sought to be classified under Heading 5703 (Carpets and other floor coverings) whereas the Revenue claimed classification under CH 87. The Apex Court noted that Clause C of III – Parts and Accessories in HSN Explanatory Notes to Section XVII specifically excluded textile carpets. The Apex Court declined to apply the 'principal use' test to bring the goods within CH 87 as the car mats were categorically covered under CH 57 and specifically excluded from CH 87 by the HSN Explanatory Notes. It is noteworthy that here, the goods could have been covered either under CH 57 or 87 and the Apex Court found that because they were specifically covered under CH 57, there was no necessity to employ the 'principal use test' for ascertaining classification.

Do the HSN explanatory notes impact the stance adopted in Westinghouse Saxby?

Relays find specific mention in Heading 8536 and are also implicated under Heading 8608 as mechanical/electro-mechanical signalling for Railways and Note 2(f) to Section XVII of the Tariff Act excludes electrical machinery/equipment of CH 85. Suffice it to say, there is plenty of wiggle-room for deciding where relays must be classified. On the one hand, the HSN Explanatory Note 7(e) to Part III in Section XVII lists 'electrical signalling apparatus in trains' as an example of electrical apparatus in CH 85 excluded by Note 2(f) to

[2] "Harmonized Commodity Description and Coding System", Explanatory Notes issued by the World Customs Organisation (2002).

[3] *Intel Design Systems (India) Pvt. Ltd.* v. *CCE* - 2008 (223) E.L.T. 135 (S.C.)

[4] *CCE* v. *Uni Products India Ltd.* - 2020 (372) E.L.T. 465 (S.C.)

Section XVII of the Tariff Act. At the same time, the HS Explanatory Note 3 to Part III in Section XVIII lays out the 'principal use' test and when it would be triggered, clearly stating that **when a part or accessory can fall in one or more other Sections as well as in Section XVII, its final classification is determined by its principal use.**

Way forward and conclusion

It is clear from the above abstract that the decisions quoted in the Instruction were rendered in highly specific, factual scenarios. The *Westinghouse* decision effected a balance between the larger objective of 'group classification' in the context of 'principal use' against the specific exclusions in Note 2(f) of Section XVII of the Tariff Act. The Instruction's advice that all classification matters must countenance a holistic of all relevant aspects starting from HSN explanatory notes to the section and chapter notes is beyond reproach.

The Instruction appears to be a graceful attempt to qualify the operation of the *Westinghouse* decision by indirectly restraining the tax administration from applying it. The immediate impact of the Instruction may be that the Westinghouse decision will be applied sparingly, in light of the several caveats contained therein. Seeing as Circulars are binding on tax authorities[5], the Instruction enables tax authorities to bypass the *Westinghouse* decision even in an identical case, in light of the Review Petition seemingly pending before the Supreme Court. It remains to be seen how the concerns raised in the Instruction are settled in the review proceedings.

[The authors are Joint Partner and Principal Associate, respectively, in the GST Advisory team in Lakshmikumaran & Sridharan Attorneys, Chennai]

Goods and Services Tax (GST)

Notifications and Circulars

GSTR-1 and GSTR-3B mis-match – Reasonable time to be allowed to assessee to explain short-payment or non-payment of tax: The Central Board of Indirect Taxes and Customs ('**CBIC**') has clarified that where ever any amount of tax, self-assessed by the registered person in GSTR-1 is found to be short paid or not paid through GSTR-3B return, the proper officer may send a communication to the registered person to pay the amount short paid or not paid, or to explain the reasons within reasonable period of time. According to Instruction No. 01/2022-GST, dated 7 January 2022, proceedings for recovery of the said

[5] *CCE, Vadodara* v. *Dhiren Chemical Industries* - 2002 (143) E.L.T. 19 (S.C.)

amount as per provisions of Section 79 of the CGST Act, 2017 may be initiated by the proper officer if the registered person fails to reply to the proper officer, pay the amount short/not paid or where the registered person fails to explain the reasons.

GST rate not increased for textiles and textile articles but increased for footwear priced at less than INR 1000/pair: The Finance Ministry has decided to not increase the rate of GST on textiles and textile articles with effect from 1 January 2022. Consequently, the increase in rate of tax for certain job work services (dyeing or printing) in respect of textile and textile products, has also been deferred now. However, it may be noted that the Ministry has implemented the earlier decision in respect of increase in the tax rate for footwear which are priced below INR 1000 per pair. Such footwear are taxable @ 12% with effect from 1 January 2022. Notifications Nos. 21 and 22/2021-Central Tax (Rate), both dated 31 December 2021 were issued for implementing the decision of the 46th Meeting of the GST Council.

Classification of goods – GST rate notifications amended to implement changes in HSN effective from 1 January 2022: The World Customs Organisation Convention on Harmonized Commodity Description and Coding System (HS convention) has come out with the HS-2022, which is the new (seventh) edition of the Harmonized System (HS) nomenclature. The changes have come into force from 1 January 2022. As India is a party to the HS convention, necessary changes have been brought in the First Schedule of Customs Tariff Act,1975 with effect from 1 January 2022 in order to align the same with the HS 2022. On the same lines, changes have also been made in GST notifications as these notifications refer to the Custom Tariff Act, 1975 for classification of goods. Details of the elaborate changes are available in L&S Indirect Tax Update No. 41 of 2021 available here.

CGST Act – Changes effective from 1 January 2022: Certain changes as proposed by the Finance Ministry in Union Budget 2021, and which became part of the Finance Act, 2021 later, have come into force from 1 January 2022. As per Notification No. 39/2021-Central Tax, dated 21 December 2021, provisions of Sections 108, 109 and 113 to 122 of the Finance Act, 2021 which amends the Central Goods and Services Tax Act, 2017 are effective from 1 of January of this year. These provisions amend Section 7, 16, 74, 75, 83, 107, 129, 130, 151, 152, 168 and Schedule II of the CGST Act, 2017. Detailed analysis of the changes is available in L&S Indirect Tax Update No. 40, available here.

Ratio decidendi

Investigations – Transfer of investigations from State Authorities to Central Authorities when permissible – Section 6 and CBIC Circular dated 5 October 2018 do not cover all situations: The Delhi High Court has observed that neither Section 6 of the CGST Act nor the SGST Act nor the CBIC Circular dated 5 October 2018 operate in a situation where the 'intelligence-based enforcement action' has repercussion or involvement of taxpayers beyond the territorial jurisdictional limit of the officer initiating such an action. The Court was also of the view that the provisions also do not address a situating where two or more Officers, may be Central or State or only Central or State, initiate separate 'intelligence-based enforcement action' but having a common thread or involvement of multiple taxpayers, like a case of conspiracy.

The action, in this dispute, was initiated by the State Tax Authorities but the same was later transferred to the Central Authorities which was contested by the assessee relying on the Section 6 and the CBIC Circular. The High Court dismissed the petition observing that Section 6 and the said circular cannot be given an overarching effect to cover all the situations that may arise in the implementation of the CGST and the SGST Acts, and that there was no prohibition in the CGST Act or the SGST Act to such transfer of investigation.

The High Court however also opined that it cannot be said that in every such case, the 'proper officer' having limited territorial jurisdiction must transfer the investigation to the 'proper officer' having pan India jurisdiction. [*Indo International Tobacco Ltd*. v. *Additional Director General* – Judgement dated 11 January 2022 in CONT.CAS(C) 751/2021 & CM No.35806/2021, Delhi High Court]

Detention of goods in transit – Mere change of route by itself not sufficient to infer intention to evade: The Gujarat High Court has reiterated that merely from the direction preferred by the assessee for delivery of goods to the destined place, an inference of intention to evade tax cannot be drawn. According to the Court, mere change of route without anything more would not necessarily be sufficient to draw an inference that the intention was to evade tax. The Revenue authorities had seized the goods and the vehicle stating that the vehicle was travelling to the different direction than the direction of destination or way to the destination, and hence there was intention to evade. The High Court also reiterated that mere under valuation of the goods also by itself is not sufficient to detain the goods and vehicle, far from being liable to confiscation. [*Karnataka Traders* v. *State of Gujarat* – 2022 TIOL 43 HC AHM GST]

Mining lease – Levy of GST on royalty and district mineral fund contribution paid to State for minor mineral lease, stayed: A batch of writ petitions were filed relating to levy of GST under reverse charge mechanism on the amount of royalty and district mineral fund contribution paid to the State of Jharkhand in respect of mining lease of stone boulders or minor minerals. The Court, relying on the Supreme court case of *Lakhwinder Singh* v. *Union of India* [2021-VIL-85-SC], stayed the payment of GST for grant of mining lease and royalty by the petitioner till further orders. [*Ratan Black Stone and Others* v. *Union of India* – 2022 TIOL 75 HC JHARKHAND GST]

Registration cannot be denied for non-submission of electricity bill: The petitioner submitted an online application for grant of GST registration furnishing all the documents as required. Show cause notice was issued to submit electricity bill or house tax receipt for which the petitioner filed a reply explaining the nature or possession of business premises as the owner, along with submitting the house tax receipt. However, the department rejected the application for non-submission of electricity bill. The Court stated that once the petitioner has satisfied the requirement of the law by providing PAN, aadhar and also house tax receipt then the authority should not have insisted for submission of electricity bill. Court held that in the absence of any defect being pointed out in the reply and the documents submitted, the petitioner has every right to carry on the business lawfully and such right should not be confiscated in illegal and arbitrary manner. [*Ranjana Singh* v. *Commissioner of State Tax* – 2022 VIL 02 ALH]

Upfront payment to State Government for mining lease is 'advance': The Madhya Pradesh Authority for Advance Ruling has held that the upfront payment to the State Government for obtaining mines is in the nature of advance paid

and is not a 'deposit' in terms of Section 2(31) of the CGST Act, 2017. Noting that there was no clause of refund of that amount after allotment of mines on lease, hence the payment was not a deposit but an advance to be adjusted in full at earliest against amount payable to government from production of minerals, the AAR held that the said payment will be an 'advance' against the revenue share from the date of allotment of mines. It held that GST would be payable on this advance from the date of allotment of mines in terms of Section 13(3) of the CGST Act which determine time of supply. [In RE: *Essel Mining & Industries Ltd*. – 2021 VIL 486 AAR]

Electricity and water charges collected by lessor of property, on actuals, are liable to GST: The Maharashtra AAR has held that the electricity and water charges paid by the assessee (lessor of property rented) as per meter reading and collected from the tenants at actuals on reimbursement basis are liable to GST. The Authority observed that the electricity and water charges were for effective enjoyment of the rented premises, without which the occupation of the premises could not be possible. It noted that the provision of essential services was mandatory on the lessor and it was not mere facilitating the payment of electricity and water charges. Observing that without the provision of such utility services, the lessee could not run their businesses, the AAR held that the amounts towards such electricity/water charges would be part of 'consideration' received in relation to renting of immovable property by the lessor. Plea of 'pure agent' was rejected. [In RE: *Indiana Engineering Works (Bombay) Pvt. Ltd*. – 2021 VIL 473 AAR]

Land filling pit is a civil structure – ITC not available on inputs and input services used for its construction: The Karnataka Appellate Authority for Advance Rulings has held that the land filling pit is to be considered as 'civil structure' and not a plant and machinery. It was hence held that input tax credit on goods and services used for its construction would not be available as per Section 17(5)(d) of the CGST Act. The applicant was engaged in the business of solid waste management and for processing and disposal of the solid waste had taken land on lease from the Government. They constructed a land filling pit into which the solid waste is filled and closed and sealed for 30 years. The land fill pit was capitalised in their books of accounts as an asset and they have claimed depreciation under income-tax. Dismissing the appeal, the authority observed that a civil structure would be any man-made structure which is built by applying the science of civil engineering and can be built with cement and steel or by means of other materials depending on the purpose of the structure and its feasibility. [In RE: *Mother Earth Environ Tech Pvt. Ltd*. – 2021 VIL 71 AAAR]

Centage charges and Building and Other Construction Worker Welfare Cess includible in value of supply: Taking note of the definition of 'consideration' and the aspect of 'valuation of supply', the Uttar Pradesh Authority for Advance Rulings has held that GST is chargeable on the centage charges and Building and Other Construction Worker Welfare Cess (BOCWW Cess) amounts while including these in the value of supply of construction services. The applicant was engaged in construction of bridges and civil engineering works assigned by public works department (PWD). The applicant used to provide an estimate of cost for construction of bridges to the PWD and the PWD used to give a fixed percentage of that amount commonly known as centage for incurring administrative expenditure. The Authority noted 'consideration' includes entire payment and that under Section 15(1) of CGST Act, 2017, there is an intent to include all taxes, duties, cesses, fees and all charges in the value of supply. [In RE: *UP State Bridge Corporation Limited* – 2021 VIL 447 AAR]

Technical testing in India for foreign clients, on samples provided by latter, is not export of services: In a case where the applicant used to receive samples from overseas companies on which the testing was carried out and test reports were handed over to the recipients who were located outside India, the Goa Appellate Authority for Advance Ruling has held that the said technical testing services cannot be treated as 'zero rated supply/export of services' under GST law. The AAAR was of the view that condition (iii) under Section 2(6) of the IGST Act, 2017 which states that 'place of supply' must be located outside India, was not fulfilled. It was held that in terms of Section 13(3)(a) of the IGST Act, the 'place of supply of service' was in Goa, India since the samples or goods on which the testing service was to be performed were made available by the service recipients to the applicant, which squarely fits into the situation specified under the said Section 13(3). Since the 'location of supplier' was in Goa and the 'place of supply' was also determined to be in Goa, the supply was held to be intra- state supply in terms of Section 8(2) of the IGST Act. [In RE: *Syngenta Biosciences Private Limited* – 2022 VIL 04 AAAR]

GST/VAT developments outside India

Bahamas reduces VAT from 12% to 10%

With effect from 1 January 2022, Bahamas has reduced its VAT rate from 12% to 10% on all goods and services. VAT will also be charged on the imported goods at 10% by Customs. However, as per the VAT Guidance issued by the Ministry of Finance, Department of Internal Revenue, there will be a transition period of 90 days from the effective date whereby retailers will be allowed to change their shelf prices.

Bahrain increases standard rate of VAT from 5% to 10%

Bahrain has with effect from 1 January 2022 increased its standard rate of VAT from 5% to 10%. According to the VAT FAQs published by the National Bureau of Revenue, Bahrain, supplies which are subject to the zero-rate (e.g. basic food, construction of new buildings, oil and gas, healthcare, and education) or exempt from VAT (e.g. real estate and certain financial services) will be unaffected. It is also stated that imports of goods and services on or after 1 January 2022 will also be subject to the 10% rate unless they are zero-rated or exempt from VAT.

China exempts insurance of export goods from VAT till 31 December 2025

The Ministry of Finance and State Administration of Taxation of China has exempted domestic units and individuals from payment of VAT on product liability insurance and product quality assurance insurance, with export goods as the subject of insurance. As per Announcement [2021] No. 37, the exemption is available from 1 January 2022 till 31 December 2025.

Right to deduct input VAT can be refused if taxable person fails to adduce proof that supplier a taxable person: The Court of Justice of the European Union has held that the right to deduct input VAT must be refused where the true supplier of the goods or services concerned have not been identified and the taxable person fails to adduce proof that the supplier had the status of 'taxable person'. The Court in this regard in its case *Kemwater ProChemie* v. *Odvolaci Financni Redeitelstvi* [Judgement dated 9 December 2021] held that where the true supplier of the goods or services is not identified, the taxable person must be refused the right to deduct input tax if considering the factual circumstances and notwithstanding the evidence provided by the taxable person, the information needed to verify that the supplier was a taxable person, is lacking.

Customs

Notifications and Circulars

Classification of automobile parts – Supreme Court decision in case of *Westinghouse Saxby* does not refer to its wider applicability: Taking cognizance of the divergent practices adopted in assessment of the 'automobile parts', the CBIC has *vide* Instruction No. 1/2022-Cus., dated 5 January 2022 clarified that judgment in the case of *Westinghouse Saxby* should not be applied to wider issues but to classification of commodity 'relays' used in railway signalling equipment of Chapter 86. Further, the Board has advised that classification of parts under Section XVII should be based on relevant facts, relevant section and chapter notes, various Supreme Court decisions and the HS Explanatory notes. The Department has also filed a review petition against the judgment in the case of *Westinghouse Saxby.*

It may be noted that the Supreme Court in this case has held that 'relays' are classifiable as parts of 'railway signalling equipment' under Heading 8608 of the Central Excise Tariff. Here, the Supreme Court, diverging from its earlier decisions, gave precedence to the 'sole or principal use' test of Section Note 3 over Note 2(f) to Section XVII, which specifically excluded 'electric equipment' from being classified under Section XVII. The Apex Court further did not consider whether the part is not a good or article specifically covered under any other chapter heading.

SCOMET items – Annual update released: The DGFT has notified annual SCOMET Update 2021 to amend the Appendix 3 to Schedule 2 of ITC (HS) Classification of Export and Import Items 2018. As per DGFT Notification No. 47/2015-20, dated 20 December 2021, in order to provide transition time to the industry, the notification will come into effect after 30 days of its issuance, i.e., from 19 January 2022.

ASEAN-India FTA – Effective rate of duty further reduced on certain products: Notification No. 46/2011-Cus., dated 1 June 2011 has been further amended to give effect to 13th tranche of preferential tariff as per ASEAN India Free Trade Agreement. Customs duty has been revised in respect of goods covered under Entry Nos. 80, 81, 83, 124 and 125 of the Table in the notification. It may be noted that the Customs duty rates for these items were also reduced from January 2021 vide Notification No. 45/2020-Cus. Now, Notification No. 54/2021-Cus., dated 24 December 2021, reducing the rates further, is effective from 1 January 2022. Goods covered are classifiable under sub-headings 090111, 090240, 090411, 151110 and 151190 of the Customs Tariff Act, 1975.

Duty credit scrips under FTP – Last date for submitting applications extended: The last date of submitting applications under MEIS, SEIS, ROSCTL, ROSL and 2% additional ad hoc incentive (under Para 3.25 of FTP) which was earlier notified to be 31 December 2021 has been extended till 31 January 2022. DGFT Notification No. 48/2015-20 dated 31 December 2021 issued for the purpose also prescribes late cut of 10% for MEIS where period of export is from 1 July 2018 to 31 March 2019, and 5% for SEIS for FY 2018-19.

Steel Import Monitoring System registration when not required: Post issuance of Notification No. 33/2015-2020, dated 28 September 2020 amending import policy of all HSN Codes under Chapters 72, 73 & 86 of Schedule-I (Import Policy) of ITC (HS) from 'Free' to 'Free subject to compulsory registration under Steel Import Monitoring System ('**SIMS**')', the DGFT has clarified that re-import of steel for packing purposes will not be covered under SIMS as it is not primarily meant for value addition. DGFT Circular No. 38/2015-20, dated 19 January 2022 also clarifies that in case where the steel/steel item is exported from DTA to SEZ and then imported from SEZ to DTA, without or with value addition, there should be no requirement for SIMS registration.

General Authorisation for Export of Chemicals and related equipment under SCOMET list specified: Paragraph 2.79G has been added in the Handbook of Procedures of the Foreign Trade Policy to lay down the procedure for General Authorisation for Export of Chemicals and related equipment ('**GAEC**') under SCOMET list. Public Notice No. 45/2015-20, dated 13 January 2022 amends the Handbook of Procedures for this purpose. As per the new para, the GAEC shall be valid for 5 years and cannot be revalidated in terms of Para 2.80 of the HBP. Guidelines for submission of online application for one-time registration have also been issued by Trade Notice No. 30/2021-22, dated 13 January 2022.

Palm oil (other than crude) and fractions – Basic Customs duty reduced, and 'free' import policy extended: Basic Customs Duty has been reduced on refined bleached deodorized (RBD) palm oil, RBD palmolein, RBD palm stearin and any palm oil other than crude palm oil. As per Notification No. 53/2021-Cus., dated 20 December 2021, effective from 21 December 2021, the rate of basic customs duty would be 12.5% instead of 17.5%. Amendments in this regard have been made in Notification No. 48/2021-Cus. Further, the Directorate General of Foreign Trade has extended the free import policy of items classifiable under HS Code 1511 90 10, 1511 90 20 and 1511 90 90, till 31 December 2022. It may be noted that imports are however not permitted through any port in the State of Kerala. Notification No. 46/2015-20, dated 20 December 2021 has been issued by the DGFT for this purpose.

Liquid Medical Oxygen containers imported temporarily – Retention relaxed: For providing relaxation in re-export of ISO Containers imported temporarily for combating the COVID 19 pandemic Circular No. 1/2022-Customs, dated 18 January 2022 has been issued. The Circular allows extension till 30 September 2022 for re-export of ISO Containers meant for transportation of liquid medical oxygen grade, if imported under Notification No. 104/1994-Cus. Further, in respect of ISO Containers imported on lease by availing IGST exemption under S. No. 557B of Notification No. 50/2017-Cus., the Circular clarifies that where the ISO Containers in India are under a valid lease and the IGST amount is paid on such lease under the GST law, the IGST is not required to be paid on the value of such containers, and in such situation, the need for re-export would not arise.

Ratio decidendi

TED refund on supplies to EOU by DTA unit – DGFT to refund TED paid in cash: The 3-Judge Bench of the Supreme Court of India has held that the responsibility of refund of Terminal Excise Duty ('**TED**'), in case of supplies to an

EOU unit by a DTA unit, in reference to applicable Foreign Trade Policy ('**FTP**'), would be that of the authority responsible to implement the FTP under the Foreign Trade (Development and Regulation) Act, 1992. The Court was of the view that if TED is paid by utilizing Cenvat credit, the refund should be in the form of reversal of commensurate amount in the Cenvat credit account. However, if the amount towards TED is paid in cash by the DTA supplier to the authorities under the Central Excise Act, 1944, the refund of TED amount would be made, by the authority implementing the applicable FTP, in cash with simple interest as per Para 8.5.1 of the FTP. The Supreme Court also held that the responsibility of TED refund would also be on the DGFT in case the same is to be refunded to the EOU, subject to a suitable disclaimer from the DTA supplier.

Interestingly, observing difference between 'benefit' and 'entitlement', the Apex Court also held that provision of TED refund to EOU is a benefit and not the entitlement of an EOU unit. The Court in this regard was of the view that EOU is not entitled for refund of TED on its own accord but can avail of the entitlements of DTA supplier on complying essential procedure. [*Sandoz Private Limited* v. *Union of India* – Judgement dated 4 January 2022 in Civil Appeal No. 3358 of 2020 and Ors., Supreme Court]

Valuation – Technical know-how and technical assistance when not includible: The CESTAT Mumbai has allowed the appeal of the assessee in a case where the Revenue department had sought to include payments made for technical know-how and technical assistance in the value of imported goods. According to the Department, the transaction of purchase of goods and for services were connected through a licence agreement for expansion of capacity. The Tribunal held that rendering of service was not the condition for sale of goods. It observed that the purchase order for the goods was issued much after those service agreements were finalised. It also noted that the service was to be rendered in India for upgradation of manufacturing facility as a whole and not only for the imported goods on which the service will impact after delivery at the site of the importer. It held that the qualifying expression 'as a condition of sale' cannot be stretched limitlessly to subsume all commercial transactions merely for sharing commercial objective in common. [*Arcil Catalyst Pvt. Ltd.* v. *Commissioner* – 2022 VIL 14 CESTAT CU]

Foreign going vessel – Exemption to ship stores – Appeal maintainable before High Court: The Kerala High Court has held that the appeal against the decision of the Tribunal on the question as to whether the concerned ship was a foreign going vessel and thus giving exemption to ship stores, was maintainable before the High Court. The Court in this regard noted that the emphasis was on the statue or standing of the vessel but not on the rate of duty of customs or the value of goods consumed from the stores. It observed that the question of payment of duty, or rate of duty will depend only on the primary question posed, i.e., whether the vessel was a foreign going vessel or not. [*Commissioner* v. *Asean Cableship Pvt. Ltd.* – 2021 TIOL 2332 HC KERALA CUS]

MEIS – Non-ticking of box on web portal not debars benefit under MEIS: In this case, the Bombay High Court was faced with the issue of eligibility to avail benefit under MEIS Scheme. It was held that merely because the exporter did not tick a particular box on the web portal would

not debar the exporter from availing benefit under MEIS Scheme when sufficient intention can be gathered from the description of the goods. The Court termed non-ticking of the box as 'technical lapse'. [*Ajanta Industries* v. *Asst. Commissioner* – 2021 (12) TMI 389 Bom HC]

MEIS benefit when shipping bill sought to be amended manually, permissible: The Gujarat High Court has directed the Customs department to provide the benefit of MEIS scheme in a case where the assessee had sought for amending the shipping bill, filed initially in EDI system, manually because of a genuine mistake. The Court noted that the Policy Relaxation Committee had asked the EDI to make suitable changes to grant the MEIS benefits, however, the same could not happen for want of availability of mechanism permitting the manual amendment of the shipping bill. It observed that the issue was more of procedural in nature than of substantive kind as the software had the limitation and it did not permit even after the manual correction of the shipping bill. Allowing the petition, the High Court observed that no technicality can mar the right of the parties which they otherwise accrue under the substantive law. [*Jindal Saw Limited* v. *Chief Commissioner* – 2022 VIL 26 GUJ CU]

MEIS – Manual amendment permissible in EDI shipping bill when EGM closed: In a case where the assessee marked 'No' in the column (of the EDI shipping bill) asking whether they were claiming the benefit of any export incentive, the CESTAT Hyderabad has held that the software should not make the amendment under Section 149 of the Customs Act impossible if such as amendment is legally permissible. The original authority had declined to amend the shipping bills because the EGM was already closed and it was not possible to amend the shipping bill thereafter in the EDI system. The assessee had mistakenly mentioned 'no' while on the face of the Shipping Bills, it had categorically mentioned that it would claim the benefit of MEIS scheme. The Tribunal held that the amendments can be permitted manually. [*Hindustan Urban Infrastructure Limited* v. *Principal Commissioner* - 2022-VIL 41 CESTAT HYD CU]

Investigating Officer cannot seize goods and documents under Customs Section 110: Taking note of the interpretation of 'proper officer' in the decision of the Supreme Court in *Canon India Pvt. Ltd.* v. *Commissioner* [2021 (376) ELT 3 (SC)], the Delhi High Court has held that Investigating Officer cannot seize goods and documents under Section 110 of the Customs Act, 1962. The Court observed that perhaps, the judgment in *Canon India* has not been either read by the concerned officials or has not been understood in the correct perspective. [*Rani Enterprises* v. *Principal Commissioner* – 2021 (12) TMI 295 Del HC]

Every irreversible process does not result in obtaining a distinct product falling under a different classification: AAR, Delhi, while dealing with classification of 'supari' under First Schedule to the Customs Tariff Act, 1975, has held that merely because of irreversible process of 'boiling', the product would not change the essential character to that of 'preparation of betel nut' to attract classification under Heading 2106. Therefore, relying upon Chapter Note 3 to Chapter 8 read with HSN Explanatory Note thereto, the adjudicating authority classified the produce under Heading 0802 as 'Other nuts, fresh or dried, whether or not shelled or peeled'. [In RE: *Great Nuts Impex Pvt. Ltd.* – 2022 (1) TMI 621]

Central Excise, Service Tax and VAT

Ratio decidendi

Appeal against Tribunal order on limitation for demand maintainable before High Court, even though on merits issue related to rate of duty: The Larger Bench of the Bombay High Court has answered in negative the question as to whether the issue of a demand being time barred when it is made on the basis of valuation and / or rate of duty, is an issue relating to the assessment of goods and, therefore, an appeal under Section 35G of the Act, is not maintainable before this Court. The Court was hence of the view that an appeal was maintainable before the High Court when the issue involved was limitation of demand where both the parties agreed to the decision of the Tribunal on rate of duty and / or valuation. The Full Bench of the Court was of the view that any decision on the issue whether the revenue could have invoked the extended period of limitation for recovery of the excise duty would not have any bearing or impact on the rate of duty of excise or to the value of goods for the purposes of assessment.

Holding that no appeal against the order of the Tribunal would lie before the Supreme Court under Section 35L of the Central Excise Act, 1944, in such circumstances, the Court also observed that the issue of limitation was purely a question of fact or at most mixed question of fact and law. [*Commissioner* v. *Hindustan Petroleum Corporation Ltd.* – Judgement dated 23 December 2021 in Central Excise Appeal No. 60 of 2018, Larger Bench of Bombay High Court]

Cenvat credit – Availing balance 50% credit on capital goods, in different location, by service provider: The CESTAT Ahmedabad has allowed assessee's appeal in a case where the service provider had taken balance 50% credit on capital goods, in his new registration in a different city. The assessee had taken first 50% credit in Mumbai and then applied for change in service tax registration details, while moving to Surat. On rejection of such application the assessee had obtained fresh registration in Surat. The Tribunal observed that there was no transfer of credit from Mumbai to Surat and the invoice with the Mumbai address could be used by the assessee for taking credit in Surat, the Assessee being the same. Rule 10(2) of the Cenvat Credit Rules, 2004 was held not applicable as there was no transfer of business on account of change in ownership. The CESTAT also noted that there was no provision, similar to that available for manufacturers, for service providers for transfer of credit. [*S D Material Handlers Pvt. Ltd.* v. *Commissioner* – 2021 TIOL 853 CESTAT AH]

Limitation for refund of Cenvat credit to SEZ unit – Refund filed within one year of ISD invoice correct: The CESTAT Ahmedabad has held that refund claim of Cenvat credit filed within one year from the receipt of ISD invoice is not barred by limitation. The Tribunal noted that the assessee could not have filed refund claim without having ISD invoices and therefore, it was beyond their control to file refund claim before issuance of ISD invoices. Further, observing that there were humungous set of documents running into 1255 Volumes including 33,400 ISD invoices, the Tribunal observed that to compile such voluminous documents is a time-consuming exercise and therefore, the delay if any in filing the refund in respect of ISD invoices was cogent and reasonable. Revenue had denied the refund arguing that the claim had to be filed within one year from the end of month in which actual

payment of service tax was made as per Para 3(III)(e) of the Notification No.12/2013-ST. [*Commissioner* v. *Reliance Industries Limited* – 2021 VIL 744 CESTAT AHM ST]

Land procurement from farmers, seeking government permissions, etc. not liable to service tax – Tax not be levied on basis of agreements not fulfilled: Activity of procurement for land from farmers, getting land thus procured converted from agricultural land to non-agricultural land, seeking various government permissions and approvals, necessary till formation of residential layouts etc. is not covered under the category of 'site formation and clearance, excavation and earthmoving and demolition service'. The CESTAT Bengaluru, while holding so, also observed that the said activity would not fall under the taxing net till 31 June 2012 and not fall under the scope of 'service' as per Section 65B (44) of the Finance Act, 1994 for the period thereafter. The Revenue department had demanded tax arguing that residential layout designed by the assessee was in ready to use condition. The assessee had contended that it had not undertaken any work for other phases and had only procured land as part of phase-I. The Tribunal was also of the view that levy of service tax depends on the service rendered and not on the basis of agreements which were never fulfilled for which no payment was received by the service provider. [*Adithya Builders and Developers* v. *Commissioner* – 2022 TIOL 05 CESTAT BANG]

No demand under Cenvat Rule 6(3) for provision of free residential accommodation to employees: Provision of free residential accommodation to the employees is not exempted service for the purpose of demand under Rule 6(3) of the Cenvat Credit Rules, 2004. While holding so, the CESTAT Ahmedabad noted that the assessee was not receiving any value by providing the rental house to their employee within the premises. It also observed that since the house was provided to the employee which are engaged in the manufacture of the final product hence ultimately all the activities got absorbed in the manufacture of the final product which was cleared of payment of duty. [*Ultratech Cement Ltd.* v. *Commissioner* – 2022 TIOL 07 CESTAT AHM]

Limitation for refund of tax paid on advances – Date of cancellation of purchase order is relevant: In a case where the assessee had paid service tax on the amount of advances received but the purchase order was subsequently cancelled and the advance amount was returned, the CESTAT Chandigarh has held that for the purpose of refund of service tax, date on which the purchase order was cancelled is the relevant date. The Tribunal noted that the service tax paid was only a provision for payment of service tax on the services which were to be provided later. It observed that service tax was paid by the assessee provisionally for the services to be provided later on and that the amount so paid provisionally is required to be adjusted when the purchase orders were cancelled. [*Grey Orange India Private Limited* v. *Principal Commissioner* – 2022 VIL 11 CESTAT CHD ST]

Animal or vegetable fertilisers in liquid form, though in packing less than 10 kg, classifiable under TI 3101 0099: The CESTAT Chandigarh has held that animal or vegetable fertilisers in liquid form, even though in packing less than 10 kg (in bottles of sizes 100 ml, 250 ml, 500 ml, 1 litre and 5 litre), would be covered under Tariff Item 3101 0099 and not under Tariff Item 3105 1000 of the Central Excise Tariff. Observing that Heading 3105 covered goods of Chapter 31 in tablets or similar forms or in packages of a gross weight not exceeding 10 kg,

the Tribunal held that the intent of the said entry was that the goods should be in solid form i.e. in the form of tablet or powder. Principle of *nocitur a sociis* and Rule 12 of the Legal Metrology (Packaged Commodities) Rules, 2011 were relied upon. [*Biostadt India Ltd.* v. *Commissioner* - Final Order No. 60009/2022, dated 4 January 2022]

News Nuggets

Limitation for judicial or quasi-judicial proceedings – Supreme Court excludes period from 15 March 2020 till 28 February 2022

Taking into consideration the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, the Supreme Court of India has directed that the period from 15 March 2020 till 28 February 2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

The Apex Court in this regard restored its earlier Order dated 23 March 2020. It also stated that in cases where the limitation would have expired during the period between 15 March 2020 till 28 February 2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 1 March 2022.

The Order dated 10 January 2022 also clarifies that that the said period shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits and termination of proceedings.

NEW DELHI
5 Link Road, Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014
Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave
New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing,
Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden, 2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Phone : +91-80-49331800
Fax:+91-80-49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church,
Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail : lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road,
Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail : lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building
41, Chowringhee Road,
Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59,
Sector 26,
Chandigarh -160026
Phone : +91-172-4921700
E-mail :lschd@lakshmisri.com

GURUGRAM
OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,
Sector 25-A,
Gurgaon-122001
Phone : +91-124-477 1300
E-mail : lsgurgaon@lakshmisri.com

PRAYAGRAJ (ALLAHABAD)
3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.P.)
Phone : +91-532-2421037, 2420359
E-mail : lsallahabad@lakshmisri.com

KOCHI
First floor, PDR Bhavan,
Palliyil Lane, Foreshore Road,
Ernakulam Kochi-682016
Phone : +91-484 4869018; 4867852
E-mail : lskochi@laskhmisri.com

JAIPUR
2nd Floor (Front side),
Unique Destination, Tonk Road,
Near Laxmi Mandir Cinema Crossing,
Jaipur - 302 015
Phone : +91-141-456 1200
E-mail : lsjaipur@lakshmisri.com

NAGPUR
First Floor, HRM Design Space,
90-A, Next to Ram Mandir, Ramnagar,
Nagpur - 440033
Phone: +91-712-2959038/2959048
E-mail : lsnagpur@lakshmisri.com