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Margin Scheme – Few unanswered issues

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Introduction

Generally, GST is payable on the transaction value which is the price paid or payable for the supply of goods and services when transaction takes place between un-related persons and price is the sole consideration for supply. However, a registered person may at his option, discharge tax on sale of used or second-hand goods on the margin amount which is the difference between selling price and purchase price of the goods. This scheme is popularly known as 'margin scheme' across the globe. The purpose of this scheme is to avoid double taxation as these goods (second-hand goods) have already borne the incidence of tax and re-enter in the economic supply chain.

Legal provisions

Section 15 of the Central Goods and Services Tax Act, 2017[1] ('**CGST Act**') and rules made thereunder is a complete code for valuation of supply of goods and services on which tax is payable.

As per Section 15(1) of the CGST Act, the value of supply of goods and services or both between unrelated persons shall be the transaction value, which is the price actually paid or payable for supply of goods or services or both when price is the sole consideration for the supply. Further, sub-section (2) and (3) of Section 15 provides for inclusion and exclusion of certain amount from the value of supply.

However, Section 15(5) of the CGST Act empowers the Government to notify the value of supply in respect of certain transactions, on the recommendation of GST Council, notwithstanding anything to the contrary contained in Section 15(1) and (4) of the CGST Act.

In the exercise of this power, the Government has enacted Rule 32(5) of the Central Goods and Services Tax Rules, 2017 ('**CGST Rules**') which provides that value of supply in case of second-hand goods shall be the margin amount where no input tax credit has been availed on the purchase of such goods.

Further, in the exercise of power conferred by Section 11 read with Section 15 of the CGST Act, the Government has issued Notification Number 08/2018-C.T.R., dated 25 January 2018 which provides for levy of GST at a concessional rate on margin amount in case of sale of second-hand motor vehicles. Further, the margin amount shall be difference between the selling price and depreciated value of the motor vehicle where depreciation on such motor vehicle has been claimed by the seller; and in other cases, it will be the difference between selling price and purchase price.

Analysis of the above provision

As per Section 15(5) of the CGST Act read with Rule 32(5) of the CGST Rules, in case of sale of second-hand goods, tax is payable on the margin amount instead of transaction value which is paid or payable for sale of goods. However, applicability of Rule 32(5) of the CGST Rules for

[1] Similar provision exists in IGST Act, SGST Act and UTGST Act.

arriving at the value of supply is subject to fulfilment of following conditions:

a. The supply must be a taxable supply;
b. The supplier shall be a person dealing in buying and selling of second-hand goods i.e., used goods as such or after such minor processing which does not change the nature of the goods; and
c. where no input tax credit has been availed on the purchase of such goods.

Accordingly, subject to fulfilment of aforesaid conditions, a registered person may opt for margin scheme for payment of GST. Here, it is interesting to note that margin scheme is only a special valuation provision to arrive at the value of supply of second-hand goods for the purpose of payment of tax, and the rate of tax will be same as leviable on un-used goods except in case of motor-vehicles for which Notification Number 8/2018-C.T.R. has been issued for payment of GST at a concessional rate on reduced value (i.e. margin amount).

Whether margin scheme is optional or mandatory?

A doubt may arise whether opting of margin scheme is optional or mandatory for the registered persons dealing in purchase and sale of second-hand goods. In this regard, Rule 32(1) of the CGST Rules clearly provides that value of supply in respect of specified supplies shall at the option of the supplier will be determined in the manner provided in Rule 32 of the CGST Rules. Hence, it can be understood that margin scheme is optional for the taxpayer. Further, the taxpayer opting for margin scheme is barred from availing input tax credit, if any paid on the subject goods being sold under the margin scheme. Accordingly, a taxpayer has option to pay tax on margin amount without availing input tax credit on the subject second-hand goods or pay tax on the transaction value and avail input tax credit.

Reference can be made to the Ruling issued in application filed by *Attica Gold Private Limited* reported at 2020 (36) G.S.T.L. 445 (A.A.R. - GST - Kar.) wherein the Authority held that applicant cannot opt for margin scheme if input tax credit has been availed on the subject goods.

Whether margin amount must be considered qua each transaction or the supplier can compute margin in respect of all transactions executed during a tax period?

Another doubt which may arise whether margin must be computed in respect of each transaction of sale of second-hand goods or it must be considered qua all the transactions executed during a tax period.

In this regard, it may be noted that under GST, tax is payable on each transaction of supply of goods and services. Further, Rule 32(5) of the CGST Rules also provides that the value of supply of second-hand goods shall be the difference between selling price and purchase price. Accordingly, it can be understood that margin amount must be considered *qua* each transaction of supply of second-hand goods and not *qua* the transactions executed in a tax period.

Whether margin amount can be inclusive of GST?

This is a common issue faced by the persons dealing in second-hand goods as they generally do not collect tax amount separately from the customers. Hence, the issue arises whether sale price collected from the customers can be construed to be inclusive of GST payable on the margin amount; and taxable amount and tax can be calculated by way of reverse calculation in the absence of specific provision.

The aforesaid issue was raised in *Deccan Wheels* reported in 2021 VIL 393 AAR, before the Maharashtra Authority of Advance Ruling. However, this question was subsequently withdrawn by the Applicant before the issuance of Ruling, but the concerned officer opined that tax will be payable over and above the margin

amount. Hence, it can be construed that department is of the view that tax will be payable over and above the margin amount.

It is pertinent to note that the Courts in a plethora of judgements, in the erstwhile regime, have held that sale price will be deemed to be inclusive of tax if such tax is not separately collected. However, applicability of this principle is yet to be tested in the court of law in the context of margin scheme where margin amount has been deemed to be the value of supply of second-hand goods. Here, it may be noted that there is a specific provision under UK VAT laws and EU VAT Directive that margin amount will be deemed to be inclusive of tax. However, there is no such specific provision under Indian GST laws.

Considering the ambiguity in the industry, it is highly desirable that CBIC issues circular to clarify the above issue.

Whether input tax credit can be availed by person dealing in sale of second-hand goods?

This is another common issue which is faced by the persons dealing in second-hand goods. Here, it may be noted that the Authority in the case of *Deccan Wheels (Supra)* has held that the Applicant dealing in second-hand motor vehicle will not be eligible to take ITC of any expenses incurred during the course of business. However, the Authority has not given any specific reasoning for reaching at the conclusion. This Ruling is likely to cause confusion in the industry as they generally avail ITC of GST paid on other expenses barring the subject goods. In such a case, CBIC may clarify eligibility of ITC on such expenses.

Conclusion

This scheme enables the taxpayers to pay tax on the margin amount instead of transaction value leading to lower amount of tax on sale of second-hand goods. However, the open issues need to be addressed by the CBIC to bring certainty and uniformity in the industry.

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Goods and Services Tax (GST)

Notifications and Circulars

Exemption and lower rate of tax withdrawn in respect of services provided to a Governmental authority or a Government Entity: With effect from 1 January 2022, the exemption will be withdrawn in respect of pure services or composite supply of goods and services provided to Governmental authority or a Government Entity. Similarly, Governmental Authority or Government Entity have been removed as the specified recipients for the concessional rate of 12%/5%. Amendments have been made for this purpose by Notifications Nos. 16 and 15/2021-Central Tax (Rate), both dated 18 November 2021.

Textiles and textile articles – GST rate set to be enhanced with effect from 1 January 2022: Notification No. 1/2017-Central Tax (Rate) has been amended by Notification No. 14/2021-Central Tax (Rate), dated 18 November 2021 to move majority of the textile and textile articles covered under 5% and 18% slabs to 12% slab. Primarily all goods covered under Section XI - Textile & Textile Articles (i.e. Chapters 50 to 63) of the Custom Tariff Act, 1975 will be subject to GST at 12% with effect from 1 January 2022. It may be noted that certain changes have also been made in job work services in relation to textiles and textile products by Notification No. 15/2021-Central Tax (Rate).

Dynamic QR Code not required when recipient of service located outside India, subject to conditions: The Central Board of Indirect Taxes and Customs ('**CBIC**') has clarified that Dynamic QR Code is not required in case an invoice is issued to a recipient located outside India, for supply of services for which the place of supply is in India, and the payment is received by the supplier in convertible foreign exchange or in Indian Rupees wherever permitted by the RBI. Circular No. 156/12/2021-GST, dated 21 June 2021 has been modified by Circular No. 165/21/2021-GST, dated 17 November 2021 for this purpose.

Refund – CBIC clarifies on various issues: In order to ensure uniformity in the implementation of the GST provisions, the CBIC has clarified that provisions relating to time limit and unjust enrichment are not applicable in case of refund of excess balance in electronic cash ledger. Circular No. 166/22/2021-GST, dated 17 November 2021 also clarifies that the relevant date for filing of refund claim for refund of tax paid on deemed export supplies would be the date of filing of return, related to such supplies, by the supplier. The Circular also clarifies that amount deducted/collected as TDS/TCS by TDS/ TCS deductors under the provisions of Section 51 /52 of the CGST Act and credited to electronic cash ledger can be refunded to the registered person as excess balance in electronic cash ledger.

Ratio decidendi

Right of refund of amount paid during investigation when is independent of process of investigation: The Karnataka High Court has recently directed the Revenue department to consider the application for refund filed by the assessee in respect of the amount paid by the assessee-petitioner during investigation in November 2019. The investigation was not concluded till the hearing before the Court. Considering the facts of the case where it found that the amount was not paid voluntarily, and the assessee was a *bona fide* taxpayer, the Court observed that consideration of the right of refund would be independent of the process of investigation and the two cannot be linked.

The departments contention that since payment was made voluntarily, such payment needs to be construed to be the payment in furtherance of self-ascertainment under Section 74(5) of CGST Act, was rejected by the Court. Further, considering the facts, including that the amount was paid at a time when there was no legal obligation to do so, the Court held that the amount was not paid voluntarily. It noticed that there was apprehension of possible arrest in the minds of the assessee-petitioner when the gates were closed from inside during investigation, etc. Department's contention of alternative remedy was also rejected by the Court while it observed that the question was not significant, when the eventual direction in the present writ petition was only for consideration of the refund application. [*Bundl Technologies Pvt. Ltd.* v. *Union of India* – 2021 TIOL 2073 HC KAR GST]

Refund under Section 77 allowed even where taxpayer himself subsequently finds out the transaction as inter-state or intra-state: Relying upon CBIC Circular dated 25 September 2021 which clarified that refund under Section 77 considers situation even when the taxpayer himself subsequently finds out the transaction as intra-state or inter-state, the Punjab & Haryana High Court has directed the department to refund the amount of CGST and SGST withheld for more than 2 years along with applicable interest. The Court observed that subsequently the amount had also been paid correctly. The petitioner had approached the department seeking refund as they had paid CGST and SGST instead of IGST considering their supply as intra-state transactions. The department insisted that the petitioner pay taxes under correct head first and then the prayer for refund could be considered. The petitioner deposited IGST but the refund was rejected stating that the phrase 'subsequently held' in Section 77 of CGST Act applies only in a case where adjudicating authority had actually held whether a transaction was inter-state or intra-state. [*SBI Cards & Payment Services Limited* v. *Union of India* – 2021 VIL 775 P&H]

Refund permissible of TCS related credit remaining unutilized in electronic cash ledger: The Telangana High Court has rejected the Revenue department's contention that Tax Collected at Source ('**TCS**') is not a tax and the same deposited by the ecommerce operator with the Government can only be utilized for payment of tax by the supplier for outward supplies. The Department had also contended that Section 52 of the CGST Act does not envisage refund. It observed that if TCS is not a tax, then such collection would have to be treated as without authority of law. Further, the court after analyzing Section 54(1) of CGST Act, stated that the said Section covers two different classes of persons who can claim refund namely (i) any person and (ii) registered person and two different types of refund namely (i) tax, interest of any amount and (ii) balance in electronic cash ledger. The court also considered the FAQ on TCS provided under the similar issue and held that the assessee-petitioner was entitled to claim refund of the balance in electronic cash ledger under proviso to Section 54(1) of CGST Act. The petitioner was trading over e-commerce platform. The ecommerce operator had deposited the amount with the Government as TCS as per Section 52 of CGST Act which appeared in petitioner's electronic cash ledger. [*Appario Retail Private Limited* v. *Union of India* – 2021 VIL 760 TEL]

Refund should not be withheld on account of technical glitches: The petitioner became entitled for refund of the amount deposited under Section 129(3) of the Kerala GST Act for release of goods as per the order passed by the Appellate Authority. The department stated that due to technical glitches since the tax was paid through a temporary account, refund cannot be granted through that temporary account. The court directed the department to pay the refund within 30 days and stated that technical glitches shall not stand in way of ultimate relief of the grant of refund to the petitioner. [*Dantara Jewellers* v. *State of Kerala* – 2021 VIL 734 KER]

Refund during pendency of investigation – Department directed to process claim: The Bombay High Court has directed the Revenue department to process the refund application filed by the assessee under Section 16(3)(b) of the Integrated Goods and Services Tax Act, 2017. The department was not processing the refund application due to a pending investigation to secure the interest of the Revenue. The assessee in this case relied upon the provisions of Section 54(10) of the Central Goods and Services Tax Act, 2017 to contend that

department's action of refusing to process the refund application was untenable. [*Evertime Overseas Private Limited* v. *Union of India* – 2021 VIL 723 Bom]

In a similar dispute before the Telangana High Court, where the refund of IGST was denied due to a system alert, the High Court has held that even if the department's claim of non-completion of verification of suppliers of the assessee-petitioner up to two levels as to be accepted, the department ought to have granted provisional refund to the extent of 90% as provided under Section 54(6) read with Rule 91 of the CGST Rules. [*Bhagyanagar Copper Pvt. Ltd.* v. *CBIC* – 2021 TIOL 2143 HC TELANGANA GST]

Form GST-DRC-01 under CGST Rule 142(1) is not a mere formality: The Madras High Court has observed that uploading or serving of summary of show cause in Form GST-DRC-01 under Rule 142(1) of the Central Goods and Services Tax Rules, 2017 is not a mere formality, but it is mandated under the Rule. The Court hence quashed the order passed by the authorities on the same day when GST-DRC-01 notice, that is, summary of notice was uploaded. Remanding the matter for reconsideration after uploading the said form afresh, the Court observed that the assessee should get a chance of getting summary of show cause and to respond the same. [*Balaji Traders* v. *State Tax Officer* – 2021 TIOL 2068 HC MAD GST]

Cancellation of registration on hyper technical ground not sustainable: In a case where the registration was cancelled due to a minor defect in the sub-let agreement, when the assessee was working from home during Covid-19, the Calcutta High Court has held that canceling the registration on such hyper technical ground was not correct. The Court observed that such action will not help the State rather it will cause revenue loss to the State as well as aggravate unemployment problem. The dispute was remanded back for reconsideration. [*Cigfil Retail Pvt. Ltd.* v. *Union of India* – 2021 VIL 800 CAL]

ITC to the extent of capitalisation of repair services not available to housing society: The Maharashtra AAR has held that a housing society registered under the Maharashtra Co-operative Society Act, 1960, cannot claim Input Tax Credit ('**ITC**') on repairs, both major as well as minor, to the extent of capitalisation of the said service. It noted that the applicant was engaged in club or association supply of service as a business and the construction service that was provided by the applicant society to its members was in furtherance of the said business. The Authority held that the supply rendered by the applicant was covered under Section 17(5)(c) and (d) of the CGST Act, 2017. Therefore, it was held that ITC on GST paid on such supply of aforesaid service shall not be available to the extent of capitalisation of the said service. [In RE: *Vishal Cooperative Housing Society Limited* – 2021 VIL 399 AAR]

Valuation – Salaries, EPF/ESI reimbursed by client not excludible from assessable value: In a case where the applicant was providing housekeeping services to a hospital and the hospital management fixed the salary /wages of the housekeepers and supervisor and paid the assessee-applicant the same along with EPF, ESI etc., the Telangana AAR has held that applicant was liable to pay GST on the amount of wages / salaries, EPF/ ESI, etc. reimbursed by the hospital. It observed that the applicant was not a pure agent of the hospital under GST law and that the deductions available under Section 15 of the CGST Act, 2017 did not include the amounts pertaining to EPF, ESI, salary or wages. The AAR was of the view that the entire amount

received from the hospital by the applicant was leviable to GST. [In RE: *Versatile Resource Solutions* – 2021 VIL 385 AAR]

ITC not available even on indirect expenses when benefit of margin scheme claimed: The applicant was engaged in business of sale of second-hand cars wherein the applicant undertook sale of the said cars post minor processing. The applicant did not claim Input Tax Credit ('**ITC**') on purchase of the second-hand cars and had opted for the margin scheme under Notification No 8/2018-Central Tax (Rate). The advance ruling was sought to determine whether the applicant could claim ITC on the indirect expenses incurred for the purpose of business such as rent, commission, professional fees and telephone. The Maharashtra AAR held that since the applicant had been availing the benefit of the said notification and was paying GST at a concessional rate, the applicant could not avail ITC. [In RE: *Deccan Wheels* – 2021 VIL 393 AAR]

ITC not available on inputs/input services used for promotional scheme for distributors, etc.: The Tamil Nadu AAR has held that ITC is not available on GST paid on inputs/input services such as trip to Dubai, gold vouchers, television and air coolers procured by the applicant to implement the promotional scheme for its distributors, retailers and dealers. The Authority held that the said inputs /input services were in the nature of gifts for personal consumption of the receiver. The same was specifically restricted for credit under Section 17(5)(g) of the CGST Act, 2017. Further, the Authority held that the promotional rewards were in the nature of gifts extended to the retailers for promoting their products which were voluntarily distributed by the applicant without any consideration/ tax invoice. The Authority was hence of the view that input tax credit would not be available by virtue of the restrictions in Section 17(5)(g) and Section 17(5)(h) of the CGST Act 2017. [In RE: *GRB Dairy Foods Pvt. Ltd.* – 2021 VIL 391 AAR]

Premium coating on goods belonging to customers qualifies as job work: The Maharashtra AAR has held that the applicant, engaged in rendering premium coating services for various products belonging to its customers, qualifies as job worker. The Authority emphasised on the various components that were necessary for an arrangement to qualify as a job work under Section 2(68) of the CGST Act, 2017 and observed that the applicant had undertaken process on the goods that were supplied by its GST registered principal. It noted that the product that emerged after the coating process was not a different product as the process undertaken had only increased the life span of the said products. It also noted that the title to the goods on which the processes were undertaken was with the principal. Accordingly, the said services were held to be covered under Entry (id) of Heading 9988 of Notification No. 20/2019-Central Tax (Rate). [In RE: *Fine Electro Coating* – 2021 VIL 387 AAR]

Eggs covered as agricultural produce – No GST on rail transportation: The Karnataka AAR has held that eggs are covered as 'agricultural produce' and hence an exemption from GST would be available under Serial No. 20 of Notification No. 12/2017 Central Tax (Rate) for transportation of eggs. Taking note of the definition of 'agricultural produce' under the said notification, the AAR held that fresh eggs in shell on which no further processing is done are covered under the definition of 'agricultural produce'. It noted that there is no condition in the definition that this must be done by a certain type of person to qualify for the definition. [In RE: *SAS Cargo* – 2021 VIL 409 AAR]

Customs

Notifications and Circulars

SCOMET items – Supply to SEZ/EOU and outside India: Existing entry in Para 2.76 of Handbook Procedures (HBP) of FTP 2015-20, relating to supply of Special Chemicals, Organisms, Materials, Equipment, and Technologies (SCOMET) items from DTA to SEZ has been amended and will now incorporate the word 'EOU' along with 'SEZ' , thereby bringing out further clarity in relation to export policy of SCOMET items. The revised para now also provides that export authorisation is required if the SCOMET item is being exported outside India (to another country) from SEZ/EOU. DGFT Public Notice No. 32/2015-20, dated 29 October 2021 has been issued for the purpose.

Courier imports – Registration of authorised couriers to be valid for lifetime: The Central Board of Indirect Taxes and Customs ('**CBIC**') has amended the Courier Imports and Exports (Clearance) Regulations, 1998 and Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010 to provide for lifetime validity of registration of authorised couriers. Hitherto, registration of such couriers was valid only for a certain period and had to be renewed each time. The new provisions now also provide for voluntary surrender and deemed invalidity of registration. The Board has also issued Circular No. 24/2021-Cus., dated 27 October 2021 to explain the above. The Circular also directs Commissioners to rationalise the existence of multiple registration under different regulations, etc.

Tariff rate quota quantity lowered for goods of Heading 1604 and 2208 from Mauritius: The Tariff Rate Quota Quantity for prepared or preserved fish falling under TI 16041410, 16041490, 16042000 of the Customs Tariff Act and Rum and other spirits obtained by distilling fermented sugarcane products covered under TI 22084011, 22084012, 22084091 and 22084092 has been reduced in case of imports from Mauritius. In respect of goods of Heading 1604, earlier the quantity was 7000 tons for each of the three Tariff Items, which has now been reduced to 7000 tons combined for all goods under the three specified TIs. Similar amendment has also been made in respect of goods of Heading 2208 which now specify 1.50 million litres combined for all goods covered under four Tariff Items. Amendment in this regard have been made in Notification No. 25/2021-Cus. by Notification No. 51/2021-Cus., dated 22 October 2021. Also, the date for submission of online applications with DGFT has been extended to 31 January 2022 by DGFT Public Notice No. 38/2015-20 dated 22 November 2021.

Customs duty lowered on imports from Sierra Leone: Sierra Leone has been included in the list of least developed countries under Notification No. 96/2008-Cus. to allow lower rate of customs duties on imports therefrom. Sierra Leone is the 36th country to be granted such benefit subject to compliance of the Customs Tariff (Determination of Origin of Products under the Duty-Free Tariff Preference Scheme for Least Developed Countries) Rules, 2015. Notification No. 96/2008-Cus. has been amended for this purpose by Notification No. 50/2021-Cus., dated 22 October 2021.

Ratio decidendi

Education cess paid using MEIS scrips – Benefit of Circular No. 2/2020-Cus. not deniable: The Madras High Court has held that the benefit of the CBIC Circular No. 2/2020-Cus., dated 10 January 2020 cannot be denied to the importer alleging that the education cess or the higher and secondary education cess being a different component, cannot be treated as customs duty or additional customs duty. According to the Department, the debit of education cesses in the MEIS scrips is not permissible as per the decision of the Supreme Court in the case of *Unicorn Industries Ltd.* Allowing the assessee's petition, the Court also rejected the contention of the Revenue department that neither the education cess nor the higher education cess can be construed as part and parcel of either the customs duty or the additional customs duty. [*KTV Health Food Pvt. Ltd.* v. *Commissioner* – 2021 TIOL 1941 HC MAD CUS]

Certificate of Country of Origin cannot be unilaterally rejected: The CESTAT Kolkata has held that the Country of Origin Certificates are to be considered as conclusive evidence towards the origin of goods when issued by the designated committee of the originating country. Hence, in the absence of material on record questioning their validity, such certificates are to be considered as substantive and conclusive evidence. Further, the Tribunal held that in the absence of enquiry by originating country or any confirmation towards overseas enquiry, the Country of Origin Certificates cannot be unilaterally cancelled. [*So-Hum Trading Co. & Anr.* v. *Commissioner* – 2021 (11) TMI 489-CESTAT Kol]

Refund in absence of re-assessment – Amendment of Bill of Entry – Dictum of *Dimension Data* must be followed: In this case, the assessee made an application for amendment of bill of entry as excess duty was earlier paid by mistake. Aggrieved by the order of rejection for amendment, the assessee filed for correction of clerical errors under Section 154 of Custom Act, 1962. However, application under Section 154 of Customs Act was also rejected on the ground that it is a form of re-assessment only. The CESTAT Bengaluru, taking into account the dictum of *ITC Ltd.* v. *Commissioner* [2019 (368) ELT 216 (SC)] and *Dimension Data* [2021-TIOL-224-HC-MUM-CUS], directed the adjudicating authority to follow the directions laid down in *Dimension Data* for amendment of Bill of Entry as per Section 149 read with Section 154 of the Customs Act, 1962. [*Kluber Lubrication India Pvt. Ltd.* v. Commissioner – 2021 VIL 633 CESTAT BLR CU]

It may be noted that in another dispute where the Revenue department had amended the Bills of Entry by re-assessing the same under Section 149 of the Customs Act, 1962, the CESTAT Mumbai has allowed the assessee's appeal. Contention of the Revenue that the assessee had not filed appeal against the Bills of Entry was held to be incorrect. The Tribunal was of the view that once the Bills of Entry was re-assessed and the refund was arising out of it, nothing existed there against which any appeal was required to be filed. [*Brightpoint India Pvt. Ltd.* v. *Commissioner* – 2021 VIL 620 CESTAT MUM CU]

Seizure – Time limit to issue show cause notice applicable when provisional release not availed: Observing that the petitioner did not avail the release of the goods pursuant to the passing of the order of provisional release, the

Bombay High Court has held that the rigors of sub-section (2) of Section 110 of the Customs Act, 1962 will continue to apply as the character of the goods continue to be goods seized under sub-section (1). The Court was of the view that hence the Customs authority was required to issue a show cause notice under clause (a) of Section 124 within six months of the seizure of the goods, i.e., within the time specified in Section 110(2). The second proviso to sub-section (2) of Section 110 provides exemption from application of time limit of six months to cases in which an order of provisional release of seized goods has been passed. [*Indosheel Mould Ltd.* v. *Union of India* – 2021 TIOL 2118 HC MUM CUS]

Penalty – No mis-declaration by recipient of foreign courier: Relying on the decision of *UPS Jetair Express Pvt. Ltd.* v. *CC* where the Tribunal had held that handling in course of professional engagement does not imply knowledge, the CESTAT Delhi has set aside penalty on a bank which was a recipient of a foreign courier containing demonetized currency (prohibited goods). Taking note of the Section 82 of the Customs Act, as was relevant during time of import, it held that the bank as the recipient cannot be held liable for wrong declaration on the courier. It noted that there was nothing to show or indicate that it was appellant-bank who had willfully or intentionally made the declaration. [*Citibank NA* v. *Commissioner* – 2021 VIL 628 CESTAT Del CU]

Demand – Limitation period for clearances before 8 April 2011: Distinguishing the Supreme Court decision in the case of *Mysore Rolling Mills Private Limited* [1987 (28) ELT 50 (SC)], the CESTAT Bengaluru has granted relief to an assessee in a case where the clearances were made before 8 April 2011, the date when the time period for normal limitation for demand was extended from 6 months to one year. It noted that unlike the Supreme Court decision where a new provision (extended period for limitation) was introduced, the present case dealt with an amendment in the existing provision. Reliance in this regard was also placed on Section 28(10) of the Customs Act, 1962. [*Agappe Diagnostics Ltd.* v. *Commissioner* – 2021 VIL 561 CESTAT BLR CU]

Sweet corn is not 'cereal' for exclusion from Chapter 12 of Customs Tariff: The CESTAT Mumbai has held that 'sweet corn' is not 'cereal' for the purposes of exclusion from Chapter 12 of the First Schedule to the Customs Tariff Act, 1975. The Tribunal in this regard noted that the use is not the criteria for classification, save where the same is explicitly intended. Rejecting Department's plea of classification under Chapter 10, it observed that though the tariff accorded recognition of the product as 'cereals' to enable national policy to be determined accordingly and within the enumerations under the relevant subheading., nonetheless, 'sweet corn', though a fresh cereal, is further excepted from such coverage by the general notes pertaining to Chapter 10 in the Explanatory Notes to the Harmonized System of Nomenclature (HSN). [*Syngenta India Ltd.* v. *Principal Commissioner* – 2021 VIL 640 CESTAT MUM CU]

Central Excise, Service Tax and VAT

Notifications and Circulars

Exclusion from pre-show cause notice consultation is case-specific and not formation specific: The CBIC has clarified that exclusion from pre-show cause notice consultation is case-specific and not formation specific. The clarification by Circular No. 1079/03/2021-CX, dated 11 November 2021 was issued to a reference from the Directorate General of GST Intelligence ('**DGGI**') to clarify whether DGGI formations fall under the exception/exclusion category of the CBIC's instruction dated 21 December 2015. The Board in this regard reiterated that pre-show cause notice consultation is not mandatory for cases booked for recovery of duties/taxes not levied or paid or short levied or short paid or erroneously refunded by reason of fraud, collusion, wilful mis-statement, suppression of facts, or contravention of any of the provision of the Central Excise Act, 1944 or Chapter V of the Finance Act, 1994 (or the rules) with the intent to evade payment of duties/taxes.

Ratio decidendi

Export of service – Service provided to related person registered abroad is not provision to 'any other establishment': Relying upon Gujarat High Court decision in the case of *Linde Engineering India Pvt. Ltd.*, the CESTAT Ahmedabad has held that the foreign recipient of the services provided by the assesses were not mere 'other establishments' of the assessee registered in India. The Revenue department had alleged that though the related parties of the assessee may be registered as separate entities in their respective countries under their respective Acts, it did not absolve their status of being 'any other establishments of the assessee' and that the criteria of being 'any other establishment' has nothing to do with the place of registration. Observing that each of the service recipient was an independent company registered in their respective countries, the Tribunal held that services provided by the appellant qualified as export of services, under Rule 6A of Service Tax Rules, 1994. Demand under Rule 6 of the Cenvat Credit Rules, 2004 was also set aside observing that the service provided was not exempted service. [*L&T Sargent & Lundy Limited* v. *Commissioner* – 2021 VIL 564 CESTAT AHM ST]

'Manufactured sand' covered under 'sand' – Common parlance is the best way to classify goods: Applying the principle of common parlance, the Karnataka High Court has held that 'sand' includes 'manufactured sand' in whatever name it would be called. It held that Notification dated 31 March 2015 was only clarificatory and would not disentitle the assessee to claim the reduced rate of tax at 5/5.5% under Entry 83 of the Third Schedule of the Karnataka Valued Added Tax Act. The department had relied upon the said notification, reducing the rate of tax on manufactured sand to 5%, to conclude that prior to 31 March 2021, the 'manufactured sand' was liable to be taxed under the residuary entry at 14.5%. Reading the specified Entry 83 which read as 'sand and grits', the Court observed that if the intention of the Legislature was to exclude 'manufactured sand', it would have made it clear in the entry itself.

The Court also noted that the 'Robo Sand' i.e., 'manufactured sand' and the 'river/natural sand'

had similar physical properties as per the report of the Department of Civil Engineering of the Indian Institute of Science. Relying upon various Supreme Court decisions, the High Court also noted that common parlance test is the best way to classify the goods *vis-à-vis* the determination of rate of tax. [*Robo Silicon Pvt. Ltd.* v. *State of Karnataka* – 2021 VIL 778 KAR]

Cenvat credit – Nothing in Rule 6(3) which required approval of formula by any competent authority: In a case where furnace oil was a common input, procured jointly for all the products and also used to generate steam which was further used for manufacture of dutiable as well as exempted products, the CESTAT Delhi has allowed the appeal of the assessee. Observing that the furnace oil had gone into production of steam which was further used in manufacture of syrup, which was further used in manufacture of both dutiable and exempted products, it held that accounts could only be maintained by corresponding credit and debit entries reversing proportionate amount of Cenvat credit. It noted that the quantity of furnace oil attributable to unit quantity of each of those products (dutiable or exempted) was a technical matter and the assessee had used the technical report to debit the amount. It noted that there was nothing in the Commissioner's order to show that the calculations were wrong and by how much. Allowing the assessee's appeal, the Court also held that there was nothing in Rule 6(3) of the Cenvat Credit Rules, 2004 which designated a Competent Authority or which required of approval of the formula by any Competent Authority or by the Commissioner. [*Hamdard (Wakf) Laboratories* v. *Commissioner* – 2021 VIL 630 CESTAT ALH CE]

Refund of credit which could not be carried forward in Tran-1: The CESTAT Chennai has held that payment of tax, after being pointed out by the audit officers, does not fall under the scope of recovery of arrears of tax by an assessment or adjudication proceedings. The Tribunal was hence of the view that Section 142(8) of the CGST Act, 2017, according to which benefit of availment of credit is not available when the assessee pays the tax after assessment or adjudication proceedings, was not applicable for denying refund of such tax paid under RCM of which ITC was available to the assessee. The assessee could not carry forward the credit to GST regime. The Tribunal was of the view that when the department admitted that the credit was eligible, then it ought to have refunded the amount as the appellant could not carry forward the credit to Tran-1. Sub-section (3) of Section 142 was held to be attracted. [*Terex India Pvt. Ltd.* v. *Commissioner* – 2021 TIOL 696 CESTAT MAD]

Lubricants are not excisable goods for exclusion from Sabka Vishwas (LDR) Scheme: The Madras High Court has held that lubricants cannot be considered to be excisable goods for the purposes of exclusion from the Sabka Vishwas (Legacy Dispute Resolution) Scheme. Observing that the rate of duty against 'lubricants' was blank, the Court held that the mere mention of the commodity in the 4th Schedule to the Central Excise Act, 1944 would not be a bar to the consideration and acceptance of the petitioner's application under the SVLDRS Scheme. Referring to the Supreme Court decision in the case of *Moti Laminates*, the Court held that mere mention of the commodity without the rate of tax would serve no purpose as far as excisability is concerned. Allahabad High Court's decision in the case of *Indian Oil Corporation*, which held to the contrary, was distinguished. [*Indian Oil Corporation Ltd.* v. *Commissioner* – 2021 TIOL 2085 HC MAD CX]

Manufacture – Assembly simpliciter, including fitting and minor adjustments, does not constitute 'manufacture': The Madras High Court has held that the activity of assembly of the prescription lenses and the spectacle frames wherein the lenses are merely mounted upon the frames, to result in a spectacle, is not 'manufacture' for the purpose of levy of Central Excise duty. The Court observed that though the minute break-down of the machinery and the processes indicated a chain of events requiring skill and sophistication, that were very significant in magnitude and impact, the end result of all the processes only resulted in assembly of the lens with the frame. It was of the view that process of assembly is bound to involve some amount of refining and fine-tuning of the individual components and this, by itself, will not tantamount to 'manufacture'. It also held that production of a distinct commercial product was immaterial. [*Titan Company Limited* v. *Commissioner* – 2021 VIL 744 MAD CE]

Compensation received for cancellation of allotment of mines is not for tolerating an act, not liable to service tax: In a case where the allotment of mines were cancelled by the Supreme Court and later under the provisions of the Coal Mines (Special Provisions) Act, 2015, the assessee was provided some compensation, the CESTAT Kolkata has held that service tax cannot be levied on the amounts received by the assessee as compensation. Rejecting Revenue department's contention that the assessee had tolerated the act of cancellation, the Court noted that the assessee had no choice of tolerating cancellation or not. It noted that both the cancellation of the allocation of the blocks and the receipt of compensation were by operation of law. [*MNH Shakti Limited* v. *Commissioner* – 2021 VIL 600 CESTAT KOL ST]

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