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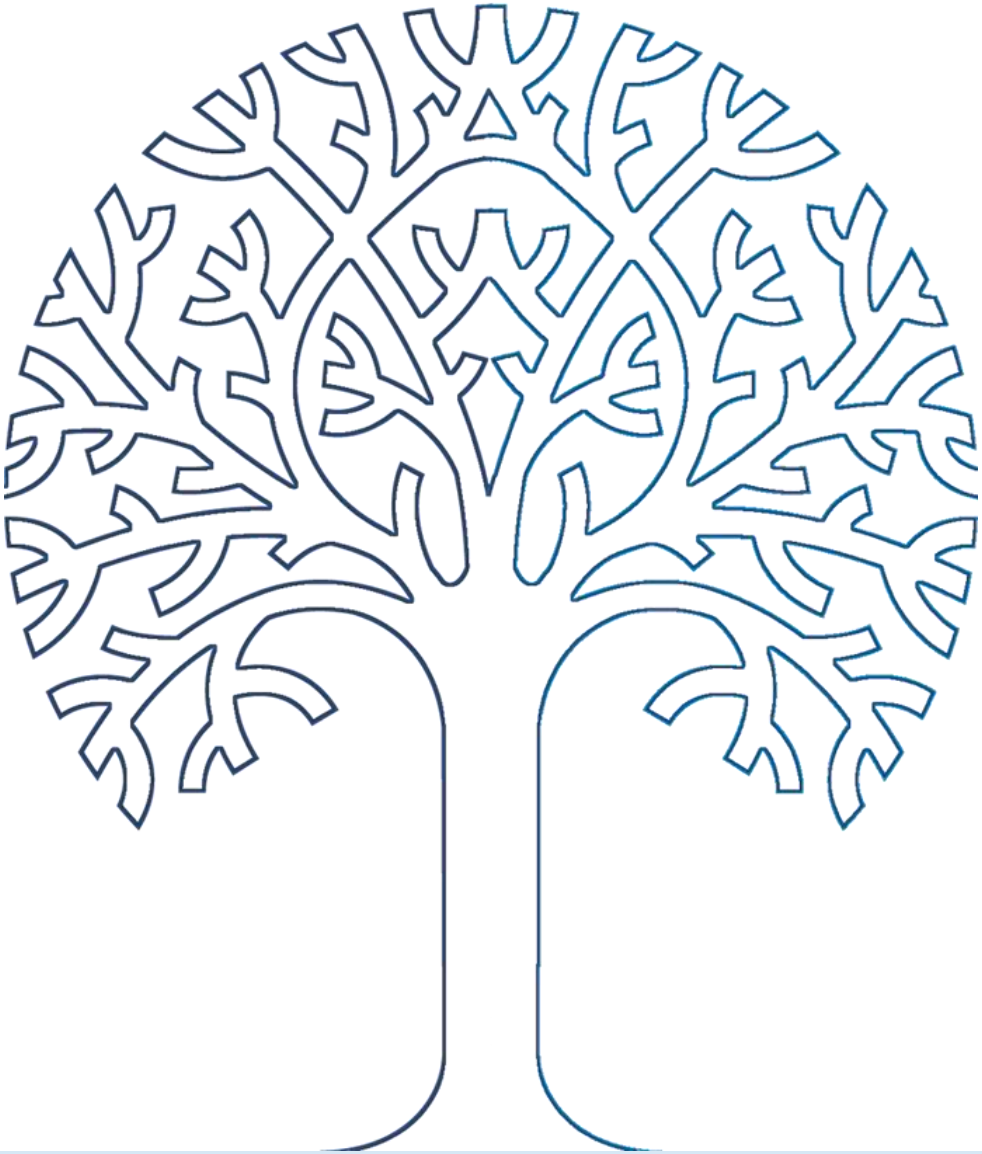

Article

Dry lease of aircrafts under GST: A classification conundrum

By Priyanka Kalwani, Devanshi Sharma and Aanchal Kesari

The article in this issue of Tax Amicus discusses elaborately the problems of classification and rate of GST in case of dry leasing of an aircraft. In respect of classification, the authors note that there is no specific mention of aircrafts under the Explanatory Notes to sub-heading 997311 or under the residuary entry 997319, though the Service Code 7311 of the UNCPC provides for transport equipment and specifically includes aircrafts. For rate of tax, the authors note that though it can be argued that aircrafts are covered under Sl. No. 17(viia) of Notification No.11/2017-Central Tax (Rate) and the rate of tax on leasing or renting would be 5%, the Revenue department may contend that Heading 9973 does not cover transport vehicles and therefore, such services are classifiable under the residuary entry, attracting GST at the rate of 18%. The authors conclude by stating that a clarification from the government is much needed on the correct classification and rate of GST applicable on the dry leasing of transport vehicles including aircrafts.

Dry lease of aircrafts under GST: A classification conundrum

In today's fast-paced world, it has become a common practice for businesses to lease aircrafts for travel of their personnel. Such aircrafts may be leased with or without operator.

A dry lease is a leasing arrangement where an aircraft is leased without any crew and ground staff, wherein the lessee has operational control over the aircraft. Whereas a wet lease is an arrangement where the aircraft is leased along with the crew and the ground staff.

Prior to 1 October 2019, Heading 9966 of the Scheme of Classification of Services ('**SOC**') covered 'Rental services of transport vehicles ***with or without*** operator'. Similarly, Heading 9973 covered 'Leasing or rental services ***with or without operator***'.

Notification No. 20/2019-Central Tax (Rate) dated 30 September 2019 ('**Amending Notification**') amended Headings 9966 and 9973, as well as the Rate Notification[1] by omitting the terms 'or without' from Heading 9966 and 'with or' from Heading 9973. At present, sub-heading 9966 specifically covers rental services for various transport vehicles such as road vehicles, water vessels, aircrafts with operator.

These changes have prompted a debate on the correct classification of leasing of aircrafts without operator.

Heading 9973 of the SOC covers leasing or renting of machinery and equipment, other goods, IPR, etc. The sub-heading 997311 covers 'Leasing or rental services concerning transport equipment including containers, without operator'. The Explanatory Notes to the SOC for sub-heading 997311 clarifies that such sub-heading includes leasing or rental services of intermodal containers and other land transport equipment without operator.

Further, it is pertinent to note that the residuary entry, i.e. sub-heading 997319, includes leasing, renting or hiring services concerning all kinds of machinery, whether or not electrical, except personal or household goods, generally used as capital goods by industry, such as engines and turbines, machine tools, mining and oil field equipment, lifting and handling equipment, coin/card operated gambling machines, exhibition material, professional, scientific measuring and control apparatus, accommodation and office containers, other commercial and industrial machinery, etc.

Thus, there is no specific mention of aircrafts under the Explanatory Notes to sub-heading 997311 or under the residuary entry 997319. The Explanatory Notes for the SOC adopted for the purposes of GST are based on the explanatory notes to the UNCPC. The Service Code 7311 of the UNCPC provides for transport equipment. The said code specifically includes cars, light vans,

[1] Notification No.11/2017-Central Tax (Rate) dated 28.06.2017

goods transport vehicles, railroad vehicles, other land transport equipment, vessels, **aircrafts,** and containers.

Unlike the UNCPC, the Indian SOC or the Explanatory Notes offer no clarification as to whether dry lease of transport vehicles such as motor vehicles, vessels and aircrafts would fall under Heading 9973. It is possible to take a view that in light of the UNCPC, the term 'transport equipment' under the Indian SOC will also cover transport vehicles such as aircrafts, and accordingly, dry lease thereof is classifiable under Heading 9973. This view also finds support from the minutes of the 37th GST Council Meeting wherein it was observed that the Amending Notification was issued to align the classification under GST with UNCPC.

The next issue that arises for examination is the rate of GST applicable on dry leasing of aircrafts. Sl. No. 17 of the Rate Notification covers 'Leasing or rental services without operator'. The relevant entries under Sl. No. 17 are as under:

- (viia) Leasing or renting of goods – Same rate of tax as applicable on supply of like goods involving transfer of title in goods
- (viii) Leasing or rental services, without operator, other than (i), (ii), (iii), (iv), (vi) and (viia) above – 18%

It can be argued that the definition of 'goods' as per Section 2(52) of the Central Goods and Services Tax Act, 2017 ('**CGST Act**') is wide enough to cover aircrafts. This argument can be further substantiated based on the fact that aircrafts are covered under Sl. No. 244 of the Rate Notification[2] for goods. The rate of GST on aircrafts for other than personal use under this entry is 5%.

Recently, the Appellate Authority for Advance Ruling, Karnataka in the case of In RE: *Yulu Bikes Pvt. Ltd.* [2020 (10) TMI 434], concluded that the services of renting or leasing of e-bikes provided by the appellant without an operator is classifiable under the Heading 9973 and that the rate of GST applicable will be as per Sl. No. 17(viia) i.e., the same rate of tax as applicable on the supply of like goods involving transfer of title in goods.

Regardless of the above, the Department may contend that Heading 9973 does not cover transport vehicles and therefore, such services are classifiable under the residuary entry, attracting GST at the rate of 18%.

It is evident that there is much ambiguity on the issue of classification of dry lease of aircrafts under GST. At this juncture, it may be highlighted that the Input Tax Credit on renting or leasing of aircrafts is restricted in terms of Section 17(5)(b)(i) of the CGST Act, unless it is used for the purposes specified therein. Thus, the tax paid on such leasing services becomes a major cost for the service recipient which results in blocking of the working capital.

Therefore, a clarification from the government is much needed on the correct classification and rate of GST applicable on the dry leasing of transport vehicles including aircrafts.

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[2] Notification No. 1/2017-Central Tax (Rate) dated 28 June 2017.

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Notifications and Circulars

GST Rate notifications amended to bring into effect recommendations of 49th GST Council Meeting

Pursuant to the recommendations made by the GST Council in its 49th meeting held on 18th February 2023, the Ministry of Finance has revised Notifications Nos. 1/2017-Central Tax (Rate), 2/2017-Central Tax (Rate), 12/2017-Central Tax (Rate), 13/2017-Central Tax (Rate), and 1/2017- Compensation Cess (Rate). Notifications Nos. 1 to 4/2023-Central Tax (Rate) and No. 1/2023-Compensation Cess (Rate), all dated 28th February 2023 have been issued for the purpose. All the amendments have come into force with effect from 1st March 2023. Some of the changes are highlighted below.

- GST rate on Rab (semi-solid sugarcane juice) has been reduced from 18% to 5% in case where the same is sold as pre-packed and labelled. Rab will be exempt from GST in all other cases.
- GST rate has been reduced on pencil sharpeners from 18% to 12%.
- Exemption granted to National Testing Agency or authority or body set up for conducting entrance examination for admission to educational institutions.
- Taxable services supplied by Courts and Tribunals are now chargeable to GST on reverse charge basis.
- Exemption from compensation cess granted to coal rejects supplied to a coal washery..

Ratio Decidendi

Directing summoning party to stop payment to the assessee is beyond the scope of CGST Section 70(1)

The Andhra Pradesh High Court has held that directing the summoned party to stop payment to the assessee is beyond the scope of Section 70(1) of the Central Goods and Services Tax Act, 2017. The Court noted that Section 70(1) only says that the proper officer shall have the power to summon any person whose attendance is considered necessary either to give evidence or to produce a document or any other thing in the enquiry and nothing more. Further, observing that the impugned notice was

issued under Section 70(1) and not in exercise of powers conferred under Section 83, the Court held that the Department exceeded his power in directing the summoned party to stop further payments to the petitioner-assessee. [*Sri Sai Balaji Associates* v. *State of Andhra Pradesh* – 2023 VIL 165 AP]

Show cause notice just to extend blocking of credit ledger is not acceptable

In a dispute pertaining to blocking of credit ledger, not un-blocking the same on expiry of one year, and then appropriating the blocked ITC against a tax demand, the Delhi High Court has set aside the show cause notice, the subsequent order and the Instructions dated 8th March 2022 issued by the Department of Trade & Taxes (Policy Branch), Government of NCT, New Delhi. The Court noted that counter affidavit filed by Revenue clearly established that the impugned show cause notice was issued in a mechanical manner and solely for the reason that the assessee's ITC was required to be unblocked as the period of one year had elapsed after it was blocked. The Court was also of the view that the impugned show cause notice was issued in a mechanical manner and was not in conformity with the provisions of Section 74 of the CGST Act, 2017. The Court also noted that even the impugned order was passed solely to deprive the assessee from utilising the ITC, which could no longer be kept blocked.

Further, observing that Rule 86A of the Central Goods and Services Tax Rules, 2017 provides for a drastic measure of blocking ITC, the High Court also held that existence of a 'reason to believe' that the ITC has been availed fraudulently or the conditions of ineligibility, as specified in clauses (a) to (d) of Rule 86A of the CGST Rules, 2017, are satisfied, is necessary to trigger the action under Rule 86A. The Court in this regard noted that the Revenue Authority (SGST Authority) had no tangible material to form any belief that the ITC lying in the assessee's ECL was on account of any fake invoice, and that it had proceeded to act solely on the basis of a direction issued by another authority (CGST Authority). [*Parity Infotech Solutions Pvt. Ltd.* v. *Government of NCT of Delhi* – 2023 VIL 162 DEL]

Intimation in Form GST DRC-01A and show cause notice under Section 73(1) – Simultaneous uploading is wrong

In a case where the notice under Section 73(1) of the CGST Act, 2017 and the intimation in FORM GST DRC-01A was uploaded simultaneously, the Uttarakhand High Court has quashed the order passed by Deputy Commissioner, State Tax, and allowed the writ petition filed by the assessee. Remanding the matter back to the Competent Authority, the Court noted that the assessee was denied a valuable right of filing his submission in response to the intimation in Form GST DRC-01A. [*Ravi Enterprises* v. *Commissioner* – 2023 VIL 142 UTR]

Penalty not sustainable under Section 129 on goods seized from godown

The Calcutta High Court has allowed assessee's writ petition in a case where the Revenue was of the view that since the goods had not reached the end point as mentioned in the e-way bill, the goods were in transit, and that the goods ought to have been covered with valid e-way bills till the time of delivery to the recipient. Observing that the goods were not seized while in

transit but were seized from a godown, two days after the expiry of the e-way bill, the Court held that as the goods were not confiscated while on the move, imposition of penalty under Section 129 of the CGST Act is erroneous and bad in law. The Court noted that the authority had not come up with a case that the goods ought not to have been offloaded and stored at the said godown but should have been transported to the place mentioned in the e-way bill. The Court also noted that despite the shortfall in the quantum of goods available in the said godown, the authority never questioned the identity and quantum of the goods apropos the expired e-way bill. [*Sandip Kumar Singhal* v. *Deputy Commissioner* – 2023 VIL 164 CAL]

GST Tribunal – Bombay High Court suggests measures to reduce writ petitions due to non-constitution of GST Tribunal

The Bombay High Court has suggested two measures in order to reduce the inflow of writ petitions arising due to the non-constitution of the GST Tribunal. According to it, the Revenue department should consider incorporating a stipulation contained in Clause 4.3 and Clause 5 of the Commissioner of State Tax, Maharashtra State, Mumbai Trade Circular No. 9T/2020, dated 26th May 2020 in the order passed by the First Appellate Authority. As per the abovementioned clauses, the time limit for filing the appeal stands extended and if a declaration is filed in terms of Annexure-I within the stipulated period, the protective measure would automatically come into force. Secondly, the Department should consider to give 15 days' period to make such declaration in case recovery is being undertaken in terms of Clause 5 for failure to file a declaration within the time limit. [*Gulf Oil lubricants India Ltd.* v. *Joint Commissioner* – 2023 VIL 132 BOM]

E-way bill not cancelled though vehicle made available only after 10 days – Misuse of statutory provisions

The Allahabad High Court has dismissed assessee's writ petition in a case where the dealer had waited for 10 long days and did not cancel the E-Way Bill generated by him on common portal, though the vehicle was not provided by the transporter. The Court in this regard noted that once, Part-B of Form GST EWB-01 is filled, a presumption is raised that the goods are in movement. Terming it as complete misuse of the statutory provisions, the Court also noted that the counter affidavit reflected movement of the vehicle through various Toll Plazas on relevant dates and was established that number of trips were made to other places through one and the same document and also through one and the same vehicle. [*Ayann Traders* v. *State of U.P.* – 2023 VIL 147 ALH]

Refund of IGST when exporter's supplier received fake invoices

The Delhi High Court has allowed a writ petition filed by the assessee in a case where the assessee's applications for refund of IGST due to exports were not processed, as the supplier from whom the assessee had purchased the goods had allegedly received fake invoices from its suppliers. The Court in this regard noted that there was no conclusive finding based on any cogent material that the invoices issued to the assessee were fake

invoices. It also noted that it was established that the goods were exported and that the assessee had paid for the same including the IGST and Cess. The Court also found merit in the contention of the assessee that it is not required to examine the affairs of its supplying dealers. [*Balaji Exim* v. *Commissioner* – 2023 TIOL 333 HC DEL GST]

Development of land before sale of land is not supply of service

The Karnataka Appellate AAR has held that development of land before the sale of land is not a supply of service. The AAAR in this regard rejected the contention of the Department that development of land with the required infrastructure before its sale would be covered under the clause 'construction of a complex intended for sale to a buyer'; that the activity of the developer-Assessee is covered under 'construction services' and GST is payable on the sale of developed plots. The Department had also contended that if the buyer enters into a contract/agreement with the developer, when the development of land is in progress (before the completion), the activity of development is taxable. Observing that the developed roads, drains, water supply lines and tanks, electricity lines and sewerage facilities were not sold to the purchasers of plots in the layout, the Appellate AAR was of the view that undertaking of the development works by the owner cum developer was not a service rendered to the buyer when the buyer does not receive the ownership of the development works and infrastructure. It also held that the developer-Assessee was undertaking the development works as per the mandatory statutory requirement and any amounts received from interested buyers was only an advance for the purchase of land and not for the development works. [In RE: *Rabia Khanum* – 2023 VIL 11 AAAR]

ITC is to be reversed on sale of alcoholic liquor for human consumption by a restaurant, as same falls under 'non-taxable supply'

The West Bengal AAR has held that the assessee, providing restaurant services, is obliged to reverse ITC in view of the sale of alcoholic liquor for human consumption effected by it at its premises. The AAR in this regard held that the sale of liquor for human consumption is a supply under GST on which tax is not leviable, and thus would qualify to be a non-taxable supply. On conjoint reading of Section 2(47) and 2(78) of the CGST Act, 2017, the AAR was of the view that the subject supply would also be treated as exempt supply, and the assessee is required to reverse ITC attributable to the exempt supply under Section 17(2) of the CGST Act read with Rule 42 of the CGST Rules, 2017. The Authority for this purpose also rejected the contention that reversal of ITC would in other way mean discharging of GST liability on output supply of alcoholic liquor for human consumption. [In RE: *Karnani FNB Specialities LLP* – 2023 VIL 30 AAR]

No ITC if preceding seller (not the current seller) has not discharged liability

The Punjab AAR has held that the purchaser is not entitled to claim Input Tax Credit on the purchases made by it from the seller who had discharged its tax liability but where the preceding seller

has not discharged its liability. The Authority in this regard took note of Section 16(2)(c) of the CGST Act, 2017 and noted that no registered person is entitled to take the credit of any input tax in respect of any supply unless the tax charged in respect of such supply has been actually paid to the Government. It was of the view that if the seller or preceding sellers have not deposited the tax earlier, purchaser is not eligible to claim ITC on such supply. [In RE: *Vimal Alloys Pvt. Ltd.* – 2023 VIL 42 AAR]

Renting of residential dwelling to a registered person would attract RCM irrespective of nature of use

The Odisha AAR has held that the service received by a registered person by way of renting of residential premises used as guest house of the registered person is subject to GST under reverse charge mechanism. The issue pertained to applicability of Notification No. 05/2022-Central Tax (Rate) dated 13th July 2022 which brought an amendment to Notification No. 13/2017-Central Tax (Rate) by inserting Sl. No. 5AA. As per the abovementioned notification, with effect from 18th July 2022, service by way of renting of residential dwelling to a registered person shall be attracting GST under reverse charge mechanism. The applicant had contended that 'residential dwelling' was not defined under GST or in the earlier service tax regime, and the term 'guest house' is not covered within the ambit of residential dwelling according to normal trade parlance. The AAR however noted that the type or nature or purpose of use of such residential dwelling i.e., whether for residence or otherwise by the recipient, was not a condition in the said RCM notification. [In RE: *Indian Metals and Ferro Alloys Limited* – 2023 (3) TMI 622- Authority for Advance Ruling, Odisha]

Supply of ice cream at outlet is covered under restaurant service only when supplied along with food

The Gujarat AAR has held that the supply of ice cream from the outlets of the assessee-applicant cannot be considered as supply of 'restaurant services'. It, in this regard, was of the view that supply of readily available ice creams, not prepared in their outlets and sold over the counter, is supply of goods, leviable to GST @ 18%. The Authority was however of the view that an ice cream when ordered and supplied along with cooked or prepared food through their outlets would assume the character of composite supply, wherein the prepared food was the principal supply. The latter supply was hence held as qualifying as 'restaurant services' leviable to GST at the rate of 5% with no Input Tax Credit. [In RE: *HRPL Restaurants Pvt. Ltd.* – 2023 (3) TMI 54-Authority for Advance Ruling, Gujarat]

Job work – Retaining certain amount from inputs before manufacture is not normal loss/wastage

The West Bengal AAR has observed that retaining a certain amount from the input before it is put into the manufacturing process cannot be treated as 'wastage' or 'normal loss'. The business model of the assessee-applicant involved receiving 1000g of pure gold for manufacturing of ornaments and an

allowance by the principal for wastage of 40g. The assessee-applicant would sub-contract the order to another job worker with an allowance of waste of 30g. The question before the Authority was to determine the taxability of 10g of pure gold, retained by the applicant in the course of manufacture of gold jewellery. The Authority in this regard was of the view that the price was not the sole consideration for the supply and the value of such excess wastage allowed to the applicant shall be considered as non-monetary consideration. The Authority held that the value of 10g of pure gold shall form a part of the value of supply of job work services provided by the assessee-applicant. [In RE: *Aabhushan Jewellers* Pvt. Ltd. – 2023 (2) TMI 873-Authority for Advance Ruling, West Bengal]

GST on trading of tobacco leaves without processing or after coating

The Gujarat AAR has held that in case of purchase of tobacco leaves from the farmer, the assessee-applicant is liable to pay GST on RCM basis at 5% in terms of Sr. No. 109 of Schedule I of Notification No. 01/2017-Central Tax (Rate) 28.6.2017. Further it was held that the assessee-applicant is liable to pay GST on forward charge basis at 5% in terms of Sl. No. 109 of Schedule I of the Notification in respect of trading of tobacco leaves procured from farmer subject to the condition that there are no further processes on the same. The Authority also held that in case of supply of unmanufactured tobacco leaf consequent to coating the same with natural edible gum, the assessee-applicant is liable to pay GST at 28% in terms of Sl. No. 13 of Schedule IV of the Notification. It was however made clear that in case of supply of the said coated tobacco to the customers in gunny bag with their name being printed/mentioned on the gunny bags so as to identify the lot, the applicant would also be liable to pay 71% compensation cess additionally in terms of Notification No. 01/2017-Compensation Cess (Rate). Further, the Authority was of the view that the assessee-applicant was liable for payment of GST at the rate of 12% in terms of Notification No. 20/2019-Central Tax (Rate) on the job work process of coating, done in respect of tobacco leaves supplied by other registered persons. [In RE: *JCP Agro Process P. Ltd.* – 2023 (3) TMI 786-Authority for Advance Ruling, Gujarat]

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- Stepper motor classifiable under Tariff Item 8501 10 12 – Customs AAR

Notifications and Circulars

India-Australia FTA – Origin procedures clarified

The Ministry of Finance has clarified on various aspects of rules of origin (ROO) and operational certification procedures (OCP) of the India-Australia Free trade Agreement. As per Instruction No. 10/2023-Cus., dated 10th March 2023,

- printed copy of e-COO (electronic certificate of origin) needs to be presented to the Customs officer in lieu of defacing the original hard copy of a certificate of origin.
- affixing of QR Code on the COO/e-COO is not a requirement for valid COO/e-COO.
- absence of Overleaf Notes on the COOs received from Australia may not be a ground for initiating verification or denial of preferential benefit.
- so long as the details on the COO and the transport documents match, putting 'any ports in India' in the Port of Destination field of the COO by Issuing Bodies of Australia may not be a ground for initiating verification or denial of preferential benefit.

Milk, fish and pork, and their products – Requirement of health certificate for import deferred

The Food Safety and Standards Authority of India (FSSAI) has deferred till further orders the requirement of health certificate issued by competent authority of the exporting country for import of milk and milk products, fish and fish products, and pork and pork products. The requirement was to come into effect from 1st of March 2023. Instruction No. 8/2023-Cus., dated 3rd March 2023 shares FSSAI Order dated 24th February 2023 for this purpose.

Crude soya-bean oil and crude sunflower seed oil – Tariff Rate Quota exemption now limited only till 31 March 2023

The exemption from basic customs duty (BCD) and agriculture infrastructure and development cess (AIDC), in respect of import of 20 lakh MT/financial year of crude soya-bean oil and crude sunflower seed oil each, under Notification No. 30/2022-Cus. is now limited only till 31st March 2023. The benefit was earlier available till 31 March 2024. Notification No. 15/2023-Cus., dated 3rd March 2023 has been issued for the purpose. It may be noted

that as per DGFT Public Notice No. 60/2015-20, dated 1st March 2023, no TRQs will be allocated for import of these products. The Public Notice however also states that imports of these products through Bills of Lading dated on or before 31st March 2023 will be allowed under TRQs till 30th June 2023.

Tur whole exempted from BCD

The Ministry of Finance has reduced the basic customs duty on Tur whole from 10% to nil, with effect from 4th March 2023. Notification No. 16/2023-Cus., dated 3rd March 2023 amends Notification No. 50/2017-Cus. for this purpose.

Vessels and other floating structures for breaking up – BCD exempted till 31 March 2025

The Ministry of Finance has exempted vessels and other floating structures imported for breaking up, from basic customs duty (BCD). The exemption will be available from 24th February 2023 till 31 March 2025. Sl. No.555A has been inserted in Notification No. 50/2017-Cus. for this purpose, by Notification No. 13/2023-Cus., dated 23rd February 2023.

Ratio Decidendi

Search – Mere recording satisfaction without supportive materials is insufficient to trigger a lawful search

The Supreme Court of India has held that mere recording that the person concerned is satisfied, without the supportive materials is insufficient to trigger a lawful search. The Apex Court, in this regard, observed that the person authorizing the search must express his satisfaction that the material is sufficient for him to conclude that search is necessary, and further there should exist something to show what is such material. Dismissing the appeals filed by the Revenue, the Court observed that in the present case the concerned official who authorized the search did not refer to any information nor indeed any report on the record which was produced before the High Court. [*Union of India* v. *Magnum Steel Ltd.* – 2023 VIL 16 SC CU]

Demand – Invocation of extended period – Jurisdictional question

The Supreme Court has remanded back the matter to CESTAT on the question as to whether extended period in terms of the

Proviso to Section 28(1) of the Customs Act, 1962 was available. The Court in this regard took note of the Tribunal's observations in its decision and the reasons that prevailed with the Tribunal, and held that it was difficult to find if the Tribunal adverted to the question as to whether the necessary elements of the said Proviso to Section 28(1) were existing or not. The Court was of the view that even if such a question was not raised by the assessee-appellant in the memo of appeal presented before the Tribunal in specific terms, it indisputably remains a jurisdictional question, as without existence of the elements specified in the said Proviso, the show cause notice in question, as issued on 26th September 2006 in relation to the imports made from November, 2001 to April, 2003, was not maintainable. [*Shashi Dhawal Hydraulics Pvt. Ltd.* v. *Commissioner* – 2023 VIL 13 SC CU]

Refund consequent to finality of amendments in Bills of Entry when not deniable

The CESTAT New Delhi held that the Revenue cannot raise a plea of non-assailment of order of assessment and consequent denial of refund claim, when the order carrying out amendments in the Bills of Entry had attained finality. The assessee in the present case had sought refund as a consequent of re-assessment or amendments in the Bills of Entry, while department was of the view that refund should not be allowed as assessment order was not assailed. The Tribunal also rejected the Revenue's contention, in respect of limitation for refund claim, that the period of one year should be counted from the date of assessment and not from the date of amendment in the Bills of Entry. Revenue's appeal was thus dismissed. [*Principal Commissioner* v. *Lava International Ltd.* – 2023 VIL 192 CESTAT DEL CU]

Notification effective only after digitally signed and uploaded for publication

In a case where even though notification was dated 1st March 2018, but it was uploaded for publication in Official Gazette only on 6th March 2018 after it was digitally signed, the CESTAT Bengaluru has held that the said exemption notification would come into force only on 6th March 2018. Notification No. 29/2018-Cus., dated 1st March 2018 had increased the basic customs duty from 40% to 54% in respect of RBD Palmolien Edible Grade. Observing that a notification cannot be published unless it is digitally signed by the nodal officer, the Tribunal noted that in the present case the notification dated 1st March 2018 was digitally signed on 6th March 2018 at 17:15 hours and hence before that it could not have been uploaded for publication. Various High Court decisions in respect of same notification were relied upon. [*Adani Wilmar* v. *Commissioner* – 2023 VIL 177 CESTAT BLR CU]

Customs Brokers Licensing – Show cause notice under Regulation 20 to be 'issued' and not 'served' within specified time

The Delhi High Court has held that the expression 'issue' in Regulation 20 of the e Customs Brokers Licensing Regulations, 2013 must necessarily be construed to mean the action of preparing the notice and despatching the same. According to the

Court, it cannot be construed as serving the notice on the customs broker or receipt of the notice by the customs broker. The Court hence rejected the Customs Broker's contention that since the notice was not received by it within 90 days of receipt of the offence report, the proceedings being beyond the period of limitationwas not maintainable. It, in this regard, noted that attempts to deliver the notice to the Customs Broker were also made within the specified period but the same could not be delivered by the postal authority as the premises of the respondent was found closed. Supreme Court's decision in the case of *Commissioner* v. *Kundan Lal Behari Lal*, was distinguished. [*Commissioner* v. *R.P. Cargo Handling Services* – Judgement dated 2nd March 2023 in CUSAA 223/2019, Delhi High Court]

Absence of snuffing would not make leather 'unfinished'

The CESTAT Chennai has held that absence of snuffing on leather would not make it unfinished, if all major manufacturing operations are carried out. Observing that Shaving/snuffing as used in Guidelines for identification of finished leather for export by the Bureau of Indian Standards would mean shaving or snuffing, the Tribunal was of the view that conditions of the DGFT's Public Notice No.21/2009-14 would be satisfied, if shaving or snuffing is carried out. Earlier, the Central Leather Research Institute (CLRI) had opined that the sample failed to satisfy norms prescribed for finished leather in terms of the Public Notice as there was 'absence of snuffing on grain imparting visible evidence of removal of grain'. [*Nabisha Leathers* v. *Commissioner* – 2023 VIL 221 CESTAT CHE CU]

GoPro digital camera for use while surfing, skydiving, etc. is classifiable under TI 8525 80 20

The CESTAT Mumbai has held that GoPro digital camera (action camera) for use while surfing, skydiving, etc. is classifiable under TI 8525 80 20 of the Customs Tariff Act, 1975. The Tribunal in this regard noted that the cameras were undisputedly digital cameras and would merit classification under TI 8225 80 20 only which is more specific rather than the residual entry at 8515 80 90. Further, the Tribunal allowed the benefit of Notification No. 50/2017-Cus. (Sl. No. 502) to the said goods, while it observed that an Explanation (in some other notification) defining the phrase 'Digital Still Image Video Camera', as also used in present notification, cannot be used to restrict the phrase used in the notification under consideration. Department's contention that Notification No. 25/2005-Cus. is more specific, was also rejected. [*Creative Newtech Ltd.* v. *Commissioner* – 2023 (3) TMI 180-CESTAT Mumbai]

Stepper motor classifiable under Tariff Item 8501 10 12

The Authority for Advance Ruling Customs has held that stepper motor (3800-B07F-0000) proposed to be imported by the applicant for use in manufacture of idle air control valve for two wheelers will be classifiable under Tariff Item 8501 10 12 of the First Schedule of the Customs Tariff Act, 1975. Tariff Items 8409

91 99, 8409 99 90, and 8481 90 90 were the other contesting entries. The AAR in this regard relied upon Rule 3(a) of the General Rules of Interpretation, Note 2 (f) of Section XVII of the Customs Tariff, and that the subject goods were brushless direct current (DC) motor that generated output power not exceeding 37.5W. M.F.(D.R.) Instruction No. 1/2022-Cus. dated 5th January 2022, was also referred here. [In RE: *Hitachi Astemo FIE Private Limited* – 2023 VIL 07 AAR CU]

Central Excise, Service Tax and VAT

Ratio decidendi

- Karnataka VAT – Mere production of invoices or payment by cheque is not enough to discharge burden for availing Input Tax Credit – Supreme Court
- No excise duty on plastic scrap separated from lead scrap before use of latter – CESTAT New Delhi
- Right to use IT software – Point of taxation is date of commissioning and not date of download – CESTAT Chennai
- Cenvat credit available on services of Commission Agent engaged in collection of debts – CESTAT Kolkata
- Activity of soil conservation and land reclamation covered under 'conservancy' – CESTAT Ahmedabad
- Pre-deposit obligations cannot be set off against refund claims – Delhi High Court
- Tractors fitted with certain attachments after clearance from factory, still classifiable under Heading 8701 – CESTAT Mumbai

Ratio decidendi

Karnataka VAT – Mere production of invoices or payment by cheque is not enough to discharge burden for availing Input Tax Credit

The Supreme Court has held that mere production of the invoices as per Rules 27 and 29 of the Karnataka VAT Rules, 2005 or the payment made by cheques is not enough and cannot be said to be discharging the burden of proof cast under Section 70 of the Karnataka VAT Act, 2003 in respect of availing Input Tax Credit. The Apex Court in this regard observed that the dealer claiming ITC has to prove beyond doubt the actual transaction which can be proved by furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, in addition to tax invoices and particulars of payment, etc. According to it, for claiming ITC, genuineness of the transaction and actual physical movement of the goods are the *sine qua non*. [*State of Karnataka* v. *Ecom Gill Coffee Trading Private Limited* – 2023 VIL 20 SC]

No excise duty on plastic scrap separated from lead scrap before use of latter

In a case where the assessee was separating plastic scrap from lead scrap before use of the latter in manufacture of lead ingots, the CESTAT New Delhi has held that the assessee was neither manufacturing nor was it producing the plastic scrap. It noted that the plastic scrap already existed and the assessee was only separating it manually from the rest of the scrap. Revenue department's contention that excise duty was payable on this other (plastic) scrap on the ground that it arises during the process of segregation of the scrap which process is ancillary to the manufacture of goods and therefore qualifies as manufacture itself, was thus rejected. Observing that it was only a process of segregation of raw materials, and that manufacture begins thereafter, the Tribunal held that no duty can be charged on the plastic and other scrap segregated from the input scrap. [*Commissioner* v. *R P Industries* – 2023 TIOL 201 CESTAT DEL]

Right to use IT software – Point of taxation is date of commissioning and not date of download

The CESTAT Chennai has held that the point of taxation for the right of use of IT software would not be the date on which it is downloaded, but the date of commissioning of the software. The software, in the present case, was downloaded in December 2007 while the said service was brought under the tax net only on 16th May 2008. The Tribunal in this regard was of the view that in the context of the Information Technology Software Service, merely downloading the software onto his computer would not be of help to the said person, unless he can use it. It noted that the contract for the right to use the software, that is End User License Agreement (EULA), was entered into on 27th May 2008, although with an earlier effective date as 1st January 2008, it is only after its operationalisation the right to use the software can be said to have occurred. [*United India Insurance Co. Ltd.* v. *Commissioner* – 2023 VIL 169 CESTAT CHE ST]

Cenvat credit available on services of Commission Agent engaged in collection of debts

The CESTAT Kolkata has allowed assessee's appeal in a case involving Cenvat credit on services provided by a commission agent engaged in collection of debts from various subscribers. Observing that collection of debt is an integral part of assessee's business, the Tribunal was of the view that when the assessee uses collection agent for collecting the debts, the same would fall under clause (i) of the 'input service' definition. Further, the Tribunal also set aside the impugned order on limitation. It was of the view that matter involved interpretation and the Department was in error in equating services collection agent with that of commission agents towards sale of goods/sales promotion. Gujarat High Court decision in the case of *Cadila Healthcare Ltd.* was distinguished. [*Vodafone Idea Ltd.* v. *Commissioner* – 2023 VIL 216 CESTAT KOL ST]

Activity of soil conservation and land reclamation covered under 'conservancy'

In a case involving demand of service tax on the services provided by the public sector undertaking formed by the Government especially for the purpose of soil conservation and land reclamation, the CESTAT Ahmedabad has held that the activity of soil conservation and land reclamation would fall under the term 'conservancy' as stated in Notification No. 25/2012-S.T. Allowing the benefit of this exemption notification, the Tribunal relied upon the meaning of 'conservancy' in Merriam Webster Dictionary and Britannica Dictionary. It, in this regard, also noted that the entire amount received by the assessee from the government in the shape of grant was reimbursement and could not be taxed as does not fall within the definition of consideration for service.

The Tribunal also set aside the demand in respect of rent-a-cab service for amount recovered from the employees when the

official vehicles are put to personal use by the employees. It noted that the assessee was not in the business of providing rent-a-cab service and any recovery made for private use of vehicle was in terms of the employment agreement. [*Gujarat State Land Development Corporation Ltd*. v. *Commissioner* – 2023 VIL 153 CESTAT AHM ST]

Pre-deposit obligations cannot be set off against refund claims

The Delhi High Court has declined to accept the contention that the assessee can set off its obligation to make a pre-deposit against its claim for the refund of Cenvat credit. However, finding merit in the contention that the assessee-petitioner's remedy of an appeal would be rendered illusory where the petitioner does not have the liquid funds to make the said pre-deposit, the Court directed the petitioner to deposit 2.5% instead of 7.5% to maintain the appeal against the order-in-original. [*Kindle Infraheights Pvt. Ltd.* v. *Commissioner* – 2023 VIL 160 DEL CE]

Tractors fitted with certain attachments after clearance from factory, still classifiable under Heading 8701

Tractors fitted with certain attachments after their clearance from the factory at the instance of the customer by the dealer, is not classifiable under Tariff Item 8429 51 00 as machinery but is still covered as tractor under Heading 8701 of the Central Excise Tariff Act, 1985. Relying on the HSN Explanatory Notes, the CESTAT Mumbai was of the view that even the heavy-duty tractors for constructional engineering work will be classified under Heading 8701 and not under 8429 as determined by the Revenue. It also noted that the goods were cleared as tractors, the fact which was certified by Central Farm Machinery and Testing Institute, Ministry of Agriculture, and the Automotive Research Association of India. Further, according to the Tribunal, in terms of provisions of the Central Motor Vehicle Rules, 1989, the said goods were tractors only. Exemption under Sl. No. 40 of Notification No. 6/2006-C.E. was thus held as available. [*Mahindra & Mahindra Ltd.* v. *Commissioner* – 2023 VIL 160 CESTAT MUM]

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