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Export duty on iron ore and steel intermediaries – An industry perspective!

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The Government has with effect from 19 November 2022 rolled back export duty on iron ore pellets and steel products, including pig iron, flat-rolled products of carbon steel and stainless steel, bars, rods and non-alloy steel, *vide* Notification No. 58/2022-Customs, dated 18 November 2022. Export duty on iron ores with a grade higher than 58% has been reduced from 50% to 30%, while the lower grade iron ores no longer attract export duty restoring back the exemption granted up to 21 May 2022.

The duty on export of iron ore pellets and select steel products was imposed with effect from 22 May 2022, and parallelly, the duty on export of iron ores and concentrates were increased with the objective of checking on the rising steel prices in the Indian market, addressing shortages and curbing inflation. The move to roll back the export duty within a period of six months is taken considering the stability in domestic prices of the steel products and taking all stakeholders concerns into account, in view of the fact that the inventory of steel products has risen drastically, and India became net importer of steel in October 2022 due to curtailed exports.

Levy of export duty

Export duty is levied on goods exported from India in terms of Section 12(1) of the Customs Act, 1962 at the rates specified under the Second Schedule to the Customs Tariff Act, 1975. The rate of export duty can be increased in terms of Section 8(1) of the Customs Tariff Act by way of issuance of notifications for carrying out any amendment in the existing entries in the Second Schedule. Similarly, notifications can be issued in terms of Section 25(1) of the Customs Act for granting exemption from payment of export duty, as provided under the Second Schedule.

Previously, Notifications Nos. 28/2022-Customs and 29/2022-Customs, both dated 21 May 2022 were issued for imposition of export duty on the subject goods, by way of amending the Second Schedule and Notification No. 27/2011-Customs dated 1 March 2011, respectively. Now, in order to roll back the export duty, Notification No. 58/2022-Customs, dated 18 November 2022 has been issued.

While the industry is rejoicing over Government's decision to roll back hefty duty on export of steel and its inputs, some of the issues that may have arisen during the short duration of these six months are worth pondering.

Valuation of export goods

When the export duty was introduced back in May 2022, many exporters were taken by surprise and were finding it difficult to shell out duty ranging from 15% to 50% on export goods. Therefore, to honour the export commitments, they negotiated with their customers for claiming partial or total reimbursement of export duty. A question therefore arose as to whether export duty was to be calculated by including the amount recovered from customers towards payment of such duty?

Circular No. 18/2008-Cus., dated 10 November 2008 clarified that for the period up to 31 December 2008, Export duty was calculated

by taking the free on board ('**FOB**') price declared by the exporter as the cum-duty price and working backwards from the FOB price. Therefore, if exporter received INR 100 and goods were subjected to export duty @ 10%, then the exporter was required to discharge INR 9.09 [i.e., 100*(10/110)]. However, w.e.f. 1 January 2019, the duty is to be calculated on transaction value under Section 14 of Customs Act. Resultantly, in the above example, the exporter would be liable to discharge export duty of INR 10 [i.e., 100*10%].

As per Section 14(1) of the Customs Act, export duty is payable on the transaction value i.e., price actually paid or payable for the goods when sold for export from India for delivery at the time or place of exportation, and the liability for discharging such duty is cast upon the exporter in terms of Section 51(1). **At this juncture, it is pertinent to examine if the duty is payable on the amount collected as 'export duty' by express indication of such amount in the invoice and shipping bills, over and above the consideration for the goods sold**.

It may be pertinent to note that the Tribunals have decided the matters in favour of the Revenue by holding that the law does not allow abatement of duty element from the FOB price in determining the transaction value for the purpose of assessment of Export duty. The issue is pending before the Supreme Court for final disposal (Civil Appeal No. 9844 - 9888/2010 in the case of *Sesa Goa Ltd*.). It is to be seen if the outcome of this judgment will have any bearing on the exporters who have claimed reimbursement of export duty from their customers, over and above the FOB price.

Determination of 'Fe' content

The duty on export of iron ores depends upon its grade and hence the method of determination of iron (*Fe*) content in the ore is crucial. The Board in its Circular No. 4/2012-Cus., dated 17 February 2012 noted the observations made by the Apex Court in the matter of *UoI* v. *Gangadhar Narsingdas Aggarwal* [1997 (89) E.L.T. 19 (S.C.)] to clarify that for the purpose of charging of export duty the assessment of iron ore for determination of Fe content shall be made on Wet Metric Ton (*WMT*) basis and not on the basis of Dry Metric Ton (*DMT*).

Though, the issue in respect of determination of Fe content was settled by the Apex Court (*supra*), divergent practices for calculation of Fe content and charging Export duty are still being followed by Customs formation. The exporters also face challenges in determination of exact Fe content as there is a considerable lapse of time between drawing of sample by the Customs department and its test report and the loss of moisture throws a distorted picture of the Fe content in the ores.

Denial of export benefits

Some of the export related benefits such as Remission of Duties and Taxes on Export Products ('**RoDTEP**') scheme or refund of unutilised Input Tax Credit ('**ITC**') are restricted for goods that are subject to export duty. Para 4.55 of the Foreign Trade Policy categorizes export transactions/exporters in respect of which rebate under RoDTEP Scheme is not available and clause (iii) bars rebate for export products that are subject to export duty.

The Second Proviso to Section 54(3) of the Central Goods and Services Tax Act, 2017 restricts refund of unutilized ITC in cases where the goods exported out of India are subjected to Export duty. On this aspect, the Orrisa High Court in *National Ventures Pvt. Ltd*. v. *UoI* [2022 (61) G.S.T.L. 395 (Ori.)] has relied upon the clarification from the Board *vide* Circular No. 160/61/2021-GST, dated 20 September 2021 to

hold that exported goods levied to Nil rate of duty cannot be considered to be subjected to any export duty and refund of accumulated ITC would be admissible.

These restrictions not only add to the cost of goods sold in the hands of the exporters, but also end up in a scenario where the domestic taxes and levies end up getting exported, which is contrary to the well settled principle in foreign trade.

Import duty on inputs

Notification No. 59/2022-Customs, dated 18 November 2022 has been issued for withdrawal of exemption from payment of Basic Customs Duty on import of Anthracite and Pulverized coal injection ('**PCI**') Coal, Coke & Semi coke and Ferronickel, while Notification No. 59/2022-Customs dated 18 November 2022 is issued for withdrawal of Agriculture Infrastructure and Development Cess exemption on import of Anthracite, PCI Coal and Coking Coal.

A section of the industry is disappointed on the decision to restore duty on import of raw materials used for manufacture of articles of steel, ranging from 2.5% to 5%. The industry is of the view that there has been an uptrend in the international prices of these raw materials and hence imposition of non-creditable import duty on these products may ultimately result in increased manufacturing costs.

Parting remarks

While the Government has taken a conscious call for imposition of export duty on iron ore and some of the steel intermediaries, the consequence of such levy may have a far-reaching impact on the trade, industry and the economy as a whole. Increase in the cost of critical inputs such as steel due to inefficient tax structure may not only increase the expenditure on Government's infrastructural projects but also adversely impact private investments, even after the rollback of export duty. The exporters of the products that have been subjected to export duty are advised to make representations to the Government so as to avoid any unintended adverse implications arising from such levy.

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Goods and Services Tax (GST)

Notifications and Circulars

Refund due to inverted duty structure – Changes by Notifications Nos. 14/2022-Central Tax and 9/2022-Central Tax (Rate) are prospective only: The Central Board of Indirect Taxes and Customs ('CBIC') has clarified that changes made by Notification No. 14/2022-Central Tax, dated 5 July 2022 in the formula prescribed under Rule 89(5) of the Central Goods and Services Tax Rules, 2017, relating to refund in case of inverted duty structure, is prospective. According to the CBIC Circular No. 181/13/2022-GST, dated 10 November 2022, the amended formula for calculation of refund of input tax credit

on account of inverted duty structure would be applicable in respect of refund applications filed on or after 5 July 2022 only. Similarly, the Circular also clarifies that restriction imposed *vide* Notification No. 09/2022-Central Tax (Rate), dated 13 July 2022 (effective from 18 July 2022) on refund of unutilised input tax credit on account of inverted duty structure in case of specified goods falling under Chapters 15 and 27 would also apply prospectively only. The restrictions accordingly will not apply to refund applications filed before 18 July 2022.

Transitional Credit – CBIC lays down guidelines for verification of Tran-1/Tran-2: The CBIC has issued a detailed Circular to lay down guidelines for the GST officers for verification of Tran-1 or Tran-2 filed consequent to the Supreme Court directions allowing such filing for a period of two months. According to Circular No. 182/14/2022-GST, dated 10 November 2022, the jurisdictional tax officer shall start the verification process immediately on availability of TRAN-1/TRAN-2 filed/revised by the applicant on the back office system or on receipt of self-certified downloaded copy of the same from the applicant, whichever is earlier. The Circular also talks about following the principles of natural justice in the process of passing the order relating to allowance or disallowance of the Transitional Credit. Laying down an elaborate procedure in this regard, the Circular also talks about the modalities of coordination between central tax authorities and state tax authorities.

Ratio decidendi

Provisional release of goods seized in transit and thereafter confiscated is permissible: The Gujarat High Court has rejected the contention raised by the Revenue department that they have no power for provisional release of the goods seized in transit though same were subjected to confiscation under Section 130 of the Central Goods and Services Tax Act, 2017. The Court in this regard observed that once the notice in Form MOV-10 under Section 130 for confiscation of goods is issued, the goods in question stand seized under Section 67(2) and applicability of Section 129 comes to an end. It held that in such circumstances, the respondent authorities are required to exercise powers to release goods and conveyance as provided in sub-section (6) of Section 67. The High Court also noted that it is mandatory for the authority to exercise powers under Section 67(6) for provisional release of the goods and conveyance as there is mandate by word 'shall' provided under said section. [*Dhanlaxmi Metals* v. *State of Gujarat* – 2022 VIL 728 GUJ]

Determination of tax liability under CGST Section 129(1) is not correct: Observing that there is no provision under Section 129 of the Central Goods and Services Tax Act, 2017 for determination of tax due, which can be done only by taking recourse to the provisions of Section 73 or 74, as the case may be, the Allahabad High Court has allowed a writ petition in a case where department had proceeded to determine the tax liability as well as penalty only under the provisions of Section 129. The dispute involved detention of goods in transit, because of non-filing of Part-B of the e-way bill by the transporter in time. [*Bharti Airtel Ltd.* v. *State of U.P.* – 2022 VIL 720 ALH]

Job work for manufacture of alcoholic beverages for human consumption – Notification No. 6/2021-CT(R) prescribing 18% tax is retrospective: The Andhra Pradesh High Court has clarified that 18% GST is payable on the manufacturing of alcoholic beverages for human consumption by way of job work. The Court in this regard observed that notification No. 6/2021-Central Tax (Rate), though was published in Gazette on 30 September 2021, but being

clarificatory in nature, must be retrospective in operation. It observed that it was never the intention of the legislature to exempt expensive items like alcoholic liquor under the category of food and food products even though the same is for human consumption. It noted the recommendations of the 45th meeting of the GST Council and held that as per common parlance also, alcoholic liquor is not considered food. The High Court held that services by way of job work in relation to the manufacture of alcoholic liquor for human consumption would not be eligible for GST @ 5%. [*Esveeaar Distilleries Private Limited* v. *Assistant Commissioner* – 2022 VIL 734 AP]

Deposit in Electronic Cash Ledger does not amount to payment of the tax liability: The Jharkhand High Court has answered in negative the question whether the amount deposited as tax through valid challans by a registered person in the Government Exchequer (in the Electronic Cash Ledger) prior to the filing of the GSTR 3B returns could be treated as discharge of his tax liability. Reading Sections 39 and 49 of the CGST Act, 2017 along with Rules 61(2) and 87 of the CGST Rules, 2017, the Court was of the view that the deposit in the Electronic Cash Ledger does not amount to payment of the tax liability. The Court in regard emphasised on the expression 'deposit' used in Section 49(1) and the expression 'may be used' in Section 49(3) and noted that tax liability gets discharged only upon filing of GSTR 3B return. Interest liability in case of delayed filing of GSTR-3B and consequent payment of tax, was thus upheld. [*RSB Transmissions India Limited* v. *Union of India* – 2022 VIL 745 JHR]

Detained in-transit goods must be released if assessee furnishes security: The Kerala High Court has held that the GST department cannot refuse to release goods and conveyance, pending finalization of the proceedings issued under Section 129, once the assessee complies with the provisions of Section 129(1)(c) of the Central Goods and Services Tax Act, 2017. Section 129(1)(c) asks for furnishing of security equivalent to the amount of penalty as specified in clauses (a) and (b) of Section 129(1). The assessee was aggrieved as despite the willingness to comply with the provisions of Section 129(1)(c), the Revenue Department had refused to accept the bank guarantee and release the goods, pending adjudication of the notice. [*VTS Steels* v. *Assistant State Tax Officer* – 2022 VIL 722 KER]

Wrong mention of GSTIN in GSTR-1 – High Court allows correction in GSTR-1: The Jharkhand High Court has allowed a petition to make necessary correction in GSTR-1. There was an error in filing GSTR-1 for January 2019, mistakenly mentioning an incorrect GSTIN Number, which was noticed only during the settlement of accounts later. The Court said that since there was no tax impact or loss of revenue for the State Exchequer and, in fact, such correction of relevant returns in the case of the petitioner i.e., GSTR-1, GSTR-2A would allow buyers to rightly avail the input tax credit. The Court observed that the purchaser had reversed the entry of input tax credit wrongly availed based on entries in books of account since the invoice was not reflected in his GSTR-2A return for the respective period. Furthermore, the party whose GSTIN was wrongly mentioned had not availed ITC wrongly reflected in its GSTR-2A. [*Mahalaxmi Infra Contract Ltd.* v. *Goods and Services Tax Council* – 2022 VIL 735 JHR]

Audit – Non-grant of time to file reply to draft audit report is fatal: In a case where the procedural requirement of the assessee having to be given 30 days' time to file a reply to the draft audit report was not followed, the Orissa High Court has set aside the final audit report issued under Section 65(6) of the OGST Act, 2017. The Revenue department had issued both the draft

and final audit reports on the same date. The High Court hence granted time to assessee to file reply to the draft audit report and directed the Revenue department to extend the time for issuance of final report. [*Simon India Ltd.* v. *Commercial Tax and GST Officer* – 2022 VIL 747 ORI]

BPO services when not 'intermediary' – No change in scope of intermediary in GST regime vis-à-vis service tax regime: In a case where the assessee was engaged by foreign company for actual performance of BPO services and information technology services to the customers of the former, where the assessee would be responsible for all risk related to performance of services which would be akin to services provided on 'its own account', the Punjab and Haryana High Court has held the assessee as not an 'intermediary'. Allowing refund of input tax credit, the Court observed that there is broadly no change in the scope of 'intermediary' services in the GST regime *vis-a-vis* the service tax regime except addition of supply of securities in the definition of 'intermediary' in the GST law. It noted that the assessee was providing the services which had been sub-contracted to it by the main contractor (foreign company) and receiving fee/charges from the main contractor. [*Genpact India Pvt. Ltd.* v. *Union of India* – 2022 VIL 751 P&H]

Appeal against cancellation of registration maintainable even if option available to seek revocation of cancellation: The Karnataka High Court has held that merely because that the petitioner has an option of seeking revocation of the cancellation under Section 30 of the CGST Act, 2017, it cannot be said that independent of the said remedy, an appeal would not be maintainable. The Court was hence of the view that against an order cancelling the registration of GST, the assessee has a remedy by way of appeal under Section 107 of the CGST Act. The assessee in this case could not file for revocation of cancellation within the prescribed time due to Covid-19. [*Shailaja Chandrashekar* v. *Additional Commissioner* – 2022 TIOL 1379 HC KAR GST]

Notice pay recovery and surety bond forfeiture are not considerations for any supply: Relying upon CBIC Circular dated 3 August 2022 (Circular No. 178/10/2022-GST), the Haryana Authority for Advance Rulings has held that the amount received as notice pay recovery by the applicant-assessee from the employees who leave the applicant company without serving mandatory notice period mentioned in the employment contract is not a consideration for any supply or services. Similarly, it was held that surety bond forfeiture in case of contractual employees who leave the company without serving minimum contract period as per the employment contract is also not a consideration *per se*. The AAR was of the view that these amounts are covered under Schedule III(1) and not clause 5(e) of Schedule II appended to the CGST Act, 2017 or in the definition of 'business' under Section 2(17). [In RE: *Rites Limited* – 2022 VIL 283 AAR]

E-Commerce Operator merely connecting businesses with customers not liable under CGST Section 9(5): In a case where the assessee was merely connecting the drivers and passengers, providing computer application services for facilitating business transactions, the Karnataka AAR has held that supply of services was not through the electronic commerce operator. The AAR in this regard observed that and the role of the assessee ended on such connection; they did not collect the consideration; had no control over actual provision of service by the service provider; had no details of the ride; and had no control room/call centre etc. Holding that hence there would be no liability under Section 9(5) of the CGST Act, 2017, the Authority also observed that the word 'through' in the

phrase 'services supplied through electronic commerce operator', in Section 9(5), gives the meaning that the services are to be supplied by means of / by the agency of / from beginning to the end / during entire period by e-commerce operator. [In RE: *Multi-Verse Technologies Private Limited* – 2022 VIL 289 AAR]

Input Tax Credit available on Corporate Social Responsibility (CSR) expenditure: The Telangana AAR has held that the tax paid on purchases made to meet the obligations under corporate social responsibility (CSR) will be eligible for input tax credit under the CGST and SGST Acts. The Authority in this regard observed that the expenditure made towards corporate social responsibility under Section 135 of the Companies Act, 2013, is an expenditure made in the furtherance of the business. Observing that failure to make such expenditure will attract penalty, the Authority also noted that the running of the business of a company will be substantially impaired if they do not incur said expenditure. [In RE: *Bambino Pasta Food Industries Private Limited* – 2022 VIL 293 AAR]

Customs

Notifications and Circulars

Export/import in Indian Rupees – Benefit of export promotion schemes available – FTP and HoP amended to reflect RBI Circular No. 10: The Ministry of Commerce and Industry has amended the Foreign Trade Policy to reflect the RBI A.P. (DIR Series) Circular No. 10, dated 11 July 2022, allowing for export and import trade using Indian Rupees. Paragraphs 2.46, 2.53, 3.20 and 4.21 of the FTP have been amended to highlight the latest changes in this regard. Notification No. 43/2015-20, dated 9 November 2022 has been issued for the purpose. Further, Para 5.11 of the Handbook of Procedures, relating to EPCG Scheme, has been amended to permit invoicing, payment, and settlement of exports and imports in Indian Rupees. Public Notice No. 35/2015-20, dated 9 November 2022 has been issued for the purpose. The changes come into force with immediate effect.

Iron and steel – Export duty removed on specified goods: The Ministry of Finance has with effect from 19 November 2022 removed export duty on specified goods falling under Heading 2601 (iron ores and concentrates) and Chapter 72 (iron and steel) of the Customs Tariff Act, 1975. As per Notification No. 58/2022-Cus., dated 18 November 2022, the omission of export duty has been done on many products including iron ore pellets; pig iron and spiegeleisen in pigs, blocks or other primary form; flat rolled products of iron or non-alloy steel, hot rolled, not clad, plated or coated; flat rolled products of iron or non-alloy steel, cold rolled, not clad, plated or coated; flat rolled products of iron or non-alloy steel of a width of 600 mm or more, clad, plated or coated; bars and rods, hot-rolled, in irregularly wound coils, or iron or non-alloy steel; and other bars and rods of iron or non-alloy steel, not

further worked than forged, hot-rolled, hot-drawn or hot extruded, but including those twisted after rolling. Similarly, export duty has also been reduced on flat-rolled products of stainless steel, of a width of 600 mm or more; other bars and rods of stainless steel; angles, shapes and sections of stainless steel; and bars and rods, hot-rolled, in irregularly wound coils, of other alloy steel. It may be noted that the export duty on these products was increased earlier with effect from 22 May 2022 by Notification No. 29/2022-Cus., dated 21 May 2022.

Food products (specified) – Import only though 61 specified ports and registration of foreign food manufacturing facilities, mandatory w.e.f. 1 February 2023: The Food Safety and Standards Authority of India has mandated registration of foreign food manufacturing facilities falling under the few specified food categories, who are intending to export to India the specified food products. As per Customs Instruction No. 30/2022-Cus., dated 14 November 2022 which forwards the FSSAI Order dated 10 October 2022, the specified food categories are milk and milk products, meat and meat products (including poultry, fish and their products), egg powder, infant food, and nutraceuticals. Further, as per another Instruction No. 31/2022-Cus. of the same date, import of these high-risk products shall be permitted only through 61 specified ports which are directly manned and managed by FSSAI office/officials. Both these changes will come into effect from 1 February 2023. It may be noted that the changes relating to mandatory registration of foreign manufacturers have also been notified to the WTO's Committee on Technical Barriers to Trade on 14th of November (G/TBT/N/IND/237).

Rice exports – Procedure for identification of parboiled rice laid down: The Central Board of Indirect Taxes and Customs has laid a procedure to be followed in case of export of rice declared as parboiled rice. Accordingly, as per Instruction No. 29/2022-Cus., dated 28 October 2022, representative samples need to be drawn at the time of export and sent for test to CRCL. The consignment would be however allowed for export on provisional basis subject to furnishing of Bond. The Instruction however notes that this procedure is not applicable in case of Tier-2 and 3 AEOs, except in case where the Risk Management System specifies that sample for test is required. It is noted that testing is required since parboiled rice classifiable under Tariff Item 1006 30 10 of the Customs Tariff Act, 1975 is not liable to export duty while rice covered under Tariff Item 1006 30 90 is liable to export duty.

EPCG Scheme – Re-fixation of annual average export obligation for 2021-22: The Directorate General of Foreign Trade has issued a Policy Circular No. 44/2015-20, dated 17 November 2022 to list various sectors/ product groups that witnessed decline in exports during 2021-22 as compared to 2020-21. All Regional Offices have been accordingly directed to re-fix the annual average export obligation for 2021-22 for EPCG authorisations. This is in line with Para 5.19 of the Handbook of Procedures according to which relief may be granted to sectors where the exports have declined by more than 5% as compared to the previous year.

Ratio decidendi

Valuation – Value of design engineering and site run (technical documents) when not includible: The CESTAT Delhi has held that merely because more than one goods are bought by buyer from seller under same agreement and under same invoice, sale of one good does not become condition of sale for another. The assessee had imported Fermenters and Control Panel Assembly and also 'design engineering and site run' under the same airway bill number but had filed two bills of entry – one for Fermenter and Control Panel Assembly and

another for technical documents (latter under Chapter 49 of the Customs Tariff Act, 1975). The Tribunal in this regard observed that there was nothing to say that the purchase of the design engineering and site run was a condition for sale of the fermenters, even though both were purchased as per the same contract and invoice and were imported under the same Airway bill.

However, it may be noted that the Tribunal rejected the contention that since the technical documents had already been allowed assessment under Chapter 49 at Nil rate of duty, therefore, the value of the same cannot be included in the value of the fermenter. It noted that while the Bill of Entry was assessed by the appraising group based on the documents submitted, the process was not complete because, the second half of the assessment *viz.,* examination of the goods had to be completed. [*Panacea Biotec Ltd.* v. *Commissioner* – 2022 TIOL 1027 CESTAT DEL]

IPR (Imported Goods) Enforcement Rules, 2007 – Registration with Customs for specified product is important: The CESTAT Delhi has set aside the confiscation and penalty imposed on imports of LED Module Lights of brand SAMSUNG, which were allegedly found as counterfeit by the rights holder. Directing the release of goods, the Tribunal observed that on the date of suspension of clearance of the imported goods, the right holder did not have registration under the provisions of the above-mentioned Rules with the Customs Department for LED Modules/Lights. The Tribunal in this regard also noted that there was delay in intimation of suspension of clearance to the rights holder, while there was also a delay on the part of the rights holder in furnishing the bond. According to the Tribunal, the order of confiscation and penalty was bad for violation of the prescribed conditions and limitation prescribed under the IPR Rules, and also in violation of Notification No.47 of 2007-Customs and the instructions dated 29 October 2007. [*Indulge Sign and Graphics* v. *Commissioner* – 2022 VIL 846 CESTAT DEL CU]

Project Imports – Provision for timely submission of statement post imports, not mandatory: The CESTAT Delhi has opined that the conditions provided under the provisions of Regulation 7 of the Project Import Regulations, 1986, providing for submission of a statement within 3 months of imports, are not mandatory, but are merely directory. The Tribunal in this regard observed that there was nothing in Regulation 7 which disentitled the importer to avail the exemption if the statement was not submitted within the stipulated time and that the provision itself provided for extending the period for submitting the statement. Holding that substantial benefit of exemption is not deniable by invoking procedural provision, the Tribunal also observed that filing of the re-conciliation statement was not one of the conditions for eligibility of the benefit. [*Polixel Security System Pvt. Ltd.* v. *Commissioner* – 2022 TIOL 1017 CESTAT DEL]

No confiscation when breach of conditions of advance authorisation regularized and certified by competent authority: In a case where the competent licensing authority had accorded closure in terms of the advance authorisation scheme upon discharge of appropriate duty, and interest thereon, as prescribed in the condition, the CESTAT Mumbai has held that in such circumstances, the regularization is complete in all respects and hence proceedings under Section 111(o) of the Customs Act, 1962 cannot be brought to conclusion. The Tribunal in this regard relied upon its earlier decisions in the cases of *Global Boards Ltd.* [2019 (368) ELT 1113 (Tri.-Mumbai)] and *Maruti Udyog Ltd.* [2001 (132) ELT 340 (Tri.-Mumbai)]. [*Apex International* v. Commissioner – 2022 TIOL 973 CESTAT MUM]

Refund – Limitation – Protest not vacated by speaking order of original authority: The CESTAT Chennai has rejected the contention of the Revenue department that when a speaking order has been issued by the original authority, the protest recorded by the assessee automatically gets vacated. The Tribunal was of the view that argument of the Revenue that when a speaking order is issued (appealable order), the protest automatically gets vacated is unacceptable when the dispute with regard to demand of duty is carried to the higher forum. The period involved was after 8 April 2011 when Section 27 of the Customs Act, 1962 was amended. Deliberating upon the meaning of the words 'save as otherwise provided' in Section 27(1B), the Tribunal held that the operation of sub-section (1B) will not come into application when the duty is paid under protest. The Tribunal however did not agree with the assessee that sub-section (1B) was introduced as an explanation. [*Sai Exports* v. *Commissioner* – 2022 VIL 852 CESTAT CHE CU]

Submission of statement of case to High Court – Time limit under Customs Section 130(A)(4) is not imperative: The Bombay High Court has held that the time limit of 120 days prescribed in Section 130(A)(4) of the Customs Act, 1962, in respect of drawing up statement of case and referring to High Court, by the CESTAT, should be construed as being directory only and not imperative. The Court was of the view that to construe the time limit for the submission of the case as mandatory might deprive the Revenue department of its right to have a question of law considered by the High Court which the Customs Act intends to be so considered. It noted that a party should not be deprived of a statutory right for no fault of its own, but for the fault of a public body over which it has no control. [*Asit C. Mehta Financial Services Limited* v. *CESTAT* – Judgement dated 20 October 2022 in Writ Petition (L) No. 26651 of 2022, Bombay High Court]

Handheld enterprise mobile computers, with or without SIM is classifiable as ADP machine and not as smartphone: The Customs Authority for Advance Rulings has held that handheld enterprise mobile computers having many features such as higher scanning capacity, data editing functionality, ruggedness, enterprise-level security features, and used by enterprises to capture data, in inventory management, store receiving, order processing, package tracking, tracing delivering etc., is classifiable under Tariff Item 8471 30 90 of the Customs Tariff Act, 1975. The AAR rejected the plea of classification as smartphone even when the goods had Cellular connectivity which can also be used for making calls. [In RE: *Ret-Tech Private Limited* – 2022 VIL 70 AAR CU]

'Viewsonic Creative Touch Interactive Flat Panel' is classifiable under Tariff Item 8471 41 90: The Customs Authority for Advance Rulings has held that 'Viewsonic Creative Touch Interactive Flat Panel' merit classification under Heading 8471 and more specifically under Tariff Item 84714190 of the first Schedule to the Customs Tariff Act, 1975. The subject item was an all-in-one computer system, functioning like a large size tablet computer, having an inbuilt Mother Board, Micro Processor (CPU), Graphics Card, RAM and SSD storage. It also had an embedded Android system pre-loaded with Android 9.0 (Oreo) Android Operating System (OS). [In RE: *Audio Distribution House Pvt. Ltd.* – 2022 VIL 72 AAR CU]

Central Excise, Service Tax and VAT

Notifications and Circulars

Pre-deposit of central excise and service tax – Form DRC-03 in GST regime is not a valid mode: The Central Board of Indirect Taxes and Customs has clarified that payments through Form GST DRC-03 under the GST regime is not a valid mode of payment for making pre-deposits under Section 35F of the Central Excise Act, 1944 and Section 83 of the Finance Act, 1994 read with Section 35F. CBIC Instruction No. 240137/14/2022-Service Tax, dated 28 October 2022 further states that CBIC-GST integrated portal should only be used for making such pre-deposits for central excise and service tax. The Circular in this regard observes that pre-deposit for exercising right to appeal is neither duty nor can be treated as arrears under the 'existing' law and hence not covered under Section 142 of the CGST Act, 2017, relating to transitional provisions. It also notes that Form DRC-03 is not a prescribed mode for pre-deposit under the GST regime as well.

Ratio decidendi

Entry Tax leviable on goods used in trial production – 'Business' includes trial production: The Madhya Pradesh High Court has rejected the contention that trial production of cement and clinker till the time of start of commercial production does not come within the definition of 'Business' as defined in Section 2(d) of the M.P. VAT Act, 2002. The Court was hence of the view that material consumed during trial production till the date of commencement of commercial production is exigible to Entry Tax under M.P. Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976. It noted that words and expression employed in Section 2(d) were clear that tax is leviable on the activity of manufacturer notwithstanding such activity entailing profit or not. [*Prism Cement, Unit-II* v. *Commissioner* – 2022 VIL 743 MP]

Formula under Cenvat Rule 6(3A) for calculating ineligible credit – Tax planning is perfectly within framework of law: Observing that a tax planning by the assessee is perfectly within the framework of law, the CESTAT Delhi has held that inherent unfairness/distortion created by the formula given in Rule 6(3A) of the Cenvat Credit Rules, 2004 should make no difference. Finding that the formula under Rule 6(3A) only required the value of the exempted goods removed and not the value of the intermediate goods, the Tribunal rejected the contention of the Revenue department that since the final exempted goods (urea) was highly subsidised (leading to lower value), it distorted the calculation under Rule 6(3A) and therefore, a fair and reasonable method of determining the amount of ineligible Cenvat credit required reckoning the value of the intermediate product (ammonia) which had gone into manufacture of the exempted urea. [*Chambal Fertilisers and Chemicals Limited* v. *Commissioner* – 2022 VIL 843 CESTAT DEL CE]

Imparting of education is also in nature of religious charitable activities – Service tax exemption available to works contract services provided to such charitable trust: Observing that religious use includes providing of education, and medical aid, which reduces human suffering, the CESTAT Delhi has held that the assessee would be entitled to exemption under Notification No. 25/2012-ST, with respect to works contract service provided to the Trust registered under Section 12A/12AA of the

Income Tax Act, 1961 and providing services of education. Notification No. 25/2012-ST provided exemption to services provided by way of construction, erection, alterations, etc., if building is owned by an entity registered under Section 12AA and meant predominantly for religious use by public. [*S. Kumar Builders* v. *Commissioner* – 2022 VIL 818 CESTAT DEL ST]

Cenvat credit on sales commission – Notification No. 2/2016-C.E. (N.T.) amending Cenvat Credit Rules, 2004 is applicable retrospectively: The CESTAT Mumbai has allowed Cenvat credit of the tax paid on sale commission paid to both Indian and overseas agents by the assessee during the period between April 2013 and August 2015. The Tribunal in this regard upheld the contention of the assessee that being a beneficial provision, it is a clarification which is retrospective in nature and covers the period of dispute occurring post 2011 amendment in the Cenvat Credit Rules. The Explanation inserted by the said notification in Rule 2(l)(c) stated that '*For the purpose of this clause, sales promotion includes services by way of sale of dutiable goods on commission basis*'. [*Morganite Crucible India Ltd.* v. *Commissioner* – 2022 VIL 830 CESTAT MUM CE]

Merely maintaining record of use is not exercising effective control: The CESTAT Ahmedabad has held that merely because a record of actual use of goods is kept it does not amount to having effective control and possession of the goods. Setting aside the demand of service tax under Supply of Tangible Goods service, the Tribunal also observed that the assessee asserted that they had paid VAT on the said transaction. Rejecting Revenue department's plea of effective control and possession, the Tribunal noted that there was absence of any manpower of the assessee at the site where such goods were sent. [*John Energy Ltd.* v. *Commissioner* – 2022 VIL 832 CESTAT AHM ST]

Cenvat credit on outdoor catering service for provision of meals to employees, admissible: The CESTAT Mumbai has allowed Cenvat credit of outdoor catering service received by the assessee during the period 2014-15 for the purpose of providing meals to its employees round the clock. The Tribunal was of the view that provision of such service enhances efficiency and performance of the assessee's employees which undoubtedly has nexus with the output service. Holding the Cenvat credit admissible, the Tribunal also stated that the said service was used by the assessee for its business activity during office hours and was neither a personal or welfare measure for its employees nor a perquisite provided by the assessee to its employees. [*Warburg Pincus India Pvt. Ltd.* v. *Asst. Commissioner* – 2022 VIL 857 CESTAT MUM ST]

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