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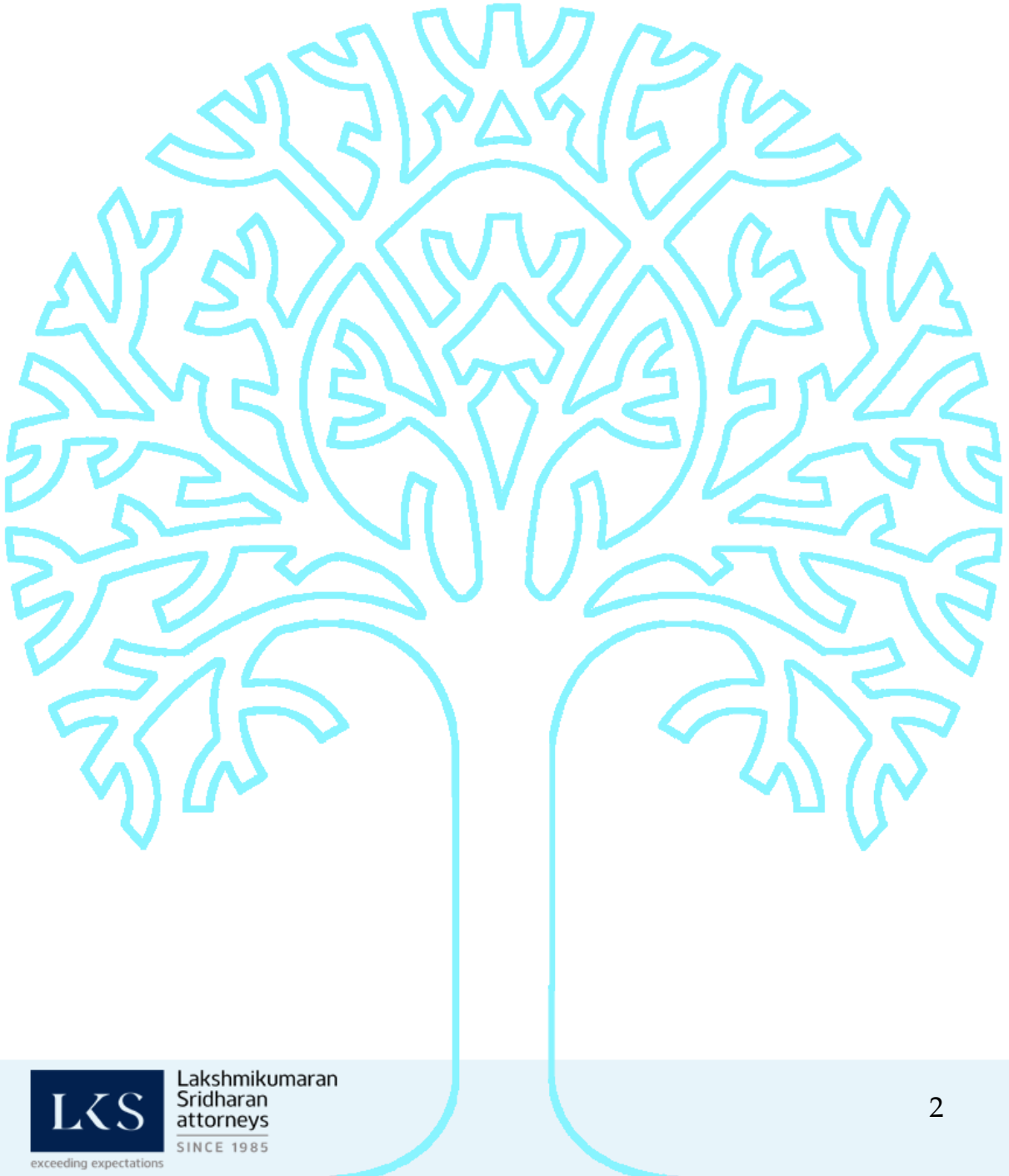

Article

Taxability of Extra Neutral Alcohol settled or not?

By **Kundan Kumar and Surbhi Premi**

Taxability of Extra Neutral Alcohol/rectified spirit, a denatured alcohol that is predominantly used as a raw material for manufacturing of liquor for human consumption has been a bone of dispute between the Centre and the States, while the former claiming its liability to GST, the States claiming that they are exclusively empowered to levy VAT and excise duty. The article in this issue of Indirect Tax Amicus traces the history of the dispute, analyses number of case law and GST Council Meetings, and observe that though the taxability of ENA would get settled from the perspective of GST based on the recommendations of the 53rd GST Council Meeting, the issue will continue from the perspective of levy of VAT and excise duty. The authors in this regard note that while States are empowered to levy VAT and excise duty on alcoholic liquor for human consumption, ENA does not qualify to be alcoholic liquor for human consumption, therefore, its taxability from the perspective of excise duty and VAT is questionable.

Taxability of Extra Neutral Alcohol settled or not?

By Kundan Kumar and Surbhi Premi

In the recently concluded 53rd Meeting, the GST Council has made several recommendations towards achieving the objectives of the Government to simplify Goods and Services Tax into a good and simple tax. The Council has, *inter-alia*, provided substantial relief to cheer up the liquor industry.

Taxability of Extra Neutral Alcohol/rectified spirit ('**ENA**'), a denatured alcohol that is predominantly used as a raw material for manufacturing of liquor for human consumption has been a bone of dispute between the Centre and the State(s), while the former claiming that supply of denatured alcohol is exigible to GST and the latter claiming that States are exclusively empowered to levy VAT on ENA, leading to a situation of dual levy in the form of GST as well as Value Added Tax ('**VAT**'). Several States have issued Notifications to bring ENA within the purview of levy of VAT. This resulted in several representations from the liquor industry to clarify the taxability of ENA under GST.

The GST Council in its 20th meeting discussed the taxability of ENA under GST at length. However, no consensus was achieved between the Centre and State over its taxability, and the Council suggested to obtain the legal Opinion of Attorney General of India regarding the taxing jurisdiction of the Centre and States(s) on supply of ENA used for manufacturing alcoholic liquor for human consumption, specifically in the light of the judgement of the Hon'ble Supreme Court in the case of *Bihar Distillery* v. *Union of India* reported at (1997) 2 SCC 727. The Attorney General opined that neither the provisions of the Constitution nor the decision of *Bihar Distillery* (*Supra*) bar the Centre and States to levy GST on supply of ENA used for manufacturing of liquor for human consumption.

This issue was again discussed in the 31st GST Council Meeting where the Council decided to maintain *status quo* unless the issue is finally decided by the Council. In the recently concluded meeting, the Council recommended amending Section 9 of the GST law to exclude levy of GST on ENA used for manufacturing of liquor for human consumption.

Here, it is imperative to discuss the constitutional provisions and the power of the Centre and the State(s) to levy tax on supply of ENA. As per Article 246(3) read with Entry 54 of State List of the Constitution, the power to levy tax on sale of

alcoholic liquor for human consumption vests exclusively with the State. Similarly, Entry 51 of State List empowers the State Government to levy excise duties on alcoholic liquor for human consumption. Further, Entry 8 of State List empowers the State Legislature to make laws with respect to the production, manufacture, possession, transport, purchase and **sale of intoxicating liquors**.

Article 366(12A) of the Constitution defines 'goods and services tax' to mean any tax on supply of goods or services or both **except taxes on the supply of alcoholic liquor for human consumption**. Furthermore, Article 246A(1) empowers the Parliament and the Legislature of every State to make laws for levy of goods and services tax. In the exercise of this power, the Parliament and the Legislative Assembly of every State have enacted GST Act for levy and collection of tax on supply of goods and services excluding levy of GST on supply of alcoholic liquor for human consumption.

In the light of existing provisions, GST is not leviable on supply of alcoholic liquor for human consumption. The power to tax such liquor exclusively vests with the State Governments *vide* Entry 54 as well as Entry 8 of List II of the Constitution of India. Therefore, any alcohol for human consumption will not attract GST and will continue to attract the State levies.

The moot issue of dispute is whether ENA is an alcoholic liquor for human consumption so as to be exigible to VAT or state excise duty.

ENA is predominantly used as raw material for manufacturing liquor for human consumption which has high content of alcohol, making it unfit to be consumed ***as such*** without further processing. Reference can be made to the landmark decision of the seven-judge bench of Hon'ble Supreme Court in the case of *Synthetics and Chemicals Ltd* v. *State of U.P.* [(1990) 1 SCC 109], wherein the Court examined the term 'alcoholic liquors for human consumption' as specified in the then Entry 51 of List II of the Seventh Schedule and held that 'alcoholic liquor for human consumption' meant liquor which is capable of being taken by human beings as such as beverage or drinks. The Court also held that 'intoxicating liquor' meant only that liquor, which is consumable by human beings, effectively alcoholic liquor for human consumption. Accordingly, the Court held that States are not entitled to levy any impost on industrial alcohol which is not meant for human consumption.

In the case of *State of U.P.* v. *Modi Distillery* [(1995) 5 SCC 753], the Apex Court relied upon the judgment of Constitution Bench in the case of *Synthetics and Chemicals Ltd.* (*supra*) and

held that the State can levy excise duty only upon alcoholic liquor fit for human consumption (when its manufacturing is complete) and not upon the raw material or input which is in the process of manufacturing to make it fit for human consumption.

In the light of the constitutional provisions and judicial precedents, it can be said that rectified spirit/ENA is not meant for human consumption, therefore, State(s) are not empowered to levy VAT and excise duty on such liquor.

However, it is interesting to note that in spite of the decision of the Seven Bench of the Apex Court, the lower benches of Apex Court have tried to differentiate the applicability of the *Synthetics and Chemicals* (*supra*) case. In the case of *Bihar Distillery* v. *Union of India*, the Division Bench of the Apex Court, *inter-alia*, held that the duties of excise on rectified spirit cleared/removed for the purposes of obtaining or manufacturing potable liquors shall be levied by the concerned State Government. The correctness of this decision was doubted in the case of *Deccan Sugar & Akbari Co Ltd.* v. *Commissioner of Excise*. The Three Judge Bench of the Apex Court reiterated that States are not empowered to levy excise duty on rectified spirit.

Therefore, Rectified spirit and ENA will not amount to alcoholic liquor for human consumption, thereby falling outside the ambit of the State to levy excise duty and VAT. Consequently, Rectified spirit and ENA will be taxable supplies under GST. This is the reason the Council has recommended for amendment for GST law to exclude ENA from levy of GST. The taxability of ENA from perspective of GST would get settled pursuant to amendment of GST laws. It needs to be seen whether such an amendment would be made prospective or retrospective. Further, in cases where the supplier has paid GST on such ENA, whether refund of GST paid would be available in case of retrospective amendment is yet to be seen.

Here, it is interesting to note that though the taxability of ENA used for manufacturing of alcoholic liquor would get settled from the perspective of GST, the same does not seem to get settled from the perspective of levy of VAT and excise duty. As noted above, States are empowered to levy VAT and Excise duty only on alcoholic liquor for human consumption, ENA does not qualify to be alcoholic liquor for human consumption, therefore, its taxability from the perspective of excise duty and VAT continues to be questionable.

The Allahabad High Court in the case of *Jain Distillery Private Limited* v. *State of U.P.* relying on the decision of Seven-

Member Bench in the case of *Synthetics and Chemicals* [(1990) 1 SCC 109], quashed the notification proposing to levy VAT on ENA. Similarly, a view was taken by the Allahabad High Court with regard to levy of excise duty on ENA in the case of *Radico Khaitan Ltd.* Also, there are contradictory rulings regarding issuance of Form C for purchase of ENA to be used for manufacturing of alcoholic liquor for human consumption.

In the light of above, it can be said that the dispute regarding the taxability (under GST) of ENA used for manufacturing of alcoholic liquor for human consumption has been settled by the Council, however, the dispute with regard to its taxability from the perspective of levy of excise duty and VAT shall continue in the future unless the provisions of the Constitution are duly amended.

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Goods & Services Tax (GST)

Notifications and Circulars

- 53rd GST Council Meeting – Highlights of the recommendations
- 53rd GST Council Meeting – Highlights of Circulars issued by CBIC

Ratio decidendi

- Registration – Reasons to be assigned for cancellation of registration in case of non-furnishing of returns – Karnataka High Court
- Verification of business premises – Notice required to be issued to assessee requiring its/employee's presence during verification – Jammu & Kashmir High Court
- Input Tax Credit – Kerala HC rejects challenge to constitutional validity of Sections 16(2)(c) and 16(4)
- Adjudication – Notification No. 9/2023-Central Tax extending time-limit with reference to FY 2017-18 is valid – Allahabad High Court
- Adjudication of cases involving fraud, suppression, etc., requires personal hearing to be given to assessee – Allahabad High Court
- Adjudication – Personal hearing required even if right to file written reply not availed – Allahabad High Court
- Cash/currency/money cannot be confiscated during course of search and seizure – Karnataka High Court
- Cash refund of amount recredited to Cenvat credit account post implementation of GST regime – Bombay High Court
- Refund claim of unutilized ITC after transfer from acquired business – Registration of acquiror during relevant period not required – Himachal Pradesh High Court
- Transition of VAT credit in GSTR-3B instead of through Form TRAN-01 is not fatal – Madras High Court
- Show cause notice in Form GST-REG-31 for cancellation of registration is wrong – Kerala High Court
- Show cause notices to proprietorship firm and its proprietor by different Commissionerates is valid – Punjab & Haryana High Court
- Reverse charge – Show cause notice not vitiated by mere mentioning Section 9(4) instead of Section 9(3) – Gujarat High Court
- Penalty – Non-mention of certain items in Delivery Challan when not violates Rule 55 – Karnataka High Court
- No GST on sale of goods warehoused in FTWZ on as-is-where-is basis to customer who clears same to bonded warehouse – Tamil Nadu AAR
- No GST on RCM basis on 'export freight' on exports on FOB basis – Tamil Nadu AAR

Notifications and Circulars

53rd GST Council Meeting – Highlights of the recommendations

GST Council Meeting presided by the Hon'ble Union Finance Minister was held on 22 June 2024 in New Delhi. The Council meeting held after more than 8 months, and the first after the General Elections, has recommended many trade facilitation measures along with many other measures relating to GST law and procedures. The Council has also recommended many changes in the GST rates for both goods and services. Some of the important recommendations are highlighted here.

53rd GST Council Meeting – Highlights of Circulars issued by CBIC

The Central Board of Indirect Taxes and Customs has on 26 June 2024 issued 16 Circulars (Circular Nos. 207 to 222/2024-GST) to clarify various issues as also highlighted in the 53rd GST Council Meeting. A summary of all these Circulars is provided below.

- Monetary limits set for Departmental appeals, etc., to GST Appellate Tribunal, High Courts, and Supreme Court – Exclusions and inclusions identified for computation of limit
- Special procedure for manufacturers of tobacco and its products – Various issues clarified
- Place of supply of goods (specially supplied through e-commerce platform) to unregistered persons, where billing address is different from the address of delivery of goods, is to be the place of delivery of goods.
- Valuation of service imported from related person where domestic entity eligible for full credit – Value in invoice will be deemed to be open market value, if invoice issued. If no invoice is issued, NIL value is to be deemed to be the open market value.
- Time-limit for Input Tax Credit in case of tax payment under RCM for supplies received from unregistered persons – Relevant FY is the year of issuance of invoice
- Discounts through credit notes after supply – Verification of reversal of proportionate ITC – CA/CMA Certificate to be obtained from recipient about reversal of credit, if tax credit note exceeds INR 5 lakh in a Financial Year

- No supply of service where foreign holding company issues ESOP/ESPP/RSU to the employees of domestic subsidiary company, and the domestic subsidiary company reimburses the cost of such securities/shares to the foreign holding company on cost-to-cost basis.
- The amount of premium for taxable life insurance policies, which is not included in taxable value determined under Rule 32(4), does not pertain to a non-taxable/exempt supply and there is no requirement of reversal of ITC.
- Insurance company is not liable to pay GST on salvage/wreckage value earmarked in the claim assessment of the motor vehicle damage if the insurance claim is settled after deducting the value of salvage from the claim amount.
- Warranty/Extended warranty – Earlier Circular No. 195/07/2023-GST further clarified
- ITC is available to insurance companies in respect of motor vehicle repair expenses incurred by them in case of reimbursement mode of claim settlement.
- ITC is not available to the insurer where the invoice for the repair of the vehicle is not in name of the insurance company.
- No supply of service if no consideration is charged from related person, or by an overseas affiliate from its Indian party, for extending loan or credit, other than by way of interest or discount.
- ITC is not restricted in respect of ducts and manhole used in network of optical fiber cables (OFCs), under clause (c) or clause (d) of Section 17(5).
- Custodial services provided by banks or financial institutions to FPIs are not services provided to 'account holder' and hence such services are not covered under Section 13(8)(a) of the IGST Act. Place of supply to be determined under Section 13(2) [location of recipient].
- Tax liability under a Hybrid Annuity Model contract, for supply of service of construction and maintenance of road, would arise at the time of issuance of invoice, or receipt of payments, whichever is earlier, if the invoice is issued on or before the specified date or the date of completion of the event specified in the contract, as applicable.

- Allocation of natural resources by Government (continuous supply of service) – In case deferred payment is made by the successful bidder in specified installments, GST would be payable as and when the payments are due or made, whichever is earlier.

Ratio Decidendi

Registration – Reasons to be assigned for cancellation of registration in case of non-furnishing of returns

The Karnataka High Court has held that the competent authority before cancelling the registration certificate, for non-furnishing the returns for a continuous period of six months, should assign reasons for cancellation of the registration. Holding that cancellation of registration certificate would be arbitrary and discriminatory, the Court observed that the Department had not assigned reasons except stating that the assessee had not filed returns for six months. It was also of the view that the order cancelling the registration was without application of mind and adversely affected the right of the assessee to carry on a business as guaranteed under Article 19(1)(g) of the Constitution of India. The Court also took note of the fact that the assessee had subsequently tendered entire arrears of tax including interest, penalty and late fees for filing the returns belatedly. [*Renuka Laxman Uppar* v. *Additional Commissioner* – 2024 VIL 558 KAR]

Verification of business premises – Notice required to be issued to assessee requiring its/employee's presence during verification

The Jammu & Kashmir High Court has held that there is violation of Rule 25 of the CGST Rules, 2017 if no notice is issued to the assessee requiring presence of its employee(s) at the time of physical verification of its business premises. The Court in this regard observed that according to Rule 25, the proper officer is required to get the physical verification of the business premises done in the presence of concerned person. The Department had in the dispute cancelled the registration of the assessee stating that during the routine inspection no employee of the assessee was available in the office and that the office was found non-functional at the principal place of business. Setting aside the cancellation of registration, the Court noted that nowhere in the CGST provisions it has been stipulated that the employee(s) must be present at the business premises all the time. [*TC Tours Limited* v. *Commissioner* – 2024 VIL 560 J&K]

Input Tax Credit – Kerala HC rejects challenge to constitutional validity of Sections 16(2)(c) and 16(4)

The Kerala High Court has upheld the constitutional validity of Sections 16(2)(c) [restriction on eligibility] and 16(4) [restriction on time for availing ITC] of the Central Goods and Services Tax Act, 2017. The Court for this purpose observed that the nature of the claim for input tax credit is in the nature of concession or entitlement which is not an absolute right and is subject to the conditions and restrictions as per GST legislation. It also noted that the scheme of GST provisions also provides that only tax collected and paid to the Government could be given as ITC. Providing an illustration wherein the inter-State supplier can take credit of tax paid by its supplier based on latter's invoice only, without the latter paying any tax to the exchequer, thus leading to transfer of amount from the originating State to the destination State, the Court held that the condition cannot be said to be onerous or in violation of the Constitution. [*M. Trade Links* v. *Union of India* – 2024 VIL 559 KER]

Adjudication – Notification No. 9/2023-Central Tax extending time-limit with reference to FY 2017-18 is valid

The Allahabad High Court has dismissed a petition challenging Notification No. 9/2023-Central Tax which extends the time-limit for passing adjudication orders under Section 73(10) of the Central Goods and Services Tax Act, 2017 with reference to proceedings for the Financial year 2017-18. Observing that challenge arose in issuance of adjudication notices under Section 73(2) and passing of orders under Section 73(10), the Court held that by way of special power under Section 168A, the Central Government and the State Government were authorized to issue necessary notifications. The Court in this regard took note of the recommendations of the GST Council which were based on the representations of the Department stating that difficulties were faced by it during Covid period (a *force majeure* circumstance) which led to delay in process of scrutiny and audit. The High Court was hence of the view that it cannot be held that there was no application of mind by the delegate in issuing the impugned notification. It was also observed that scrutiny and audit of annual returns is inherently linked to adjudication proceedings, and that the decision by the Government on recommendations of the GST Council was not

an administrative action but a legislative action. [*Graziano Trasmissioni* v. *Goods and Services Tax* – 2024 VIL 551 ALH]

Adjudication of cases involving fraud, suppression, etc., requires personal hearing to be given to assessee

The Allahabad High Court has rejected the contention of the Revenue department that the action taken against the assessee under Section 74(9) of the CGST Act, 2017 [Adjudication in cases involving alleged fraud, suppression, etc.] does not provide for personal hearing to be given to the concerned person chargeable with tax or penalty. Agreeing with the assessee that the procedure under Section 75 [General provisions relating to determination of tax], particularly Section 75(4), will have to be followed by the Department even for determination of tax under Section 74, the Court rejected the contention of the Department that Section 75 only deals with the procedure to be followed by the proper officer after remand of the matter to him by the Tribunal or the Court. The High Court in this regard observed that while sub-section (1), (2), (3), (8) and (11) of Section 75 deal with adjudication by the proper officer after remand either by the Appellate Tribunal or the Courts, sub-sections (4) and (5), (6), (7), (9) and (10) of Section 75 deal with assessment before the matter is taken up in appeal and remanded to the proper officer for reconsideration on merit. Further, considering various principles of interpretation of statute, including *casus omissus*, the Court also opined that word 'personal' can be construed to have been intended to be added but has been left out erroneously in Section 75(4). [*Eveready Industries India Ltd.* v. *State of U.P.* – 2024 VIL 555 ALH]

Adjudication – Personal hearing required even if right to file written reply not availed

Observing that the rules of natural justice as ingrained in the statute prescribe dual requirement - first with respect to submission of written reply and the second with respect to oral hearing, the Allahabad High Court has held that failure to avail one opportunity may not lead to denial of the other. The Court in this regard noted that by virtue of the express provision of Section 75(4) of the Central Goods and Services Tax Act, 2017, even in a situation of closure of opportunity to submit written reply, the assessee cannot lose its right to participate at oral hearing. [*Nasibulla Timber Store* v. *State of U.P.* – 2024 VIL 556 ALH]

Cash/currency/money cannot be confiscated during course of search and seizure

The Karnataka High Court has reiterated that the expression 'things' contained in Section 67(2) of the Central Goods and Services Tax Act, 2017 does not include cash or currency or money found during the course of search and seizure. According to the Court, similar view taken by the High Courts of Delhi, Gujarat and Kerala was correct and that the judgement of the Madhya Pradesh High Court in *Kanishka Matta* case, holding to the contrary, was not based on the correct interpretation of the said provision. The High Court in this regard noted that the object of Section 67(2) is neither to unearth unaccounted wealth, nor is it a mechanism for recovering tax by seizing assets. Directing return/refund of the confiscated cash, the Court also observed that the seizure order did not spell out reasons as to why the subject cash was being confiscated or that the same was necessary for proceedings under the CGST Act. [*B. Kusuma Poonacha* v. *Senior Intelligence Officer* – 2024 VIL 553 KAR]

Cash refund of amount recredited to Cenvat credit account post implementation of GST regime

In a case involving re-credit of rebate amount to Cenvat credit account post implementation of GST regime, the Bombay High Court has allowed cash refund of the re-credit amount under Section 142(3) of the CGST Act, 2017. The Department's contention that since the amount paid by the assessee was a voluntary deposit given on their own volition and not towards any duty, therefore, such amount must be returned in the manner it was initially paid, was thus rejected by the Court. The High Court in this regard noted that even if the assessee had made voluntary deposit, that amount must be shown as Cenvat credit in the account of the assessee, or in the alternative, it would come under the category 'or any other amount paid', under Section 142(3). ***The assessee was represented by Lakshmikumaran & Sridharan Attorneys here.*** [*Combitic Global Caplet Pvt. Ltd.* v. *Union of India* – 2024 VIL 570 BOM]

Refund claim of unutilized ITC after transfer from acquired business – Registration of acquiror during relevant period not required

The Himachal Pradesh High Court has allowed assessee's petition against the rejection of its application for refund of unutilized input tax credit due to inverted duty structure, in a case where the Department had denied refund stating that the assessee was not a registered person at the relevant point of time. Taking note of Section 54(1) of the CGST Act, 2017 which permitted any person to make an application for refund of tax,

the Court observed that the Department could not have refused to entertain the assessee's application for refund. The assessee had registered pursuant to acquisition of business undertaking from another company, and the eligible Input Tax Credit reflecting in the Electronic Credit Ledger in the books of the latter was transferred to it by filing ITC-02. Allowing the petition, the Court was also of the view that the Department should also have taken note of Rule 41 of the CGST Rules, 2017 which deals with instances of transfer of credit on amalgamation/ merger etc. of businesses/companies. Further, Department's plea that the refund application was not filed online, was also rejected by the Court while it took note of Rule 97A which permitted manual filing of refund applications. The Court was also of the view that CBIC Circular dated 18 November 2019, mandating electronic filing, cannot go contrary to Rule 97A. [*AMN Life Pvt. Ltd.* v. *Union of India* – 2024 VIL 595 HP]

Transition of VAT credit in GSTR-3B instead of through Form TRAN-01 is not fatal

In a case where the assessee had carried forward the Transitional VAT Credit in GSTR-3B return instead of filing declaration in Form TRAN-01 under Section 140 of the CGST Act, 2017, the Madras High Court has observed that the assessee cannot be made to suffer if the credit was validly availed. The High Court in this regard observed that credit availed under the provisions of the TNVAT Act, 2006 was indefeasible in nature and if it is not allowed to be utilized for discharging the tax lability under GST provisions, it has to be refunded back unless the provisions provide for lapsing of such credits. The Court also noted that there are no provisions indicating that such credit would lapse, and that Section 54 of the CGST Act, 2017 also do not provide for refund of such unutilized input tax credit that was not transitioned under Section 140. The matter was remanded for verification as to whether the assessee had validly availed input tax credit under the provisions of the TNVAT Act, 2006. [*TVL. Moon Labels* v. *Government of India* – 2024 VIL 604 MAD]

Show cause notice in Form GST-REG-31 for cancellation of registration is wrong

The Kerala High Court has held that show cause notice issued to the assessee for cancellation of its registration, in Form GST-REG-31 and not in Form GST-REG 17 is without jurisdiction. The High Court in this regard observed that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. Form GST-REG-31 is applicable to proceedings leading to the

suspension of the registration. Disposing the writ petition, the Court also noted that the show cause notice was vague. [*Kunhalavi N* v. *State Tax Officer* – 2024 VIL 592 KER]

Show cause notices to proprietorship firm and its proprietor by different Commissionerates is valid

The Punjab & Haryana High Court has rejected the contention that once a notice has been issued to a person who is a proprietor by the Panchkula Commissionerate, a separate notice cannot be issued in the name of the proprietorship concern by a different Commissionerate. Holding the argument as misconceived, the Court observed that the notices were not without jurisdiction. [*Shashank Garg* v. *Additional Commissioner* – 2024 (6) TMI 1077-P&H HC]

Reverse charge – Show cause notice not vitiated by mere mentioning Section 9(4) instead of Section 9(3)

The Gujarat High Court has observed that merely mentioning Section 9(4) instead of Section 9(3) of the CGST Act would not vitiate the show cause notice in any manner. The Court in this regard also noted that the Department had also referred to Notification No. 43 of 2017-Central Tax which pertains to Section 9(3) of the CGST Act. The assessee had admittedly purchased raw cotton, which is a specific category of supply of goods under the said notification, from the agriculturist who were unregistered. Assessee's contention that it was not liable to pay the GST on RCM basis in absence of any notification under Section 9(4) was held as not tenable by the Court while it observed that the assessee was liable to pay tax on RCM basis as per provision of Section 9(3). [*Anjani Cotton Industries* v. *Principal Commissioner* – 2024 VIL 566 GUJ]

Penalty – Non-mention of certain items in Delivery Challan when not violates Rule 55

The Karnataka High Court has held that that if the Delivery Challan contains all the details as required under Rule 55 of the Central Goods and Services Tax Rules, 2017, mere non-mentioning of the Kundan stones, in relation to the gold ornaments being transported, cannot be treated as violation of said Rule. Directing refund of penalty, the Court also observed that the lower authorities proceeded on the erroneous presumption / assumption that the gold was not being sent for sample purpose but was being transported for the purpose of sale. [*Merry Gold* v. *Union of India* – 2024 VIL 549 KAR]

No GST on sale of goods warehoused in FTWZ on as-is-where-is basis to customer who clears same to bonded warehouse

The Tamil Nadu AAR has held that GST is not leviable on the sale of goods warehoused in FTWZ on 'as is where is' basis to customer who clears the same to bonded warehouse under the MOOWR Scheme. According to the Authority, the transaction is squarely covered under clause 8(a) of the Schedule III of the CGST Act, 2017, which reads as '*Supply of warehoused goods to any person before clearance for home consumption*'. The AAR in this regard also held that 'warehoused goods', as specified in clause 8(a) of the Schedule III, covers the warehouses/warehoused goods in respect of the FTWZ/SEZ. [In RE: *Sunwoda Electronic India Private Limited* – 2024 VIL 71 AAR]

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No GST on RCM basis on 'export freight' on exports on FOB basis

The Tamil Nadu AAR has held that in a case involving exports on FOB basis, the exporter is not at all involved in any way with the 'export freight', as the same is to be arranged by the overseas buyer themselves, or through his agent, and hence the exporter is neither the provider nor the recipient of service relating to 'export freight'. According to the AAR, therefore, the question of payment of GST on RCM basis on the export freight in relation to exports made on FOB basis by the exporter, does not arise. [In RE: *DCW Limited* – 2024 VIL 73 AAR]

Customs

Notifications and Circulars

- Display assembly of a cellular mobile phone – Scope for BCD exemption clarified
- MOOWR – Procedure for transfer of goods from one Section 65 unit to another such unit
- QCOs notified by Department of Chemicals & Petro-chemicals exempted from mandatory compliance for imports by Advance Authorization holders, EOUs and SEZs
- Spices – Value addition norms relaxed
- Gold jewelry import restricted – Imports (except parts) under India-UAE CEPA TRQ however permitted without restrictions
- Review of Norms Committee decisions – Timelines relaxed

Ratio decidendi

- Refund claim of SAD – Limitation of one year as prescribed in notification is not applicable – Delhi HC decision in Sony India is applicable – CESTAT New Delhi
- No Customs duty can be demanded on goods destroyed in SEZ – CESTAT Ahmedabad
- Social Welfare Surcharge (SWS) cannot be debited from MEIS/SEIS scrips but is payable in cash – Madras High Court
- Monetary limit for Departmental appeal – Quantum of duty only relevant for determination of threshold when both duty and penalty/fine disputed – Delhi High Court
- Test report – No requirement for assessee to produce evidence contrary to the report in its favour – CESTAT Chennai
- Redemption fine imposable even when goods prohibited for import are re-exported – CESTAT Chennai
- Exemption benefit with respect to goods must be looked from the lens of 'capability of use' – CESTAT Hyderabad
- Lanterns with USB port specifically for solar charging are classifiable as solar lanterns – CESTAT Kolkata

Notifications and Circulars

Display assembly of a cellular mobile phone – Scope for BCD exemption clarified

The Central Board of Indirect Taxes and Customs (CBIC) has clarified the constituents of Display Assembly of a cellular mobile phone, including essential parts and auxiliary components. Circular No. 6/2024-Cus., dated 7 June 2024 amends Circular No. 14/2022-Cus in this regard to also distinguish general mobile phone parts from parts that are integral to Display Assembly. Pertinently, the revised Circular notes that exemption benefit under Notification No. 57/2017-Cus shall be available even if items like Frame, Receiver Mesh, etc. are fabricated, embedded, fitted or attached with the display assembly. It is stated that such additions do not alter the essential characteristic of a display assembly. However, it is clarified that where display assembly is fitted with items like PCBA, main lens, etc., then same will be treated as general part of cellular mobile, and exemption benefit shall not be extended to the same. The clarification is based on the recommendations of the Committee constituted with officials from both CBIC and Ministry of Electronics and Information Technology (MeitY).

MOOWR – Procedure for transfer of goods from one Section 65 unit to another such unit

To address non-uniformity in the compliance surrounding transfer of resultant goods (containing the warehoused goods) from one unit working under Section 65 of the Customs Act, 1962 to another such unit, the CBIC has issued Instruction No. 16/2024-Cus., dated 25 June 2024. Observing that such transfer is permitted subject to due compliance with the conditions prescribed under Manufacture and Other Operations in Warehouse (No. 2) Regulations, 2019 (MOOWR) read with the warehousing provisions under Chapter IX of the Customs Act, 1962, the Instruction reiterates the requirement of intimating the transfer to the Bond Officer in the Form appended to the MOOW Regulations; following of due process of debiting the triple duty bond (as prescribed in CBIC Circular No. 34/2019-Cus.) of the transferee and recrediting the same of the supplier; taking transit risk insurance policy to cover customs duty; etc.

QCOs notified by Department of Chemicals & Petro-chemicals exempted from mandatory compliance for imports by Advance Authorization holders, EOUs and SEZs

The DGFT has amended Appendix-2Y of the Handbook of Procedures to add Department of Chemicals & Petro-chemicals in the list of Ministries/Departments whose notifications on mandatory QCOs that are exempted by the DGFT for goods to be utilised/consumed in manufacture of export goods, i.e., imports by Advance Authorisation holders, EOUs and SEZ units. Further, Para 2.03(A)(i)(g) of the Foreign Trade Policy, 2023 has also been amended to restrict Export Obligation period to 180 days for products subject to QCOs notified by the Ministry of Textiles and the Department of Chemicals & Petro-chemicals. Notification No. 16/2024-25-DGFT dated 6 June 2024 read with a Corrigendum, and Public Notice 10/2024-25 also dated 6 June 2024 have been issued for this purpose.

Spices – Value addition norms relaxed

A minimum value addition of 25% in respect of spices will now be required only where both the export and import items pertain to Chapter 09 of the ITC(HS) Code. In all other cases, the value addition required will be only 15%. Amendments in this regard have been made in Para 10(ii) of Appendix 6B of FTP/Handbook of Procedures, 2023. As per Public Notice No. 08/2024-25, dated 3 June 2024, this will bring parity with provisions of Chapter 4 of the FTP/HBP regarding value addition for spices covered under Chapter 09.

Gold jewelry import restricted – Imports (except parts) under India-UAE CEPA TRQ however permitted without restrictions

The DGFT has amended the Import Policy of certain specified gold jewelry covered under Chapter 71 of the Schedule-I (Import Policy) of ITC (HS) 2022, from "Free" to "Restricted". As per Notification No. 17/2024-25-DGFT dated 11June 2024, the amendment is effective immediately and would be applicable on goods specified under ITC(HS) Code 7113 19 12, 7113 19 13, 7113 19 14, 7113 19 15 and 7113, 19 60. Additionally, a policy condition has been added to permit import of the restricted goods without import authorization, if imported under a valid India-UAE CEPA TRQ (except under Code 7113 19 60).

Further, it may be noted that as per Policy Circular No. 05/2024-25, dated 13 June 2024, the above restrictions will not apply to re-import of unsold jewelry exported for exhibition

abroad in terms of paras 4.79 and 4.92 of the Handbook of Procedures, 2023. Also, as per Policy Circular No. 06/2024-25, dated 19 June 2024, the restrictions will not be applicable in respect of imports made by SEZ units (other than FTWZ units).

Review of Norms Committee decisions – Timelines relaxed

In terms of paragraph 4.17 of the Handbook of Procedures, applicants can file a review of Norms Committee decisions regarding norm fixation within 12 months of the decision being uploaded on the DGFT website. Policy Circular No. 3/2024-25, dated 30 May 2024 now provides extension of the period to file the review of Norm Committee decisions taken before 1 April 2023, allowing filing of review up to 31 December 2024. Further by an Addendum of the same date, it has been clarified that review will be applicable where Advance Authorization was issued on or after 1 April 2019 and no review decision has already been taken by the Norms Committee.

Ratio Decidendi

Refund claim of SAD – Limitation of one year as prescribed in notification is not applicable – Delhi HC decision in Sony India is applicable

The CESTAT New Delhi has held that the period of limitation of one year stipulated in the Notification No. 14 September 2007, as amended by Notification dated 1 August 2008, would not be applicable in matters relating to refund claims of Special Additional Duty leviable under Section 3(5) of the Customs Tariff Act, 1975. The Department had rejected the refund claim as time-barred holding that the condition under the notification were not mere procedural. Department had further distinguished the Delhi High Court decision in *Sony India* observing that the case was related to the period before the limitation period was incorporated in the notification. Allowing the assessee's appeal, the Tribunal however noted that the Delhi High Court had held that neither Section 27 of the Customs Act, 1962 nor the provisions of the notification as amended on 1 August 2008 can impose a limitation period. Bombay High Court decision in *CMS Infosys System* was distinguished. ***The assessee was represented by Lakshmikumaran & Sridharan Attorneys.*** [*Suzuki Motorcycle India Pvt. Ltd.* v. *Commissioner* – 2024 VIL 572 CESTAT DEL CU]

No Customs duty can be demanded on goods destroyed in SEZ

The CESTAT Ahmedabad has held that Customs duty cannot be demanded on goods destroyed due to fire in a SEZ unit. The Tribunal in this regard observed that the goods were destroyed in a foreign territory and hence no Customs duty can be demanded on the said goods. Revenue departments reliance on CESTAT Mumbai decision in the case of *Sandoz Private Ltd.* was rejected by the Tribunal while it observed that the goods in that case were imported under Section 58 (bond) of the Customs Act, 1962 while in the present case the imports were made in SEZ unit. The Ahmedabad Tribunal was of the view that SEZ Act is a separate legislation and does not specifically import Section 58 to 60 of the Customs Act, as there are other parallel provisions within the SEZ Act which allow import storage and manufacture of goods without paying import duty. [*PI Industries Ltd.* v. *Principal Commissioner* – 2024 (6) TMI 203-CESTAT Ahmedabad]

Social Welfare Surcharge (SWS) cannot be debited from MEIS/SEIS scrips but is payable in cash

The Division Bench of the Madras High Court has dismissed a writ appeal filed against a Single Bench decision holding that the importer was liable to pay Social Welfare Surcharge (SWS), not by debiting from the MEIS/SEIS scrips but in cash or in any other mode. The Division Bench in this regard observed that the subject Notifications Nos. 24 and 25/2015-Cus. cannot be understood as granting exemption from SWS, as the notifications only refer to Section 25(1) and do not mention Section 110 of Finance Act, 2018 which prescribes levy of SWS. The DB of the High Court was of the view that a notification merely by virtue of having been issued under Section 25(1) of the Customs Act, 1962 cannot be understood as granting exemption from Customs duty, rather, one must enquire and find the substance of the notification. Further, the Court also held that debiting of duty scrip is a mode of payment of duty, and the fact that such duty (as debited from scrip) does not form part of the Consolidated Fund of India, was not material. [*Gemini Edibles and Fats India Pvt. Ltd.* v. *Union of India* – 2024 (6) TMI 142-Madras High Court]

Monetary limit for Departmental appeal – Quantum of duty only relevant for determination of threshold when both duty and penalty/fine disputed

The Delhi High Court has ruled that for the purposes of filing an appeal under Customs Act, 1962, only the duty under dispute shall be considered for monetary thresholds and the amount cannot be clubbed with penalty/fine and interest, to artificially meet the threshold limits. It is only in cases where the duty is not in dispute but only fine and penalty are disputed, then such fine/penalty would cumulatively be decisive factor for determining the threshold limit.

In the instant case, the Revenue had filed an appeal before the High Court against an order of the CESTAT involving a duty dispute of INR 86 lakhs and fine/penalty of INR 25 lakhs. The importer relying on Circular dated 20 October 2010 argued that threshold limit for filing appeals before the High Court is INR 1 crore and that the said threshold pertains to duty in dispute, in cases where both duty and penalty/fine are disputed. Citing the illustrations in the Circular, the High Court held that the duty and penalty/fine amounts cannot be considered cumulatively to meet the threshold requirements. [*Principal*

Commissioner v. *Linear Technologies India Pvt. Ltd.* – Judgement dated 7 May 2024 in CUSAA 88/2023, Delhi High Court]

Test report – No requirement for assessee to produce evidence contrary to the report in its favour

The CESTAT Chennai has held that when the test report is categorically in favor of the assessee, the observation that the appellant-assessee has not adduced any evidence contrary to the test report was contrary to logic. According to the Tribunal, when the test report is in favour of the assessee, there is no requirement for it to produce evidence contrary to the report.

In this case, the assessee was importing laminate flooring made of fiber, under Tariff Item 4411 13 00. Despite presence of a test report in favour of the importer, the Revenue ordered a retest along with additional queries on the technical aspects of the goods. Thereafter, the Revenue reclassified the goods under TI 4409 29 90 citing inconclusive report. The said reclassification was upheld by the Commissioner (Appeals) noting that no contrary evidence was produced by the importer. [*Pergo India Private Limited* v *Commissioner* – Final Order No. 40684/2024, dated 12 June 2024, CESTAT Chennai]

Redemption fine imposable even when goods prohibited for import are re-exported

The CESTAT Chennai has noted that once the goods are confiscated under Section 111 of the Customs Act, the title of the goods comes to be held by the government. Thereafter, even for permission to re-export the goods, the importer has to gain back the title of the goods first by payment of appropriate redemption fine under Section 125 of the Customs Act. The CESTAT Chennai further noted that the redemption of prohibited goods for re-export is upon the discretion of the proper officer and that such goods cannot be allowed for re-export without payment of such redemption fine. [*Scania Commercial Vehicles India Pvt. Ltd.* v *Commissioner* – 2024 (6) TMI 311-CESTAT Chennai]

Exemption benefit with respect to goods must be looked from the lens of 'capability of use'

In the instant case, the CESTAT Hyderabad considered the question of the entitlement to duty exemption under Notification No. 25/2023-Cus on import of Lithium Ion Battery under a Transferrable DFIA License. The issue in the case was on the question whether 'battery' falls under the description of

'Automative Battery', as noted in the DFIA license. The importer argued that the imported Lithium Battery is a type of automotive battery, supported by a certificate from IIT engineers.

The CESTAT Hyderabad emphasized that the 'capability of use' of the battery needs to be emphasized upon, and not just similarity to other automotive batteries. Rejecting the contention of the Revenue that exemption notification requires the battery to be similar to automotive battery, the CESTAT held that the DFIA scheme allows for broad categorization under 'capable of being used in electrical vehicles.' [*Principal Commissioner* v. *Olectra Greentech Ltd.* – 2024 (6) TMI 785-CESTAT Hyderabad]

Lanterns with USB port specifically for solar charging are classifiable as solar lanterns

The CESTAT Kolkata has held that lanterns with USB port specifically for solar charging, and also a separate AC charging point, are to be classified as solar lanterns under Tariff Item 9405 50 40 of the Customs Tariff Act, 1975. Dismissing the appeal filed by the Revenue department, contending classification under 8513 10 90, the Tribunal observed that there was nothing to deduce from the test report of the Revenue that the USB Ports cannot be used for charging the lanterns through solar panels. According to the Tribunal, overall, the lanterns were basically 'solar lanterns' with further ports given for normal charging through electricity in case of emergency. [*Commissioner* v. *Sigma Power Product Pvt. Ltd.* – 2024 VIL 669 CESTAT KOL CU]

Central Excise, Service Tax and VAT

Ratio decidendi

- Medicament or cosmetic – Telangana High Court upholds assessee's view on classification of certain Ayurvedic products as medicaments
- Racetrack is not a 'road' meant for public access as a matter of right – Service tax exemption not available for construction of racetrack – CESTAT New Delhi

Ratio Decidendi

Medicament or cosmetic – Telangana HC upholds assessee's view on classification of certain Ayurvedic products as medicaments

The Telangana High Court has held that the products Navaratan Oil, Gold Turmeric Ayurvedic Cream, Boroplus Antiseptic Cream, Boroplus Prickly Heat Powder and Sonachandi Chavanprash, are medicaments (drugs) and not cosmetics under the Andhra Pradesh General Sales Tax Act, 1957. The High Court in this regard rejected the Revenue Department's appeals against the order passed by the Sales Tax Appellate Tribunal, in respect of three products - Sonachandi Chavanprash, Boroplus Antiseptic Cream and Boroplus Prickly Heat Powder. The products were held to be covered as medicaments and not as cosmetics. With respect to the other two products - Navaratan Oil and Gold Turmeric Ayurvedic Cream, the Court allowed the assessee's appeals, thus holding the products to be covered as medicaments under Entry 37 of the First Schedule to the Act. Detailed observations, including the findings, of the High Court in respect of each of the specified products is available here. ***The assessee was represented by Lakshmikumaran & Sridharan Attorneys.*** [*State of Andhra Pradesh* v. *Himani Limited* – Common Order dated 14 June 2024 in Tax Revision Case Nos.155, 156, 166, 169, 182, 183, 187, 188, 192, 193 and 211 of 2004, Telangana High Court]

Racetrack is not a 'road' meant for public access as a matter of right – Service tax exemption not available for construction of racetrack

Observing that though racetrack is a 'road' but public has no access to it as a matter of right thereupon, the CESTAT New Delhi has held that service tax exemption under Notification No. 17/2005-S.T. would hence be not available for construction of car racetrack. The Tribunal observed that what was exempted was construction of road for use of general public and not the services for constructing road simplicitor. It, for this purpose, took note of the definition of 'Public place' as in Section 2(34) of the Motor Vehicle Act, and observed that the accent in the said definition was not on the circumstance that public have access on the circumstance that public has right of access. The Tribunal was hence of the view that in order for a place to fall under the ambit of definition of public place, element of right of access of public on such road is a necessary concomitant. [*Paramount Infraventures Pvt. Ltd.* v. *Commissioner* – 2024 (6) TMI 347-CESTAT New Delhi]

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