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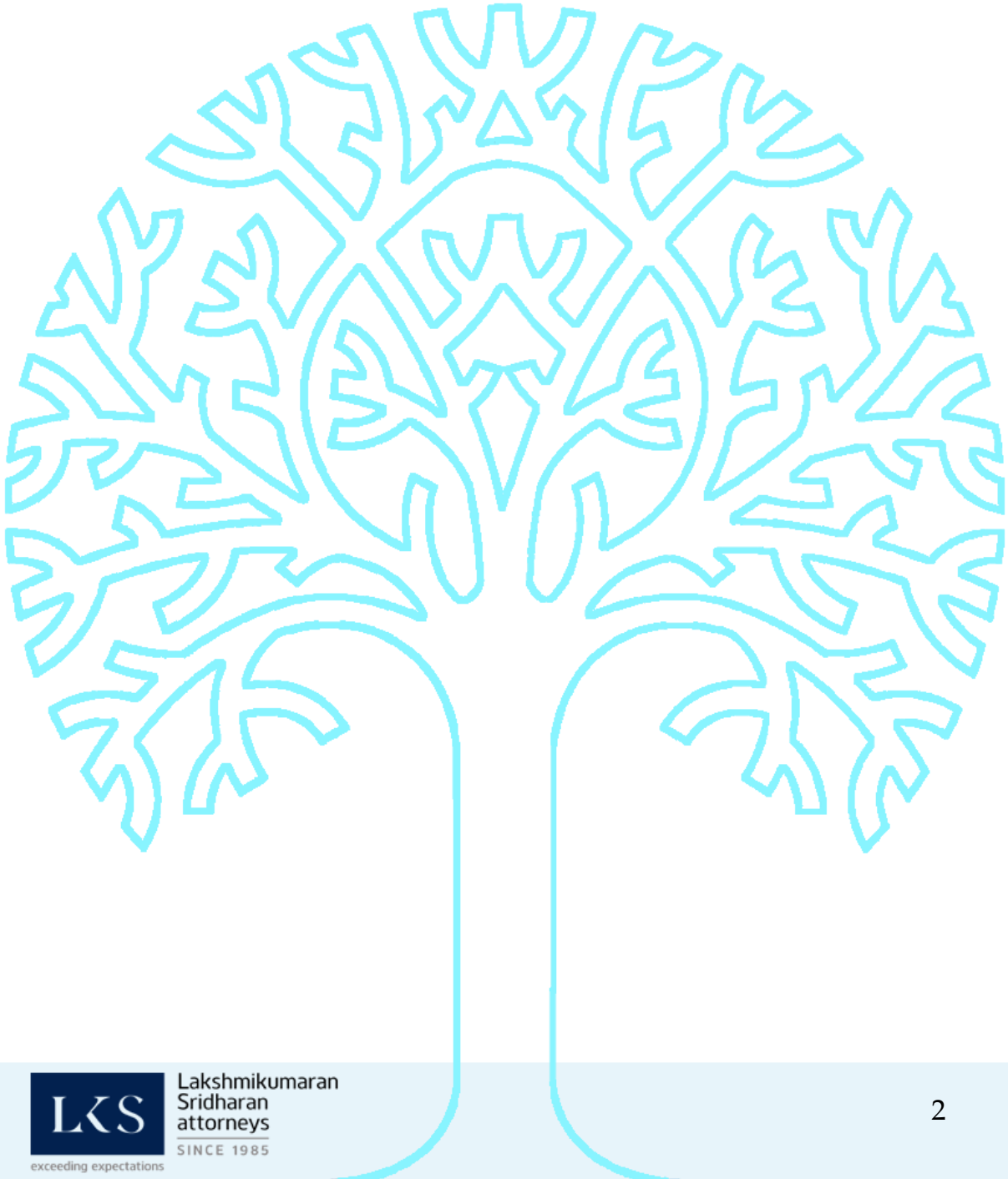

Article

IGST on FTWZ transactions: Retrospective amendment to put dichotomy to rest

By **Ratan Jain and A. Rangarajan**

The article in this issue of Indirect Tax Amicus discusses a recent recommendation of the GST Council in respect of transactions by Free Trading and Warehousing Zones ('**FTWZs**') within their premises, i.e. without exporting or clearing the goods in the Domestic Tariff Area. The article notes that there are conflicting rulings of different States' Authority for Advance Rulings. The authors elaborately discuss the conflict in the light of different AAR Rulings, including the use of different methods of interpretation (strict and purposive) for this purpose. According to them, the proposed retrospective amendment to Schedule-III of the CGST Act by the GST Council to insert paragraph 8(aa) therein and thus to clarify expressly that transactions occurring within FTWZs prior to clearance to the DTA shall be exempt supplies, is a welcome move. They believe that the change will bring clarity and boost ease of doing business.

IGST on FTWZ transactions: Retrospective amendment to put dichotomy to rest

By Ratan Jain and A. Rangarajan

For a while now, questions have been mounting as to whether the Free Trading and Warehousing Zones ('**FTWZs**') conceived under the Special Economic Zones Act, 2005 ('**SEZ Act**') can be treated as a *'bonded warehouse'* as defined under the Customs Act, 1962 ('**Customs Act**'). This question is pertinent, as it is standard practice in trade for goods to be bought and sold within FTWZ premises, often changing multiple hands, before they are either exported therefrom or cleared to the Domestic Tariff Area ('**DTA**').

If the answer to the question above is yes, such transactions would not be liable to IGST until they are cleared to the DTA. There have been divergent rulings on this issue by multiple Authorities for Advance Ruling ('**AAR**').

For instance, the AAR, Tamil Nadu in the case of *Haworth India* - 2023 (79) GSTL 493 answered the question in the negative, holding that these transactions would attract IGST. However, a diametrically opposite view was taken in *Panasonic Life Solutions India* - 2024 (8) TMI 695, as upheld by the Appellate Authority for Advance Ruling ('**AAAR**'), Tamil Nadu in 2024 (12) TMI 1220, to the effect such transactions shall not attract IGST. The AAR, Telangana in *AIE Fiber Resource and Trading (India)* - 2021 (12) TMI 1265 also answered the question in the affirmative, holding that such transactions are not liable to IGST.

While these decisions are confined in application to the respective assessees, it seems like the question of law at large may finally be put to rest, in the light of retrospective amendments proposed by the GST Council in its 55th Meeting dated 21 December 2024, seeking to provide that these transactions will not be liable to IGST.

The conflict

Section 7(5)(b) of the IGST Act, 2017, provides that 'supply' made by or to an SEZ Unit attracts IGST. As per Section 2(n) of the SEZ Act, an FTWZ Unit is an SEZ Unit. Thus, a view was possible that transactions occurring between these FTWZ Units (whether or not in the same SEZ) were liable to payment of IGST.

Section 2(21) of the IGST Act, 2017 borrows the definition of 'supply' as under the CGST Act, 2017. Schedule III of the

CGST Act, 2017 enumerates transactions that are treated neither as a supply of goods or of services. As per paragraph 8(a) therein, supply of 'warehoused goods' to any person before clearance for home consumption (i.e., before clearance to the DTA) is not treated as supply under GST law. FTWZs are ultimately enclaves where mainly trading and warehousing activities are carried on.

Thus, a question arose as to whether supply made within FTWZs would be liable to payment of IGST by virtue of Section 7(5)(b) of the IGST Act, or be exempt by virtue of paragraph 8(a) of Schedule – III of the CGST Act.

From a perspective of strict interpretation, there are a few challenges in stating that these transactions are exempt supplies:

- Explanation 2 to Schedule III of the CGST Act, 2017 states that the words 'warehoused goods' shall have the same meaning as assigned to in the Customs Act;
- Section 2(44) of the Customs Act defines 'warehoused goods' as 'goods deposited in a warehouse'. Further, Section 2(43) defines 'Warehouse' to mean either a public, or private, or special warehouse as contemplated by the Customs Act;
- an FTWZ Unit does not fall within any of these definitions, failing express registration under the appropriate provisions of the Customs Act with a license to that effect being issued by Customs authorities. In such a case however, there would be no need to wrestle with the definitions described above.

For all the above reasons, the AAR, Tamil Nadu held in *Haworth India* (*supra*) that an FTWZ is not a 'bonded warehouse' and thus, transactions occurring within would not be exempt from the purview of supply but attract applicable IGST.

However, it is interesting to examine the reasoning of the AAAR, Tamil Nadu in *Panasonic Life Solutions India* (*supra*) in holding that such transactions are not liable to IGST. These are broadly captured below:

- As per Rule 22 of the SEZ Rules, 2006 ('**SEZ Rules**'), every SEZ is required to execute Bond-cum-Legal Undertaking ('**BLUT**') in Form 'H' of the SEZ Act and submit the same with Customs authorities to avail the benefit of duty-free import contemplated in Section 26 of the SEZ Act.
- The above procedure is necessary since the exemptions under Section 26 of the SEZ Act relate to

the duty charged by Section 12 of the Customs Act. Thus, the fact that the BLUT form is accepted and signed by Customs authorities is evidence that the procedural requirements under the SEZ Act and the Customs Act travel together without any inconsistency.

- The allotment of eight-digit warehouse code for Customs Bonded warehouses is also extended to warehouses under SEZ/FTWZ as well, lending support to the synchronicity between the two legislations stated above.
- While the limited definition of 'Warehouse' under the Customs Act poses challenges, it is quite natural that the definition would be designed to serve the purpose of the Customs Act and not any other Act or situation. This is precisely the reason that Section 51 of the SEZ Act provides for overriding effect over any other law, addressing any anomalies in this regard.
- The form of BOE filed for importing goods into an FTWZ is in any case a Bill of Entry for Warehousing as per the recitals in the form of such BOE itself.
- Thus, an FTWZ being a bonded premises providing warehousing facility, is much in parity with bonded warehouses under the Customs Act. This warrants treatment of FTWZs at par with bonded warehouses.

While the ruling in *Panasonic Life Solutions* adopts a purposive approach to conclude that such supplies are exempt, adopting a strict construction may raise eyebrows, as the question of law at large remains unsettled.

Resolution

The GST Council in its 55th meeting held on 21 December 2024 has proposed amendments to Schedule-III of the CGST Act to insert paragraph 8(aa), clarifying expressly that transactions occurring within FTWZs prior to clearance to the DTA shall be exempt supplies. Further, this change, if incorporated into the statute is to operate retrospectively from 1 July 2017.

Thus, this is a welcome move providing clarity and boosts ease of doing business, since assessees will now have certainty over whether these standard trade practices are liable to IGST.

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Goods & Services Tax (GST)

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Notifications and Circulars

55th GST Council Meeting – Highlights

The 55th GST Council Meeting was held in Jaisalmer on 21 December 2024. The Council has recommended on number of issues including on rate of tax on various goods and services, measures for facilitation of trade and for streamlining compliances, and various other measures pertaining to law and procedures. Few of the important measures/changes as recommended by the Council and stated in the Ministry of Finance Press Release are highlighted below.

Rate of tax

- Accommodation service by hotels to be taxed @ 18% with ITC (with effect from 1 April 2025) if the 'value of supply' exceeded INR 7,500 for any unit of accommodation in the preceding financial year, and 5% without ITC otherwise – Definition of declared tariff to be omitted
- Autoclaved Aerated Concrete (ACC) blocks containing more than 50% fly ash content will fall under HS 6815 and attract 12% GST – *Clarification*
- Contributions by general insurance companies from the third-party motor vehicle premiums collected by them to the Motor Vehicle Accident Fund to be exempted
- Definition of 'pre-packaged and labelled' to be amended
- Food inputs supplied for food preparations intended for free distribution to economically weaker sections – GST rate to be 5%
- Fortified Rice Kernel (FRK), classifiable under Heading 1904 – GST rate to be reduced to 5%
- Gene therapy – GST to be exempted
- Motor vehicles – Sale of specified old motor vehicles including EVs to be taxed @ 18% (except in case of unregistered persons) on margin of supplier
- Motor vehicles (Utility vehicles) – Explanation in Sl. No. 52B in Notification No. 1/2017-Compensation Cess (Rate) regarding ground clearance, is applicable from 26 July 2023 – *Clarification*

- Payment Aggregators regulated by RBI are eligible for the exemption under Sl. No. 34 of Notification No. 12/2017-CT(R) – Exemption does not cover payment gateway and other fintech services which do not involve settlement of funds – *Clarification*
- 'Penal charges' collected by banks and NBFCs from borrowers for non-compliance with loan terms are not liable to GST – *Clarification*
- Pepper whether fresh green or dried pepper and raisins when supplied by an agriculturist is not liable to GST – *Clarification*
- Popcorn mixed with sugar making it sugar confectionary (e.g. caramel popcorn), attract 18% GST – *Clarification*
- Popcorn, ready to eat and mixed with salt and spices is liable to 5% GST if supplied as other than pre-packaged and labelled; 12% GST if supplied as pre-packaged and labelled – *Clarification*
- Renting of any commercial/ immovable property (other than residential dwelling) by unregistered person to registered person – Taxpayers registered under composition levy scheme to be excluded from Sl. No. 5AB introduced *vide* Notification No. 09/2024-CTR dated 8 October 2024
- Restaurant service in hotels can be opted to be taxed @ 18% with ITC with effect from 1 April 2025
- Sponsorship services provided by the body corporates to come under Forward Charge Mechanism
- Supplies to merchant exporters – Compensation cess to be reduced to 0.1%

Trade facilitation and compliance

- E-commerce – No proportional reversal of ITC required to be made by ECO in respect of supplies for which they are required to pay tax under CGST Section 9(5) – *Clarification*
- Form GSTR-9C – Late fee for delayed filing of GSTR-9C, which is in excess of late fee payable till filing of Form GSTR-9 for the period 2017-18 to 2022-23, to be waived, provided Form GSTR-9C is filed on or before 31 March 2025
- ITC in respect of ex-works supplies – Goods to be considered as received by the recipient under CGST Section 16(2)(b) – *Clarification*

- Online services (online money gaming, OIDAR services, etc.) to unregistered recipient – Supplier to mandatorily record State of recipient which will be deemed as recipient's address on record for IGST Section 12(2)(b) read with proviso to CGST Rule 46(f) – *Clarification*
- Supply of goods warehoused in a SEZ or FTWZ before clearance for exports or to the DTA, not to be treated as supply of goods/services
- Track and Trace Mechanism based on a Unique Identification Marking will be implemented for specified evasion prone commodities
- Vouchers – Transactions in vouchers shall not be supply of goods/services; distribution of vouchers on principal-to-principal basis shall not be liable to GST; additional services related to vouchers liable to GST on amount paid for such services; and unredeemed vouchers (breakage) would not be considered as supply under GST.

Changes in law and procedures

- CGST Section 17(5)(d) to be amended to replace the phrase 'plant or machinery' with 'plant and machinery', retrospectively, with effect from 1 July 2017
- IMS – CGST Sections 38, 34(2) and 39(1) and Rules 60, 67B and 61 to be amended
- ISD mechanism – Explicit inclusion of inter-State RCM transactions from 1 April 2025
- Pre-deposit to be paid @ 10% in cases involving only penalty (without involving demand of tax)

Ratio Decidendi

Telecommunication towers are not immovable property – ITC is not deniable under Section 17(5)(d)

The Delhi High Court has held that telecommunication towers would not fall within the ambit of Section 17(5)(d) of the CGST Act and thus denial of input tax credit is consequently not sustainable.

Relying upon the Supreme Court's decisions in *Vodafone Mobile Services* as well as the recent decision in *Bharti Airtel*, the Court noted that though the decisions were rendered in the context of the Cenvat Credit Rules, 2004, the decisions, on application of the generic principles which would apply to the concept of immovable property, have in explicit terms concluded that telecommunication towers are to be treated as movable. The High Court in this regard noted that the Bharti Airtel decision had held that telecommunication towers would not qualify the five fundamental precepts which define an immoveable property.

Department's reliance on the Explanation appended to Section 17, which provided for specific exclusion of telecommunication towers, was rejected by the Court while it was of the view that telecommunication towers would in any event have to qualify as immovable property as a pre-condition to fall within the ambit of clause (d) of Section 17(5). According to the Court, the specific exclusion of telecommunication towers from the scope of the phrase 'plant and machinery' would not lead one to conclude that the statute contemplates or envisages telecommunication towers to be immovable property. ***Several petitioners were represented by Lakshmikumaran & Sridharan Attorneys here.*** [*Bharti Airtel Limited* v. *Commissioner* – 2024 VIL 1356 DEL]

Refund application filed after the SC decision holding IGST on ocean freight as unconstitutional is not time-barred

The Gujarat High Court has held that assessee's application for refund of IGST paid on ocean freight, filed within a reasonable time after the Supreme Court decision in the case of *Mohit Minerals*, cannot be considered as time-barred. Quashing the order rejecting refund application on limitation, the Court noted that the assessee could have filed the refund application

only after the Apex Court's judgment wherein the notifications levying IGST were struck down as unconstitutional. Relying upon the Supreme Court decision in the case of Mafatlal Industries, the High Court also held that the writ petition filed by the assessee seeking refund of IGST waws maintainable and must be allowed as the levy was held to be unconstitutional. ***The assessee was represented by Lakshmikumaran & Sridharan Attorneys here.*** [*H K Enterprise* v. *Union of India* – 2024 VIL 1276 GUJ]

Cash whether can be seized during search – Supreme Court issues notice

The Supreme Court has issued notice in a Special Leave Application filed by the Revenue department against the decision of the Delhi High Court directing return of the currency seized during a search under Section 67(1) of the Central Goods and Services Tax Act, 2017. The Apex Court in this regard noted that the short question of law involved is whether the GST Officers are empowered to seize cash at the time of raid of the premises of the assessee in exercise of their powers under Section 67(2). The Court in its order dated 9 December 2024 noted that there is a need to interpret the expression 'and seize or may himself search and seize such goods, documents or books or things' and as to whether the term 'things' should be read ejusdem generis with goods, documents or books. [*Commissioner* v. *Anshul Jain* – 2024 (12) TMI 730 - SC]

Blocking of ITC under Rule 86A – Negative blocking – Actual availability of ITC in credit ledger is not material

The Andhra Pradesh High Court has held that the scheme of CGST Rule 86A is to put aside such amount of input tax credit which has been wrongfully utilized, and the fact as to whether it is actually available in the credit ledger or not is not material. According to the Court, the term 'such credit' can only mean the credit which was created wrongfully by any of the means set out in sub-clauses (a) to (d) of Rule 86A(1) and not the credit which is actually available in the credit ledger. The High Court hence agreed with the view taken by the High Courts of Allahabad and Calcutta while disagreed with the views of High Courts of Gujarat and Telangana.

Further, noting that the blockage order carried only the basic grounds, and that the Department submitted that there were space constraints to set out elaborate reasons, the Court observed that it is time that the authorities took note of this fact and made necessary changes to ensure that there is no space

constraint for recording of reasons in the GST portal. [*Suguna Sponge and Power Private Limited* v. *Superintendent* – 2024 VIL 1355 AP]

1) **State Authorities are empowered to issue Form GST ASMT-10 subsequent to search by Central Authorities**
2) **Blocking of ITC under Rule 86A – Negative blocking – Actual availability of ITC in credit ledger is not material**

Observing that though the issue raised by the Central Authorities and State Authorities was similar, but the quantum of amounts demanded by them were entirely different and the period of demand also differed, the Madras High Court has held that thus the question of cross-empowerment against the State Authorities would not arise. According to the Court, therefore, to the extent of difference in amount and period, the State Authority will have the power to issue Form ASMT-10 and will certainly have power to impose further prosecution for the issues, which were left out by the Central Authorities. The High Court in this regard also noted that even if the State Authorities are barred by cross empowerment for initiation of proceedings against the assessee, the blocking of ITC will always be the domain of State Authorities since the assessee was the registered person of the State Authorities.

Further, disagreeing with the views of the High Courts of Gujarat and Delhi, the Madras High Court held that the said Rule would apply to pass blocking orders by the State Authorities to the extent of fraudulently availed credit in ECL, whether it is available at the time of passing the blocking orders or not. The 1st part of Rule 86A of the CGST Rules, 2017 was read conjointly with the 2nd part of said Rule, while also taking into consideration the purposive interpretation of the said Rule. Noting that in most cases, proceedings will be initiated only after the fraudulent availment/utilisation and hence the fraudulently availed ITC would not be available in the ECL at the time of blocking, the Court held that the right way of interpretation of Rule 86A is to see whether the fraudulently availed credit was made available for the payment of output tax liabilities at any point of time. The Court while noted that negative blocking was not prohibited by statute, it was also of the view that the word 'blocking' includes both positive and negative blocking. [*TVL. Skanthaguru Innovations Private Limited* v. *Commercial Tax Officer* – 2024 (12) TMI 143-Madras High Court]

ITC is not available on goods purchased for sales promotion

The Madras High Court has held that input tax credit is not available on the items meant for sales promotional activities (T-shirts and gold coins in the present dispute). The Court in this regard relied upon an embargo under Section 17(5)(h) of CGST/TNGST Act, 2017 which applies to goods disposed of by way of gift or free samples. According to the Court, the expression - goods disposed by way of gift or free samples, will specifically apply to the goods whether manufactured or traded by an assessee under the GST provisions. The Court was also of the view that the law settled under Central Excise Act, 1944 or other Central Tax enactments is not applicable to the context of the GST enactments. [*ARS Steels and Alloy International Private Limited* v. *State Tax Officer* – 2024 VIL 1319 MAD]

No excess utilization of credit when credit of IGST amount not shown in Form GSTR-3B but split towards CGST and SGST

In a case where the assessee had by mistake not shown the IGST amounts separately in Form GSTR-3B against available credit and had resorted to splitting the said amount towards CGST and SGST, resulting in mismatch between Form GSTR 2A and Form GSTR 3B, the Kerala High Court has held that the assessee should not be seen as having availed excess credit for initiating proceedings under Section 73 of the CGST Act. According to the Court, this was a technical and inadvertent mistake and there was no loss of revenue to the State. The High Court in this regard further observed that the mistake was also insignificant because there was no dispute that no outward supply attracting IGST was made by the assessee. [*Rejimon Padickapparambil Alex* v. *Union of India* – 2024 (12) TMI 399-Kerala High Court]

Annual returns GSTR-9/9C, belated filing – Amnesty under Notification No. 7/2023-CT is available even if returns filed before such notification

Observing that the intention of the Government in issuing Notification No. 07/2023-Central Tax, dated 31 March 2023 was to encourage the filing of returns, the Himachal Pradesh High Court has held that denying the benefit of the notification when the annual returns GSTR-9/9C were filed prior to the cut-off date specified in the notification would be unjust. The Court noted that the intention of the Government was not to harass

the assessee who came forward to file their return for the assessment years mentioned in the notification. The notification waives the late fee in excess of INR 20,000 if returns are furnished between 1 April 2023 to 30 June 2023 for FYs 2017-18, 2018-19, 2019-20, 2020-21 or 2021-22. [*R.T. Pharma* v. *Union of India* – 2024 VIL 1394 HP]

Refund in case of inverted duty structure – Amendment in Rule 89(5) on 5 July 2022 is curative, thus applicable retrospectively – CBIC Circular No. 181/2022 clarifying to the contrary quashed

The Gujarat High Court has held that the amendment brought in Rule 89(5) of the CGST Rules, 2017 by Notification No. 14/2022 dated 5 July 2022 is curative and clarificatory in nature. It was thus held that the amendment would apply retrospectively to the refund or rectification applications filed within two years as per the time-period prescribed under Section 54(1) of the CGST Act, 2017. CBIC Circular No. 181/2022 dated 10 November 2022 was also held to be contrary to the purport of the amendment made pursuant to the recommendation of the GST Council as per the Supreme Court's direction to remove the anomaly in the formula in Rule 89(5).

The Court noted that the amendment made the numerator and denominator in the formula for calculating refund in harmony, which was not there prior to the amendment which had resulted in anomaly in the formula. According to the Court, the benefit cannot be denied only because the assessee had made the refund application prior to 5 July 2022, as it would create discrimination. The assessee was not entitled to include the input services as part of the formula before the amendment, but it later filed a rectification application for differential refund as per the amended formula. [*Ascent Meditech Ltd.* v. *Union of India* – 2024 (12) TMI 511-Gujarat High Court]

Order under Section 129 communicated on 8th day from date of service of notice is wrong

The Orissa High Court has quashed the Order passed under Section 129 of the Central Goods and Services Tax Act, 2017, which was made on the 8th day from date of service of the notice specifying penalty. Holding that such order does not meet the requirement under Section 129(3), the Court noted that the communication of the order was only completed the next day (8th day), when it was uploaded in the portal in

compliance with the requirement under Section 169(1)(d). It was also noted that the Department was not able to satisfy the Court about the communication made on the earlier date by mail sent to the e-mail address of assessee. The Court noted that there was no indication of any attachment (of the order) in the print-out of the e-mail, and that the Assistant Commissioner in its subsequent letter to the assessee had mentioned that the order was dated 27 September 2024 (8th day). It was also noted that the summary of the order was also uploaded on 27th. Relying upon Indian Contract Act, 1872, the Court stated that the order is to be considered as the proposal and communication of it can only be complete when it comes to the knowledge of the person against whom it is made. [*K.P. Sugandh Limited* v. *Chief Commissioner* – 2024 VIL 1376 ORI]

Demand notice under Section 74 cannot be issued on 'borrowed satisfaction'

The Karnataka High Court has held that demand notice under Section 74 cannot be issued on 'borrowed satisfaction'. In the instant case, a substantial part of the investigation including search and seizure was done by an officer who was not the Proper Officer while the notice was issued under Section 74 of the CGST Act by the Proper Officer. The Court held that since the investigation, inspection, search and seizure must be considered *ab initio void* (being not by Proper Officer), notice issued under Section 74 based upon such search, seizure and the statements recorded has also to be considered illegal, as there was no satisfaction on part of the Proper Officer for issuance of the notice under said section. According to the Court, the officer issuing the notice was required to redo the investigation and come to an independent conclusion as contemplated under Section 74 and cannot issue a notice on 'borrowed satisfaction'. [*Vigneshwara Transport Company* v. *Additional Commissioner* – 2024 VIL 1346 KAR]

Budgetary Support Scheme – Change in ownership and name of manufacturing unit is immaterial

The Sikkim High Court has upheld the contention of the assessee that the change of ownership and therefore the grant of fresh UID and registration number does not disentitle the 'Units' from availing the benefit of Budgetary Support Scheme ('**BSS**')as the scheme seeks to provide budgetary support to 'eligible Units' and not to the 'owners' thereof. The Division Bench of the Court in this regard disagreed with the finding of the Single Bench in the two decisions impugned before it that the assessees pursuant to the change in name or acquisition

assumed different legal entities from their previous ones, rendering them ineligible for budgetary support. It was of the view that mere fact of expansion, acquisition or change of name did not do away with the primary requirement that these were existing Units, prior to migration to the GST and thereby eligible Units under the BSS. The definition of 'eligible unit' was relied for the purpose while it was also noted that there was no change in respect of the geographical location of the Unit, which were in existence in Sikkim prior to the GST regime. [*Zydus Wellness Products Limited* v. *Union of India* – 2024 VIL 1343 SIK]

Audit proceeding initiated after closure of demand under Section 73, is not wrong

The Punjab & Haryana High Court has held that the fact that the Department had already taken action under Section 73 of the CGST Act, would not be a ground to restrain the authorities from conducting an audit. According to the Court, the audit may result in detection of tax not paid or short paid or erroneously refunded or it may be even otherwise, to the benefit of the concerned registered person. The Court opined that audit is akin to a preliminary inquiry and the Department ought not to be prevented from conducting preliminary inquiry relating to the books of accounts of a registered person as no prejudice can be said to be caused to the concerned registered person. [*MAG Filters And Equipments Private Limited* v. *Commissioner* – 2024 VIL 1342 P&H]

1) Attachment to the summary of show cause notice, mentioning the determination of tax, is not a show cause notice

2) Authentication under Rule 26(3) is also required for issuing notice, statement and orders for demand and recovery

The Gauhati High Court has held that Summary of the Show Cause Notice along with the attachment containing the determination of tax cannot be said to be a valid initiation of proceedings under Section 73 of the CGST Act, 2017 without issuance of a proper Show Cause Notice. The Department's submission that statement attached to the Summary of the Show Cause Notice is the Show Cause Notice, was held to be misconceived and contrary to Sections 73(1) and 73(3). Relying upon conjoint reading of sub-sections (1) (2) (3) and (4) of Section 73, the Court noted that the legislature has categorically distinguished the show cause notice from the 'statement' required to be issued by the Proper Officer, and that

irrespective of the statement, there is a requirement of issuance of a SCN.

Further, the Court was of the view that authentication as stipulated in Rule 26(3) of the CGST Rules, 2017 must be applied as and when the Proper Officer is required to issue notice or statement and pass Order in terms with the CGST Act, even though the said sub-rule refers to only Chapter III pertaining to Registration and not to Chapter XVIII of the Rules which deals with demand and recovery. According to the Court, there is an utmost necessity of the authentication by the Proper Officer. [*Vinit Kumar Jain* v. *State of Assam* – 2024 VIL 1337 GAU]

Territorial jurisdiction – Rajasthan HC has no jurisdiction to entertain writ for exports made through Nhava Sheva port

The Rajasthan High Court has held that the petitioner carrying on the business in Rajasthan or being registered under the GST provisions in Rajasthan does not give rise to a cause of action in Rajasthan for non-grant of refund of IGST by the Customs Authorities of the port from where the goods were exported. Assessee-petitioner's reliance on Circular dated 5 July 2017 to contend that Deputy or Assistant Commissioner of Central Tax is the Proper Officer for Rule 96 was found to be misplaced. The Court noted that the Circular was *qua* Rule 96(6) which was subsequently deleted w.e.f. 1 July 2017, and that the sub-rule was not relevant for refund of IGST arising due to export of goods. [*Shri Prempurji Granimarbo Private Limited* v. *Union of India* – 2024 VIL 1327 RAJ]

Demand proceedings against a company merging with another are void

Relying upon its earlier decision in *International Hospital* in context of Income Tax Act, 1961, the Delhi High Court has held that all proceedings taken against a company which had come to merge with another are rendered void and a nullity. The Court also took note of the Supreme Court decision in the case of *Maruti Suzuki* which had on a construction of Section 292B of the Income Tax Act held that a notice or order framed in respect of a non-existent entity would not be rectifiable in terms of that provision. The High Court in this regard noted that the CGST Act incorporates a provision (Section 160) which is in *pari materia* to Section 292B and hence even the powers conferred by Section 160 would not come to the rescue of the Department. Further, quashing the SCN and the order, the Court was also unable to read Section 87 of the CGST Act, 2017 as enabling the

Revenue department to either continue to place a non-existent entity on notice or to pass an order of assessment under Section 73 against such an entity. [*HCL Infosystems Ltd.* v. *Commissioner* – 2024 VIL 1283 DEL]

Jurisdiction of State Tax Officer to issue SCN when assessee allocated to Central Tax Authority and notification under CGST Section 6(1) is absent – Issue referred to Division Bench

In a case where the State Tax Officer had issued show cause notice though the assessee was allocated to the Central Tax Authority, the Single Bench of the Kerala High Court has referred the issue to the Division Bench. The assessee had here relied upon a Madras High Court decision in the case of *TVL. Vardhan Infrastructure* which had held that without there being a notification as contemplated by the provisions of Section 6(1) of the CGST Act, there is no cross-empowerment. The Kerala High Court however differed with the view of the Madras High Court while it was of the prima facie view that the officers appointed under the State Goods and Services Tax Act are proper officers for the purposes of the Central Goods and Services Tax Act, and it is only when any restriction or condition has to be placed on the exercise of power by any officer appointed under the State GST Act that a notification as contemplated by the provisions of Section 6(1) is required. [*Pinnacle Vehicles and Services Private Limited* v. *Joint Commissioner* – 2024 VIL 1265 KER]

Charitable institutions' activities are prima facie not liable to GST

The Delhi High Court has held that the activities undertaken by a charitable institution would, *prima facie*, not fall within the ambit of activities undertaken in the course of or in furtherance of business. The Court noted that Section 7 of the CGST Act, 2017, defining 'supply', connects the supply of goods or services to the activities undertaken by a person in the course of or in furtherance of business. It observed that the Department did not dispute the charitable character of the assessee-petitioner by virtue of its registration under Section 12AA of the Income Tax Act, 1961. The Order-in-Original which held the petitioner's income assessable tothe next under the Central Goods & Services Tax Act, 2017 was thus kept in abeyance till next date of hearing. [*Aroh Foundation* v. *Additional Commissioner* - 2024 (12) TMI 515-Delhi High Court]

Flavoured milk is classifiable under Heading 0402 and not under Heading 2202

The Andhra Pradesh High Court has reiterated that flavoured milk is classifiable under Tariff Item 0402 99 00 and not under TI 2202 99 30 of the Customs Tariff Act, 1975 as applicable to GST. Observing that the Entry 0402 in the GST schedule also includes milk products, the Court held that flavoured milk cannot be taken out of Heading 0402 merely because of addition of 0.5% of Badam flavour. The Court in this regard also noted that the entry in 0402 is the special entry and the entry under 2202 is the general entry and would have to give way to entry 0402. The Madras High Court decision in the case of *Parle Agro Pvt. Ltd.* was also relied upon. [*Sri Vijaya Visakha Milk Producers Company Ltd.* v. *Assistant Commissioner* – 2024 (12) TMI 784-Andhra Pradesh High Court]

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Customs

Notifications and Circulars

- Electronic collection of voluntary/self-initiated payments enabled
- Electronic integrated circuits – Compulsory registration under Chip Imports Monitoring System discontinued
- EPCG Scheme – Amendment to Para 5.10(c) of Handbook of Procedures 2015-20 (Mid-Term Review) is prospective in nature
- Revamped Preferential Certificate of Origin (eCoO) 2.0 System to be relaunched on 17 January 2025
- Yellow peas – Exemption from BCD and AIDC extended for B/L issued till 28 February 2025
- Solar power generation projects which supply electricity not eligible for benefit of MOOWR Scheme
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Ratio decidendi

- Valuation – No enhancement solely on basis of NIDB data – Authorities need to provide cogent reasons – *Delhi High Court*
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- Subsequent purchaser is not the 'importer' for demand of customs duty – No redemption fine when subsequent purchaser not the registered 'owner' of car imported – *Supreme Court*
- Interest under Customs Section 28AA is not imposable on denial of any scheme under FTP 2015-20 – FTP by itself cannot authorize interest under said section – *Kerala High Court*
- Customs cannot doubt validity of instrument (MEIS) issued under FTDR Act, absent any adjudication by DGFT – *Delhi High Court*
- LCD monitors for use with medical equipment such as ultrasound machines, X-Ray machines and CT scan, etc., are liable to IGST @ 18% – *CESTAT Mumbai*
- Valuation – Benefit of restricting air freight charges to 20% – CPT price becoming de facto FOB price – *CESTAT New Delhi*
- Refund – Unjust enrichment is not applicable to cases of goods not unloaded/short landed – *CESTAT Mumbai*
- Manufacture in bonded warehouse – Subsequent extension of license to cover full factory when applicable retrospectively – *CESTAT Ahmedabad*
- SEZ – No confiscation for bringing goods in SEZ in alleged violation of FTP and other laws – Customs authorities have no jurisdiction till goods remain in notified area – *CESTAT Mumbai*

Notifications and Circulars

Electronic collection of voluntary/self-initiated payments enabled

The Ministry of Finance has enabled the ICEGATE e-payment platform for electronic collection of voluntary/self-initiated payments. As per CBIC Circular No. 27/2024-Cus., dated 23 December 2024, the functionality will enable the users to generate a self-initiated challan for voluntary payments and then make payments through ICEGATE e-payment platform without any further approval by customs. The facility is only for past imports and exports and is not to be used for live consignments. The Circular also in this regard directs the customs officers to not to accept any payment through manual TR-6 Challan after 31 December 2024, unless the manual payment is approved with reasons by the Principal Commissioner/Commissioner. Various purposes for which payment can be made under the said facility are also listed in the Circular.

Electronic integrated circuits – Compulsory registration under Chip Imports Monitoring System discontinued

The Ministry of Commerce has revised its import policy for specified electronic integrated circuits imported under Heading 8542 of the ITC(HS), 2022. Accordingly, electronic integrated circuits imported under ITC(HS) codes 85423100, 85423200, 85423300, 85423900, and 85429000, previously requiring compulsory registration under Chip Imports Monitoring System (CHIMS) in terms of Policy Condition No. 08 of Chapter 85 of ITC (HS), 2022, Schedule-I (Import Policy) has been 'discontinued', with immediate effect. Notification No. 41/2024-25, dated 29 November 2024 has been issued for the purpose.

EPCG Scheme – Amendment to Para 5.10(c) of Handbook of Procedures 2015-20 (Mid-Term Review) is prospective in nature

Amendment to Para 5.10(c) of Handbook of Procedures 2015-20 (Mid-Tern Review) is prospective in nature and would be applicable to the third-party exports made against EPCG

Authorisations issued on or after 5 December 2027 only. This is in furtherance of judgement dated 21 December 2023 of the Gujarat High Court in the case of *South Gujarat Warp Knitters Association and Another* [***See LKS Tax Amicus, January 2024 issue here***] which had set aside the DGFT Policy Circular No. 22/2015-20 dated 29 March 2019. Circular No. 10/2024-25 dated 13 December 2024, clarifying so, also notes that subsequently SLP filed by the Union of India against the High Court decision has been dismissed by the Supreme Court on 2 August 2024.

Revamped Preferential Certificate of Origin (eCoO) 2.0 System to be relaunched on 17 January 2025

The enhanced version of the Preferential Certificate of Origin (eCoO) system - eCoO 2.0 – which was introduced by DGFT will be launched on 17 January 2025. eCoO 2.0 offers several new and user-friendly features aimed at streamlining the certification process for exporters. Some notable features of the revamped eCoO 2.0 system include multi-user access, e-signature options, integrated dashboard, cost sheet digitization. Trade Notices Nos. 24/2024-25 dated 20 December 2024 read with 23/2024-25 dated 6 December 2024 have been issued for this purpose.

Yellow peas – Exemption from BCD and AIDC extended for B/L issued till 28 February 2025

Exemption from Basic Customs Duty (BCD) and Agriculture Infrastructure and Development Cess (AIDC) on import of Yellow Peas falling under TI 0713 10 10 will now be available in respect of Bills of Lading issued on or before 28 February 2025. Further, the current Import Policy conditions for import of Yellow Peas have also been extended. Accordingly, imports will continue to be free from Minimum Import Price and port restrictions in case the Bills of Lading are issued on or before 28 February 2025, instead of 31 December 2024, subject to compulsory registration under the online Import Monitoring System. The Ministry of Finance has issued Notification No. 49/2024-Cus., dated 26 December 2024 which amends Notification No. 64/2023-Cus. with effect from 27 December 2024. The Ministry of Commerce has also issued Notification No. 43/2024-25, dated 24 December 2024 for this purpose.

Solar power generation projects which supply electricity not eligible for benefit of MOOWR Scheme

In accordance with Section 65(1) of the Customs Act, 1962, the Ministry of Finance has notified that '*goods imported for solar*

power generation projects which supply electricity' shall not be permitted in the warehouse w.e.f. 17 December 2024. This restriction will be applicable only when electricity is resulting from the manufacturing processes and other operations in relation to the warehoused goods under Section 65 of the Customs Act, 1962. Notification No. 86/2024-Cus. (N.T.), dated 16 December 2024 has been issued for this purpose.

Petroleum and Aviation Turbine Fuel – Notification exempting additional customs duty equal to Special Additional Excise Duty rescinded

The Ministry of Finance has rescinded Notification No. 32/2022-Cus., dated 30 June 2022. The notification provided exemption to imports of Petroleum Crude and Aviation Turbine Fuel (ATF), classifiable under Headings 2709 and 2710 respectively, from the levy of additional duty of customs under Section 3(1) of the Customs Tariff Act, 1975 as is equivalent to the Special Additional Excise duty leviable thereon under Section 147 of the Finance Act, 2002. Notification No. 48/2024-Cus., dated 3 December 2024 has been issued for this purpose, and is consequential to the rescinding of various central excise notifications imposing such duty in 2022.

Ratio Decidendi

a) Valuation – No enhancement solely on basis of NIDB data – Authorities need to provide cogent reasons

b) Valuation – Importer can question enhancement even if right to seek SCN or speaking order under Customs Section 17 given up

The Delhi High Court has reiterated that the National Import Database (NIDB) data cannot on a standalone basis constitute valid grounds to doubt the declared value of imported goods and that any such reassessment would have to be shored by independent and cogent evidence. The Court in this regard noted that as per various precedents, mere reliance on external data without corroborative evidence or clear justification would fail to meet the tests and principles underlying the provisions enshrined in the Customs Valuation Rules of 1988 and that of 2007.

According to the Court, a conjoint reading of Section 17(4) of the Customs Act, 1962 alongside Rule 12 of the Customs Valuation Rules, 2007 reveals that reasons in support of the formation of opinion that the self-assessment declarations are incorrect must exist and stand duly recorded. The consent or concession of the importer cannot possibly be construed as relieving the proper officer from documenting the reasons which formed the basis for it doubting the declared value.

The High Court also in this regard set aside the impugned CESTAT orders which had held that that once the importer concedes to the reassessment undertaken by the proper officer in terms of Section 17(4) and gives up its right to question the same, it would not be open for the importer thereafter to resile from the concession so made. The Court was of the view that the perceived concession made in respect of the opinion harboured by the proper officer cannot deprive the importer of the right to question the decision of the proper officer in accordance with law. Relying upon various communications of the importer to facilitate expeditious clearance of goods to avoid the financial burden of detention and demurrages and

their readiness to pay customs duty at the enhanced value 'under protest', the Court observed that the tone and tenor of the communications cannot possibly be interpreted or construed as amounting to a conscious waiver of a right to question the reassessment further. According to the Court, the same cannot possibly be viewed as amounting to an abandonment of the right to institute an appeal itself. CESTAT decisions in the cases of *Advanced Scan Support* and *Vikas Spinners* were distinguished by the Court for this purpose. ***Many of the importers (appellants) were represented by Lakshmikumaran & Sridharan Attorneys here.*** [*Niraj Silk Mills and Ors.* v. *Commissioner* – Judgement dated 27 November 2024 in CUSAA 26/2022 and Ors., Delhi High Court]

Letter rejecting issuance of MEIS scrip is appealable under FTDR Section 15

The Bombay High Court has held that the letter rejecting an exporter's application for a grant of MEIS scrip is appealable under Section 15 of the Foreign Trade (Development and Regulation) Act, 1992. The Court in this regard noted that Section 9(5) of the said Act provides that an appeal against an order refusing to grant or renew or suspending or cancelling a licence, certificate, scrip etc shall lie in like manner as an appeal against an order would lie under Section 15. Also, according to the Court, these provisions would contemplate an order passed by the authority who need not be an adjudicating authority as defined in Section 2(a) read with Section 13 but has trappings of the adjudicating authority. The Department's contention that since the rejection order was not passed by the adjudicating authority as defined under the Act, no appeal would lie, was thus rejected.

It may be noted that the High Court also held that alternatively, the authority who would be processing the application and after making inquiry, before granting or renewing or refusing of grant or renew the licence etc., would have to be treated as an adjudicating authority. Further, the Department's submission that appeal ought to have been filed to DGFT and not before Additional DGFT, was also rejected by the Court. The Court, for this purpose, observed that an appeal can be preferred before any officer superior to the adjudicating authority authorised by the Director-General to hear the appeal. [*Ashwini Ashish Dighe* v. *Union of India* – TS 626 HC 2024 (BOM) FTP]

Subsequent purchaser is not the 'importer' for demand of customs duty – No redemption fine when subsequent purchaser not the registered 'owner' of car imported

Considering the definition of 'importer' as provided in Section 2(26) of the Customs Act, 1962, the Supreme Court has held that a subsequent purchaser of the imported car is not covered within the definition to charge customs duty from him as importer. The Court in this regard noted that the appellant (subsequent purchaser) was not the importer of the car in question, was not involved in the process of importation, and that the car was neither imported for his benefit nor on his behalf. It was noted that the appellant was only a subsequent purchaser of the said vehicle from a person who had purchased the same from the importer.

Further, in respect of payment of redemption fine under Section 125 of the Customs Act, the Court noted that the appellant was not the 'owner' of the car/motor vehicle as defined under the Motor Vehicles Act, 1988 as the registration certificate continued to be in the name of the original importer even though there has been a transfer of the vehicle. The liability of a redemption fine, since the car was seized from the appellant's possession, was also rejected by the Court while it observed that the possessor of the car can be made liable only when the owner of the goods is not known. [*Nalin Choksey* v. *Commissioner* – TS 605 SC 2024 CUST]

Interest under Customs Section 28AA is not imposable on denial of any scheme under FTP 2015-20 – FTP by itself cannot authorize interest under said section

The Kerala High Court has quashed the demand for interest under Section 28AA of the Customs Act, 1962 in a case where the exporter was earlier found ineligible for the benefit of the Service Exports from India Scheme introduced by the Foreign Trade Policy in force from 1 April 2015 to 31 March 2020. The Court in this regard noted that no provision of the Foreign Trade (Development and Regulation) Act, 1992 under which Foreign Trade Policy has been framed was pointed out to show that the provisions of Section 28AA were made applicable for levying interest on any person found ineligible for any benefit received under any Scheme in the Foreign Trade Policy. The High Court though noted that under Chapter 3 of the FTP, which was in operation from 1 April 2015 to 31 March 2020, any person found ineligible for the benefit under any Scheme was

to refund the benefit along with interest under Section 28AA, but it was held that the provisions of the Foreign Trade Policy cannot by itself authorise the levy of interest under Section 28AA. Relying upon Supreme Court decision in *J.K. Synthetics Ltd.*, the Court held that levy must be supported by plenary legislation. [*Braddock Infotech Private Limited* v. *Joint DGFT* – 2024 (12) TMI 18 - Kerala High Court]

Customs cannot doubt validity of instrument (MEIS) issued under FTDR Act, absent any adjudication by DGFT

The Delhi High Court has held that Customs authorities cannot either doubt the validity of an instrument issued under the Foreign Trade (Development and Regulation) Act, 1992 or go behind benefits availed pursuant thereto absent any adjudication having been undertaken by the Directorate General of Foreign Trade (DGFT) under Rule 8, 9 or 10 of the Foreign Trade (Regulation) Rules, 1993. The Court was of the view that an action for recovery of benefits claimed and availed would have to necessarily be preceded by the competent authority under the FTDR Act having found that the certificate or scrip (MEIS in the present case) was illegally obtained. The Court also observed that the reference to a proper officer in Section 28AAA of the Customs Act, 1962 is for the limited purpose of ensuring that a certificate wrongly obtained under the Customs Act could also be evaluated on parameters specified in that provision. However, according to the Court, the said stipulation cannot be construed as conferring authority on the proper officer to question the validity of a certificate or scrip referable to the FTDR Act.

The issue involved grant of MEIS benefit to export of certain stone and marble handicrafts which according to the Revenue department were classifiable under Heading 6802 of the Customs Tariff Act while the DGFT had granted MEIS benefit under Heading 6815 as also was declared by the assessee-exporter. Allowing the petition, the Court noted that the DGFT had chosen to desist from expressing its stand with respect to the validity of the MEIS scrips issued to the assessee. Further, observing that there was absence of fraud, suppression etc., in the case, the Court held that the controversy as to whether the subject articles were liable to be classified under Heading 6802 or 6815 would not qualify the tests constructed by Section 28AAA. It was also noted that the subject of classification stood explicitly reserved for the consideration of the DGFT in terms of Para 2.57 of the Foreign Trade Policy. [*Designco* v. *Union of India* – 2024 VIL 1266 DEL CU]

LCD monitors for use with medical equipment such as ultrasound machines, X-Ray machines and CT scan, etc., are liable to IGST @ 18%

The CESTAT Mumbai has held that 'monitors' of various models imported by the assessee-appellants would be classifiable under Tariff Item 8528 52 00 of the Customs Tariff Act, 1975 and are appropriately leviable to Integrated Goods and Services Tax (IGST) at the rate of 18% in terms of Serial No. 384 or 383C of the Notification No. 01/2017-IT(Rate). The Revenue department had submitted that the goods are liable to IGST @ 28% under Serial No. 154 as they were 'other' (sub-heading 8428 59) monitors designed to be used with medical equipment, X-Ray machines and not for use with the computers or Automatic Data processing machine. Allowing the appeal, the Tribunal also relied upon classification decisions taken by HS Committee of World Customs Organization (WCO) over the years during 2001 to 2010 on monitors, consistently holding them to be classifiable under sub-heading 8528 52. CBIC Circular dated 11 January 2005, on interpretation of the exemption available to 'general purpose machine', clarifying that such exemption benefits should be extended as long as they are capable of use in the specified industry, was also relied upon. ***The assessee was represented by Lakshmikumaran & Sridharan Attorneys here.*** [*Philips India Limited* v. *Commissioner* – 2024 VIL 1531 CESTAT MUM CU]

Valuation – Benefit of restricting air freight charges to 20% – CPT price becoming *de facto* FOB price

The CESTAT New Delhi has allowed the benefit of the fifth proviso to Rule 10(2)(a) of the Customs Valuation Rules, 2007 for restricting the air freight charges to only 20% for the purpose of including in the value of goods. The Tribunal in this regard rejected the Department's submission that since the Airway Bill did not indicate the amount of freight and while the goods were sold on CPT [carriage paid to = CIF] basis, the FOB value was not separately indicated and so it was not possible to deduct the FOB value from the CPT to arrive at the freight element and restrict its inclusion in the assessable value to 20% of the FOB value. Assessee-importer's submission that 'Add.Recov.Freight' referred to in the invoices was the additional recovery towards air freight, was noted by the Tribunal while it was also satisfied that the CPT values for the relevant period were for transport by ship or rail and that air transport is far more expensive.

Further, holding that the CPT price mentioned in the invoices had become the *de facto* FOB price, the Tribunal noted that the value on CPT basis was for transport by ship and although the goods were not transported by ship but were flown through air cargo for which an additional amount was paid, the importer had paid the full amount indicated as CPT for the goods. ***The importer was represented by Lakshmikumaran & Sridharan Attorneys here.*** [*IPM India Wholesale Trading Private Limited* v. *Principal Commissioner* – 2024 VIL 1641 CESTAT DEL CU]

Refund – Unjust enrichment is not applicable to cases of goods not unloaded/short landed

The CESTAT Mumbai has allowed assessee-importer's appeal by remand in a case involving refund of customs duty arising on account of excess duty paid on the total quantity of goods proposed to be imported by the importer as per Bill of Lading, as against the actual quantity of imported goods discharged by the vessel. While remanding the dispute the Tribunal found force in the argument that in respect of provisional assessment of duty, pending discharge of the imported goods, and when the entire quantity was not discharged, the claim of unjust enrichment does not apply to such cases of goods not unloaded/short landed. The Tribunal was of the view that unloaded goods do not bear the character of 'imported goods' and that the question of applicability of Section 12 of the Customs Act, 1962 on the goods which were not at all unloaded and eventually exported back should have been examined by the authorities below at the time of final assessment. The matter was remanded for examining the legal provisions, as well as various certificates, books of account produced by the importer. ***The importer was represented by Lakshmikumaran & Sridharan Attorneys here.*** [*Ratnagiri Gas & Power Pvt. Ltd.* v. *Commissioner* – 2024 VIL 1677 CESTAT MUM CU]

Manufacture in bonded warehouse – Subsequent extension of license to cover full factory when applicable retrospectively

In a case where the Revenue department had recognized that the conditions imposed for grant of licence for manufacture under bond, during earlier period, were impracticable thus defeating the very purpose of grant of license and had subsequently extended the bonded area to the entire factory registered under Central Excise Act, the CESTAT Ahmedabad has held that the amendment can only be treated as curative. The Tribunal was of the view that the amendment will have the effect from the date of issue of original license. The Tribunal in this regard also noted that the Department had not pointed out

any misdemeanor on the part of the assessee and no diversion of goods was noticed, with all the activity happening in the full knowledge of the Revenue. ***The assessee was represented by Lakshmikumaran & Sridharan Attorneys here.*** [*Larsen & Toubro Limited* v. *Commissioner* – 2024 VIL 1620 CESTAT AHM CU]

SEZ – No confiscation for bringing goods in SEZ in alleged violation of FTP and other laws – Customs authorities have no jurisdiction till goods remain in notified area

The CESTAT Mumbai has set aside confiscation and penalty imposed under the provisions of the Customs Act, 1962 in case of goods brought in the SEZ (from outside India) allegedly in violation of certain provisions of Foreign Trade Policy [without license from DGFT] and E-Waste (Management) Rules, 2016. The Tribunal noted that under Section 51 of the Special Economic Zone Act, 2005, the notified area is outside the customs territory of India and consequently, without applicability of Customs Act, 1962 to any authorized operations within. According to the Tribunal, the jurisdiction of the Customs Act, 1962 comes into play either in connection with import contrary to the requirement for undertaking authorized operations or upon removal from the SEZ without payment of duty or in contravention of any prohibition on import into India. It was noted that there was no evidence on record or even preponderance of probability for any such act. The dispute involved bringing 'old and used computer parts' into the SEZ. [*Direct Logistics and Export Co. Ltd.* v. *Commissioner* – 2024 (11) TMI 744 - CESTAT Mumbai]

Central Excise, Service Tax and VAT

Ratio decidendi

- Zinc sulphate (agriculture grade) is a fertilizer – Sulphuric acid for manufacture of said item is eligible for exemption – *CESTAT Larger Bench*
- Advertisement activity by franchisee for outlets in India is not extra consideration flowing to foreign franchisor – No service tax liability – *CESTAT New Delhi*
- Promoting and publicizing business of foreign universities in India is 'Export of service' – *CESTAT New Delhi*
- Cenvat credit on renting of immovable property service for warehouse located outside factory premises is admissible even after 1 March 2011 – *CESTAT Ahmedabad*
- Non-completion of adjudication within the time limit prescribed under Excise Section 11A(11) is fatal – *CESTAT New Delhi*
- Activities relating to consultancy on acquisition of mines abroad is not liable to service tax under Scientific or Technical Consultancy – *CESTAT Kolkata*
- Paint is part and parcel or essential/integral feature of any component – *CESTAT Mumbai*
- Coconut oil, packaged and sold in small quantities (from 5 ml to 2 liter), when is classifiable as 'edible oil' under Heading 1513 – *Supreme Court*

Ratio Decidendi

Zinc sulphate (agriculture grade) is a fertilizer – Sulphuric acid for manufacture of said item is eligible for exemption

The Larger Bench of the CESTAT has held that an assessee is eligible for benefit under Sl. No. 32 of Notification No. 4/2006-C.E., dated 1 March 2006 on procurement of sulphuric acid for manufacture of zinc sulphate (agriculture grade). Sl. No. 32 of the notification provided for nil rate of central excise duty on sulphuric acid used in the manufacture of fertilizers. The Tribunal for this purpose was of the view that zinc sulphate (agriculture grade) is a micronutrient which is a fertilizer, and thus, irrespective of what is contained in the Explanation at Serial No. 35 of the notification and the fact that the said Explanation would not be applicable to Serial No. 32, benefit of nil rate of duty was available to sulphuric acid used in the manufacture of zinc sulphate (agriculture grade).

The Revenue department had relied upon an earlier CESTAT decision in the case of *Jyoti Chemicals*, which was maintained by the Supreme Court, to contend that zinc sulphate is *not* a fertilizer. The Larger Bench, however, observed that the Tribunal in the *Jyoti Chemicals* decision had only rejected the contention that the Explanation contained in Serial No. 35 of the notification was applicable to the entry at Serial No. 32 and hence it was held that zinc sulphate is not a fertilizer. The LB noted that the contention that even otherwise zinc sulphate would be a fertilizer in terms of the common parlance theory was not raised in the memorandum of appeal in that dispute. Supreme Court's decision in *S. Shanmugavel Nadar* v. *State of Tamil Nadu* [(2002) Supp 8 SCC 361], on the question of merging of orders, was relied upon by the Larger Bench here.

Holding zinc sulphate (agriculture grade) as fertiliser, the Larger Bench relied upon the explanation of 'fertiliser' in the World Book Encyclopedia, and Tribunal decisions in *Radhika Vitamalt Pvt. Ltd.*, *Punjab Micro Nutrients*, *Himgiri Metals* and *India Phosphate* and the CESTAT Larger Bench decision in *P.I. Industries Limited*. ***The assessee was represented by Lakshmikumaran & Sridharan Attorneys here.*** [*Jyoti Chemicals and Fertilisers* v. *Commissioner* – Interim Order Nos. 12-16/2024, dated 12 December 2024, CESTAT Larger Bench]

Advertisement activity by franchisee for outlets in India is not extra consideration flowing to foreign franchisor – No service tax liability

The CESTAT New Delhi has held that the amount spent by the franchisee in India towards advertisement and promotion of the outlets operated by it in India is not an amount of consideration in terms of Section 67 of Finance Act, 1994 read with Rule 5 of Service Tax (Determination of Value) Rules, 2006 for including in the value of Franchise Services received by the franchisee-assessee from overseas franchisors. Setting aside the demand of service tax, the Tribunal noted that the amount in question was towards promotion of assessee's own outlets, and that the presence of two people to constitute service rendered by one & received by another was thus missing. It was also noted that there was nothing in the franchise agreement that obligated the franchisee-assessee to incur expenditure for advertising the brand name, trademarks, etc. and that merely because the brand name, trademarks, etc. of the foreign franchisor appeared in the advertisement, it cannot be called a taxable service. ***The assessee was represented by Lakshmikumaran & Sridharan Attorneys here.*** [*Devyani International Limited* v. *Commissioner* – TS 640 CESTAT 2024 (DEL) ST]

Promoting and publicizing business of foreign universities in India is 'Export of service'

The CESTAT New Delhi has held that promoting and publicizing business of foreign universities in India is not liable to service tax as it amounts to 'Export of Service' in terms of Rule 6A of Service Tax Rules, 1994. Rejecting the Department's contention that the service qualified as 'intermediary service' in terms of Rule 2(f) of Place of Provision Rules, 2012, the Tribunal noted that the assessee was not an agent of the universities, as there was clear denial of agent-principal relationship in the Agreements itself. Considering various marketing activities done for the foreign universities by the assessee the Tribunal noted that the assessee while rendering these activities was the provider thereof while the foreign universities were the recipients/beneficiaries. Further, observing that there was absence of any agreement of the assessee with the students in India, the amount was received in foreign exchange from foreign universities, and that the students were paying fees directly to the universities, it was held that the place of provision was not India, and the service amounted to 'export of services'. It was also held that services of the assessee fell within the ambit of Rule 3 of the Place of Provision Rules, 2012, according to which location of service recipient is relevant. ***The assessee was***

represented by Lakshmikumaran & Sridharan Attorneys here. [*TC Global India Pvt. Ltd.* v. *Additional DG, DGCEI* – 2024 VIL 1665 CESTAT DEL ST]

Cenvat credit on renting of immovable property service for warehouse located outside factory premises is admissible even after 1 March 2011

The CESTAT Ahmedabad has allowed assessee's appeal in a case involving Cenvat credit on renting of immovable property service for warehouse located outside the factory premises for the period after 1 March 2011. The credit was denied by the Department on the ground that renting of immovable property service falls under the category of setting up of the premises of the output service provider which was removed from the inclusion clause of the definition of 'input service' with effect from 1 March 2011. The Tribunal noted that service of renting of immovable property services was directly used for providing output service and was therefore covered under the main clause of the definition of input service. Further, noting that the warehouse was used for storage of raw material which was directly related to the manufacturing activity of the assessee, the Tribunal held that credit cannot be denied merely because the warehouse was located outside the factory premises. It was also held that credit cannot also be denied if the address of head office is mentioned, as long the input service was received for the factory. ***The assessee was represented by Lakshmikumaran & Sridharan Attorneys here.*** [*L and T Sargent and Lundy Limited* v. *Commissioner* – 2024 VIL 1562 CESTAT AHM ST]

Non-completion of adjudication within the time limit prescribed under Excise Section 11A(11) is fatal

The CESTAT New Delhi has set aside orders passed by the Additional Director General (Adjudication) for the reason that the adjudication was not completed within the time limit prescribed under sub-section (11) of Section 11A of the Central Excise Act, 1944. The Tribunal in this regard noted that there was no plausible explanation by the Revenue department as to why it was not possible for the Adjudicating Authority to complete the adjudication process within the stipulated time. Allowing some 210 appeals with consequential reliefs to the assessees, the Tribunal noted that the Adjudicating Authority cannot endlessly wait and has to utilize its discretion in a fair and reasonable manner so as to balance between the principles of natural justice and the time set out in the statute for adjudication of the show cause notice. It was also held that even if no reply was filed by

the noticees, still the Adjudicating Authority should proceed to adjudicate the SCN *ex parte* as it was bound to do so within one year, unless there is strong and compelling reasons for not doing so. [*Kopertek Metals Pvt. Ltd.* v. *Commissioner* – Final Order Nos. 59511-59720/2024, dated 25 November 2024, CESTAT New Delhi]

Activities relating to consultancy on acquisition of mines abroad is not liable to service tax under Scientific or Technical Consultancy

The CESTAT Kolkata has held that service of experts conducting site visits for assisting the assessee in India in taking informed decision on the viability of acquisition of coal mining assets situated outside India, is not covered under the category of 'Scientific or Technical Consultancy'. It was noted that the activity is covered under the mentioned service only when such service is provided by a scientist or a technocrat, or any science or technology institution or organization. The activities undertaken by the experts involved review and validation of the data pursuant to site visits, meetings and discussions w.r.t. estimated resources and reserves of the mines; geological data; geotechnical and hydrological conditions effecting mining, etc. Setting aside the demand of service tax, the Tribunal also noted that with effect from 1 June 2007, the service was covered under 'Mining services' and that the demand was not raised under such service category. It was also noted that the mines were immovable property situated outside India and thus the service connected with mining was performed outside India.

The Tribunal also set aside the demand of service tax on 'sampling charges' under 'Scientific or Technical Consultancy'. It in this regard noted that the payment in foreign currency was made to third party inspection agencies for carrying out inspection w.r.t. the quality of iron ore exported. It was held that the activity was covered under 'Technical Inspection and Certification Service' under which no demand was made. Further, relying upon Rule 4(a) of the Place of Provision of Services Rules, 2012, the place of provision of said service was held to be outside India. ***The assessee was represented by Lakshmikumaran & Sridharan Attorneys here.*** [*Essel Mining & Industries Ltd.* v. *Commissioner* – 2024 VIL 1541 CESTAT KOL ST]

Paint is part and parcel or essential/integral feature of any component

The CESTAT Mumbai has held that paint is a 'part and parcel' or an 'essential feature' of an element or to say an essential or integral feature of a component as a whole. Paints were thus

allowed the benefit under Notification No. 12/2013-C.E., dated 17 March 2012 at Sr. No. 332 read with List 8, which exempted payment of central excise duty on electric generator including its 'parts' and 'components'. Paints were applied/coated to the wind mills in the present case. The Tribunal for this purpose noted that paints are used in all components as an essential requirement for their protection and safety and as an auxiliary requirement to retain their life and beauty. According to the Tribunal, disallowing exemption to 'paints', which are applied to exempted goods would be like removal of skin from a human being so as to treat him as skinless individual. [*Jotun India Pvt. Ltd.* v. *Commissioner* – 2024 VIL 1532 CESTAT MUM CE]

Coconut oil, packaged and sold in small quantities (from 5 ml to 2 liter), when is classifiable as 'edible oil' under Heading 1513

The Supreme Court has held that pure coconut oil, packaged and sold in small quantities ranging from 5 ml to 2 litres, can also be classified as 'Edible oil' under Heading 1513 of the Central Excise Tariff, 1985 and not as 'Hair oil' under Heading 3305 which covers 'Preparations for use on the hair'. The 3-Judge Bench of the Apex Court, while hearing the matter after the Division Bench was divided in its opinion, was of the view that the Department's reliance upon the 'common parlance test' was misplaced. According to the Court, the test would have to be understood in the proper perspective and cannot be considered when there is no ambiguity and difference in the heading in the Tariff and the corresponding entry in the HSN. The Court was thus of the view that the mere fact that coconut oil is also capable of being put to use as a cosmetic or toilet preparation, by itself, is not sufficient to classify it under 'hair oil', as 'coconut oil' is name-specific.

The Supreme Court in this regard held that for classifying coconut oil as hair oil, not only must the coconut oil be suitable for use as 'hair oil', but it must also be put in packaging sold in retail for such particular use, i.e., as hair oil. According to the Court, the phrase 'suitable for such use' under Headings 3303 to 3307 in Chapter Note 3 would have to be read in conjunction with the Explanatory Notes thereto, which categorically state that such packaging must be accompanied with labels, literature or other indications that the product is intended for use as a cosmetic or toilet preparation or it must be put in a form clearly specialized to such use.

Holding classification of the coconut oil, as involved in the dispute, under Heading 1513, the Court noted that the oil was sold as 'edible oil', was packed in edible grade plastic, satisfied

the requirements of the Food Safety and Standards Act, 2006, and was packaged in conformity with the Edible Oils Packaging (Regulations) Order, 1998. It was noted that edible oil would have a shorter shelf life than oil meant for cosmetic purposes and must meet the Indian Standards specifications prescribed for edible oil which are different from that for hair oil. Further, noting that the Standards of Weights and Measures (Packaged Commodities) Rules, 1977, provided that 'edible oil' can be packed in specified sizes of 50 ml, 100 ml, 200 ml, 500 ml, 1 litre or 2 litres, the Court held that sale in smaller containers would not, by itself, be indicative of it being packaging of a kind fit for use as 'hair oil'. Similarly, the fact that the product containers depicting a popular film actress with flowing tresses and that the trademark was registered for hair oil, were held as not sufficient to classify the product as hair oil. [*Commissioner* v. *Madhan Agro Industries (India) Private Ltd.* – 2024 VIL 56 SC CE]

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