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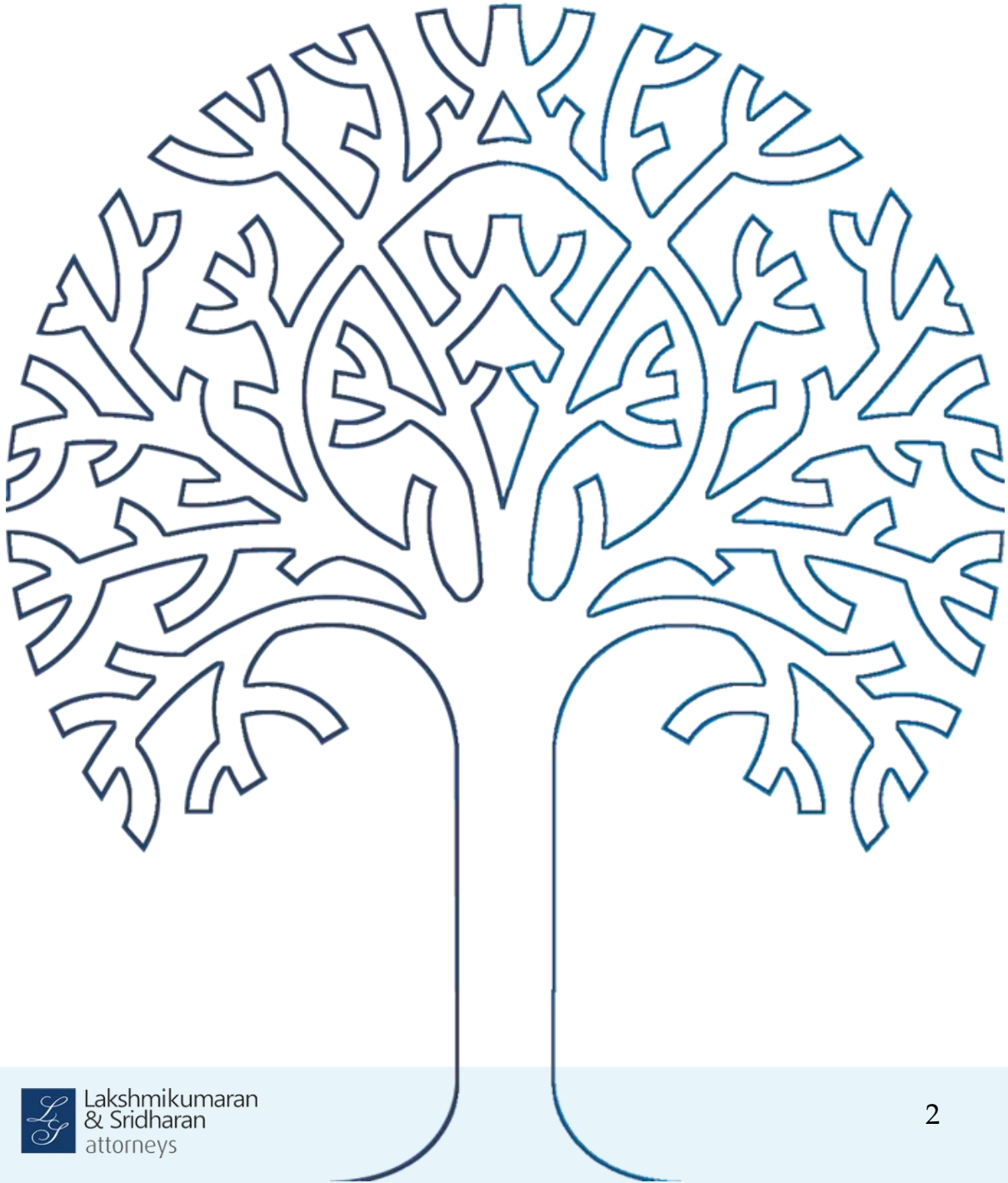

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Article

Tax relief on Grants: Not to be taken for grant-ed!

By **Rohini Mukherjee, Divya Bhardwaj and Aishwarya Vardhan**

The article in this 151st edition of LKS Tax Amicus covers the issue of taxability of grants. It notes that given the voluntary and unilateral nature of a grant, there exists ambiguity whether the provision of a grant qualifies to be a taxable supply under the scheme of GST law, as to qualify as a supply it is essential that a good or service is provided for a consideration. The authors note that it needs to be examined on case-to-case basis, whether the provision of the grant amount in a particular arrangement has its strings attached to the service provided and the consideration paid. They also in this regard explore various international precedents and observe that irrespective of whether the amount is received in the name of grant or donation or charity, it must be meticulously seen whether there is an element of *quid pro quo* in the particular arrangement. According to them, it is crucial to delve into the very essence of the transaction in order to navigate this complex maze of grants.

Tax relief on Grants: Not to be taken for grant-ed!

By Rohini Mukherjee, Divya Bhardwaj and Aishwarya Vardhan

The taxability of grants has been a bone of contention between the taxpayers and the department. While a clarification has been issued on this issue, there is no litmus test providing a definitive answer regarding the taxability of a grant.

The term 'grant' carries a connotation of something which is given unilaterally and voluntarily. It may be given with or without an intention to undertake a specific activity. To quote a few examples, grants can be in the form of research grants given to educational institutions, grants given to non-profit organizations to fund their programs and initiatives, art and cultural grants given to promote artistic expression, etc.

Grants, especially those in the nature of philanthropic undertakings and charitable purposes, which are ostensibly not conferring any benefit to the recipient, are surrounded by the question whether these would attract taxability, despite being a unilateral payment.

Further, given the voluntary and unilateral nature of a grant, there exists ambiguity whether the provision of a grant qualifies to be a taxable supply under the scheme of the GST law as pertinently, to qualify as a supply, it is essential that a good or service is provided for consideration.[1]

Before delving into the nitty-gritties of this issue under the GST regime it may be appreciated that in the erstwhile tax regime, i.e., the Service Tax regime, it has been time and again held that there needs to be a direct link between the grant and the service provided, in order for a grant or a voluntary payment to be held to be leviable to service tax.[2] Further, it has been pointed out that the concept of 'activity for a consideration' involves an element of contractual relationship wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange for a consideration.[3]

As far as the GST law is concerned, the term 'consideration' has been inclusively defined under the Act. This term is derived

[1] Section 7, CGST Act, 2017.
[2] *Jaisal Club Ltd.* v. *Commr, Japir*, [2017 (4) G.S.T.L. 357 (Tri. - Del.)].
[3] Taxation of Services: An Education Guide, Central Board of Excise and Customs [2012].

from the Latin phrase '*quid pro quo*', which means 'something for something'. Therefore, if any person is undertaking any activity, then such activity will qualify to be a supply of service only if the person undertaking the activity receives some consideration for the same.

At this juncture, a question arises as to whether the receipt of the grant amount can be said to be a consideration, wherein the grantee is providing services to the grantor, on the utilization of the grant funds. Here, it needs to be examined on case-to-case basis, whether the provision of the grant amount in a particular arrangement, has its strings attached to the service provided and the consideration paid.

It may be noted that internationally, it has been recognized that if the payment is made either as a condition of, or in expectation of services rendered by the grantee, then the grant is indeed in the nature of consideration in return for a supply.

For illustrative purposes, let us say that an entity undertakes a research project at the behest of a grantor, aimed towards benefiting the health and well-being of the public. As a corollary to such research, certain data and dissertation are developed and the ownership of this research material is given to the granter. In such a case, such a transaction may meet with scrutiny, and it will have to be seen whether the research material can be said to be a consideration for the granter.

Further, in order to gauge whether there exists a direct nexus between the service provided and the grant fund received, certain indicative non-conclusive tests that may be used are[4]:

A. A.Does the grantor receive anything in return for the funding?
B. B.If the grantor does not benefit, does a third-party benefit instead?
C. C.Are any conditions attached to the funding, which go beyond the requirement to account for the funds?

It is therefore crucial to travel beyond the nomenclature of a term to the very essence of the transaction.

It is worth noting that irrespective of whether the amount is received in the name of grant or donation or charity, it must be meticulously seen whether there is an element of *quid pro quo* in the particular arrangement. Interestingly, such a reciprocal benefit need not be explicit.

[4] Trustees of the Bowthorpe Community Trust, LON/94/1276 A, No. 12978 in Simon's Weekly Tax Intelligence, 13 April 1995, at 649; Hillingdon Legal Resource Centre (LON/90/12Y), Wolverhampton Citizens Advice Bureau, MAN/96/1145; Hope in the Community (supra).

For instance, let us understand a scenario where a grantee is receiving the grant to undertake certain charitable activities.

These activities are being undertaken for a complete third-party, who is receiving the benefit of such initiative. The grantee is only required to submit timely reports to the grantor, to ensure accountability. However, it is mutually agreed between the grantor and the grantee that the grantee will post regular updates of the charitable activity on social media and acknowledge the support of the grantor with respect to all such publications.

This very understanding between the parties can be said to provide promotional benefits to the grantor, thereby establishing a quid pro quo in this case. In this regard, it is noteworthy that *vide* a Circular issued in November 2019, the Revenue Department has clarified that when the name of the donor is displayed in the recipient institution premises, in such a manner, which can be said to be an expression of gratitude and public recognition of donor's act of philanthropy and is not aimed at giving any publicity to the donor of his business, then it can be said that there is no supply of service for a consideration.[5]

Though the above clarification was a welcome measure, the same needs to be applied carefully to the factual matrix of a particular arrangement.

In summation, for a provision of a grant to be outside the purview of GST, it is essential that the grant is indeed a unilateral payment and does not carry any consideration for the grantor. It is therefore crucial to delve into the very essence of the transaction in order to navigate this complex maze of grants.

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[5] Circular No. 116/35/2019-GST dated 11 October 2019.

Goods & Services Tax (GST)

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Notifications and Circulars

Pan masala, tobacco and tobacco products – New special procedure to be effective from 1 April 2024

The Central Board of Indirect Taxes and Customs (CBIC) has notified new procedure to be followed by the manufacturers of pan masala, tobacco and its products with effect from 1 April 2024. It may be noted that the earlier Notification No. 30/2023-Central Tax which specified the special procedure to be followed by a registered person engaged in manufacturing of certain goods like pan masala, tobacco, etc. has been rescinded with effect from 1 January 2024 by Notification No. 3/2024-Central Tax, dated 5 January 2024. It is believed that the new notification will simplify the reporting process in respect of specified goods fostering a smoother experience for manufacturers of such goods.

LPG for non-automotive purposes classifiable under TI 2711 19 10 – GST rate reduced to 5%

With effect from 4 January 2024, in column (2) of Sl. Nos. 165 and 165A of Schedule I of Notification No. 1/2017-Central Tax (Rate), TI 2711 19 00 has been substituted with TI 2711 19 10. Accordingly, GST at an effective rate of 5% shall be applicable on LPG (for non-automotive purposes) conforming to standard IS 4576 and classifiable under TI 2711 19 10. Notification No. 01/2024-Central Tax (Rate) dated 3 January 2024 amends Notification No. 1/2017-Central Tax (Rate) for this purpose, effective from 4 January 2024.

Ratio Decidendi

No interest when GST paid in Electronic Cash Ledger before due date though GSTR-3B filed belatedly

In a case where the GST amount was paid in the Electronic Cash Ledger (ECL) by generating GST PMT-06 before the due date, though the GSTR-3B return was filed belatedly, the Madras High Court has rejected the contention of the Department that the deposit of tax in ECL would not amount to payment of tax and would attract interest liability. The High Court was of the view that it is not correct to state that the instance of payment of tax to the Government would occur only upon the filing of GSTR-3B return and thereafter by debiting the ECL or electronic credit ledger. According to the Court, from the moment the amount is deposited by generating GST PMT-06, it is the money of the exchequers, since the money was collected only under the name of the exchequer in the form of GST.

The Court noted that once the amount is paid by GST PMT-06, the said amount will be initially credited to the account of the Government immediately and the tax liability of a registered person will be discharged to that extent, and that it is only thereafter, for the purpose of accounting only, it will be deemed to be credited to the ECL, as stated in Explanation (a) to Section 49(11) of the CGST Act. Considering provisions of Sections 39(1), 39(7) and Explanation (a) to Section 49(11) along with Form GST PMT-06, Form GSTR-3 and Form GSTR-3B, the Court noted that payment of tax will always be made not later than the last date for filing the GSTR-3 or GSTR-3B monthly returns. The Court also held that the submission of the Department that no tax amount will be passed on to the Government until filing of GSTR-3B would be contrary to Section 54(12) read with 39(7).

Allowing the writ petitions, the Madras High Court differed with the views of the Jharkhand High Court in *RSB Transmission (India) Ltd.* v. *Union of India* and the Telangana High Court decision in *Megha Engineering and Infrastructures Limited* v. *CCT*. ***Assessee was represented by Lakshmikumaran & Sridharan.*** [*Eicher Motors Limited* v. *Superintendent of GST and Central Excise* - (2024) 14 Centax 323 (Mad.)]

Refund not to be rejected for non-supply of authenticated documents

The Delhi High Court has held that refund cannot be rejected merely on the ground of non-supply of authenticated document. According to the Court, in case a party is entitled to refund, it is open to the Department to call for further clarification or documents as may be required to satisfy itself that refund is due and payable. The petitioner had filed an annexure to the appeal which was disregarded on the ground that the same was not signed or authenticated. The High Court held that the defect was curable, and the petitioner-assessee could have been called upon to certify the said document or produce further material in the form of vouchers, bill etc. to substantiate the said document. Relegating the matter for re-adjudication, the Court also observed that the assessee had sought a refund of Input Tax Credit and had contended that relevant documents are available with them. [*Mittal Footcare* v. *Commissioner* – (2024) 14 Centax 54 (Del.)]

Refund not deniable when delay is on account of technical glitches of portal

The Delhi High Court has held that if the taxpayer has made a *bona fide* attempt to make a refund application but was prevented to do so on account of technical glitches or for any reason attributable to GST authorities, its claim for refund cannot be denied on account of delay. The Court found it difficult to accept that the assessee's legitimate right to seek refund could be foreclosed on account of technical glitches. The High Court in this regard also observed that there was no dispute that the assessee had attempted to file an application for refund on the GST portal twice but its application could not be uploaded on account of technical glitches, and that it had also made a complaint and a ticket for the same was also raised. [*Sethi Sons (India)* v. *Assistant Commissioner* – 2023 VIL 913 DEL]

Interest on delayed refund – Date of receipt of complete refund application is relevant

The Rajasthan High Court has held that the indications made in Section 56 of the Central Goods and Services Tax Act, 2017 pertaining to 'the date of receipt of the application', can only be read as date of receipt of a 'complete application'. According to the Court, hence in case there are deficiencies, the date the deficiencies are removed by the applicant would be relevant. [*Baba Super Minerals Private Limited* v. *Union of India* – (2024) 14 Centax 92 (Raj.)]

Refund of IGST on zero rated exports does not affect refund due to inverted duty structure

The Madras High Court has held that the refund claim for zero rated exports does not disentitle the assessee from claiming a refund for unutilized ITC in case of inverted duty structure. The assessee was using viscose yarn (taxed @ 12%) as a raw material for the manufacturer of viscose fabrics (taxed @ 5%). In addition, the assessee undertook export sales and applied for and received refund as regards IGST. The High Court remanded the matter for reconsideration. [*VSM Weavess India Private Limited* v. *Assistant Commissioner (ST)* – (2024) 14 Centax 284 (Mad.)]

Registration when cannot be cancelled retrospectively

The Delhi High Court has held that merely because a taxpayer has not filed the returns for some period does not mean that the taxpayer's registration is required to be cancelled with retrospective date also covering the period when the returns were filed, and the taxpayer was compliant. According to the Court, the registration cannot be cancelled with retrospective effect mechanically as it can be cancelled only if the proper officer deems it fit to do so. The Court also held that such satisfaction cannot be subjective but must be based on some objective criteria. The assessee had himself in its application sought cancellation of registration on 17 January 2020. the registration was however cancelled only later after a show cause notice was issued on 8 October 2021 proposing cancellation of registration for non-filing of returns for 6 months. It may be noted that the Court also observed that a taxpayer's registration can be cancelled with retrospective effect only where consequences are intended and are warranted. The Court in this regard took note of one of the consequences for cancelling a taxpayer's registration with retrospective effect - taxpayer's customers are denied the input tax credit availed in respect of supplies made by the taxpayer during such period. [*Saroj Gagneja* v. *Assistant Commissioner* – 2024 VIL 01 DEL]

Uploading of notice on portal is wrong when assessee had cancelled registration earlier

In a case where the assessee-petitioner had cancelled its registration earlier, the Allahabad High Court has held that the proper notice under Section 74 of the Central Goods and Services Tax Act, 2017 is required to be issued to the assessee at its address. The Court in this regard noted that the action of the

authorities to upload the show cause notice on the web portal in spite of knowing that the assessee had already cancelled its registration prior to the date of issuance of the show cause notice, prevented the assessee from appearing in the hearing in the original proceeding, thus resulting in an *ex parte* order. Relying upon number of decisions on natural justice, the Court was of the opinion that any action that proceeds without proper intimation and service of the show cause notice to the petitioner is vitiated and bad in law, and is, accordingly required to be quashed. [*Eastern Machine Bricks and Tiles Industries* v. *State of U.P.* – (2024) 14 Centax 202 (All.)]

Appeal to Appellate Authority – Pre-deposit only of 10% of tax liability is required if liability disputed in entirety

Taking into consideration the legislative intent of Section 107(6)(b) of the CGST Act, 2017, the Karnataka High Court has held that aggrieved party has to pre-deposit 10% of the tax liability for filing appeal to the Appellate Authority, and that the pre-deposit does not extend to penalties, fees or interest when the assessee has contested the entirety of the tax liability. Upholding the contention that 'deposit of 10% of the disputed tax amount' means only the tax amount and not entire composite amount comprising tax, fine, penalty and fee, the High Court noted the crucial legislative distinction in provisions of Section 107(6)(a) and (b). The Court also observed that when the assessee disputes the entire tax amount, the focus on the pre-deposit obligation remains on the contested tax, recognizing the subsequent nature of penalty, fee, interest (termed 'consequential elements' by the Court) in the adjudicative process. [*Tejas Arecanut Traders* v. *Joint Commissioner* – 2023 VIL 923 KAR]

Demand – Issuance of bunched show cause notice for different AYs is wrong

The Madras High Court has held that issuing bunched show cause notices is against the spirit of the provisions of Section 73 of the CGST Act, 2017. The Department, in this case, had issued bunched show cause notice dated 28 September 2023 for five Assessment Years starting from 2017-18 to 2021-22. The assessee in this regard had stated that this bad precedent would pave the way for issuance of show cause notices even for the cases where limitation is not available. The High Court was of the view that by issuing bunched show cause notices the Department was trying to do certain things indirectly which

they are not permitted to do directly and that the same is not permissible in law. According to the Court, the limitation period of three years would be separately applicable for every assessment year and it would vary from one assessment year to another. [*Titan Company Ltd.* v. *Joint Commissioner* – 2024 VIL 19 MAD]

Delay in filing returns after best judgement assessment under Section 62 is condonable

The Madras High Court has held that limitation of 30 days period prescribed under Section 62(2) of the Central Goods and Services Tax Act, 2017 is directory in nature. According to the Court, if the assessee is not able to file the returns for the reasons, which are beyond his control, the said delay can be condoned and thereafter, the assessee can be permitted to file the returns after payment of interest, penalty and other charges as applicable. The Court in this regard noted that the returns not-filed pertained to the year 2022-23 and hence the time period for giving the best judgement assessment was till 31 December 2029 and the assessee could file the returns under Section 62(2) till 30 January 2030. The Court was hence of the view that the legal right of the assessee to file the returns, as available under Section 62, cannot be taken away if the best judgement assessment order is made by the Department at the earliest point of time. [*Comfort Shoe Components* v. *Assistant Commissioner* – 2024 VIL 36 MAD]

Hearing opportunity to be provided when adverse decision is contemplated, even if request for same is not made

The Madhya Pradesh High Court has held that that opportunity of hearing is required to be given, even in those cases where no such request is made but adverse decision is contemplated against such person. The Court in this regard noted the use of word 'or' in Section 75(4) of the CGST Act, 2017. The High Court also found itself unable to persuade with the line of argument of the Department that 'opportunity of hearing' does not include the opportunity of 'personal hearing'. The question whether the expression 'opportunity of hearing' is fulfilled if reply to show cause notice is received, was thus answered in negative by the Court while it noted that law makers while prescribing the statutory form have visualized different stages for the purpose of 'personal hearing' – One stage is when the reply is submitted and the other stage is date,

venue and time of the personal hearing. [*Patanjali Ayurved Limited* v. *State of Madhya Pradesh* – 2024 VIL 77 MP]

E-way bill generated subsequent to detention – Penalty not imposable when intention to evade absent

The Allahabad High Court has set aside the penalty in a case where generation of e-way bill was subsequent to the detention of goods but before order imposing penalty was passed. Holding there was no intention to evade tax, the Court noted that although the petitioner failed to generate the e-Way Bill on time, the tax invoices issued contained all the relevant details including the detail of the vehicle transporting the goods and that CGST and SGST were already charged.

It may be noted that issuing writ of certiorari, the Court also observed that a penal action devoid of *mens rea* not only lacks a solid legal foundation but also raises concerns about the proportionality and reasonableness of the penalties imposed. According to the Court, the imposition of penalties without a clear indication of intent may result in an arbitrary exercise of authority, undermining the principles of justice. [*Falguni Steels* v. *State of U.P.* – 2024 VIL 78 ALH]

No penalty for minor typographical error in vehicle number in e-way bill

In a case where instead of '5332', '3552' was incorrectly entered as the vehicle number in the e-way bill, the Allahabad High Court has held that imposition of penalty under Section 129 of the Central Goods and Services Tax Act, 2017 is without jurisdiction and illegal in law. Terming the mistake as minor typographical error, the Court observed that typographical error in the e-way bill without any further material to substantiate the intention to evade tax should not and cannot lead to imposition of penalty. The Court also observed that in certain cases where lapses by the dealers are major, it may be deemed that there is an intention to evade tax but not so in every case. Department had contended that its Circular allowed for non-imposition of penalty only in case where the mistake is only of 2 digits while presently the error was on 3 digits. Coordinate Bench's decision in *Varun Beverages Limited* v. *State of U.P.* and Supreme Court decision in *Assistant Commissioner* v. *Satyam Shivam Papers Pvt. Ltd.*, were relied upon by the Court to allowed the petition. [*Hindustan Herbal Cosmetics* v. *State of U.P.* – (2024) 14 Centax 80 (All.)]

Gift Voucher/Card cannot be taxed at the time of issuance unless there is a clear identity of goods or services and its value is ascertained

The Madras High Court has held that if the Gift Voucher/Card is issued for a specified and identified goods or for a merchandise of a particular value, tax is payable on such identified goods/services at the time of issuance of such Gift Voucher/Card, as per Section 12(4)(a) of the CGST Act, 2017. However, if such Gift Voucher/Card is issued for any unspecified goods/services to be purchased on a future date from a whole range of products/goods/merchandise offered for sale by an assessee, the tax is payable only at the time of redemption of such Gift Voucher/Card as per Section 12(4)(b). The Court in this regard noted that a Gift Card/Voucher issued by the assessee is a Prepaid Payment Instruments (PPIs) within the meaning of the RBI Master Circular dated 11 October 2017 and the assessee is under obligation to either allow the redemption of the said Voucher/Gift Card or refund the amount if the card is not used within the expiry. Further, it was held that Gift Card/Voucher is an 'actionable claim' within the meaning of Section 2(1) of CGST Act 2017 read with Section 3 of the Transfer of Property Act, 1882 and specified in Schedule III of CGST Act. The Court also held that the assessee is not liable to pay GST on 'Gift Voucher/Card' in view of Section 7(2)(a) read with Sl. No. 6 to Schedule III of CGST Act. [*TVL. Kalyan Jewellers India Ltd.* v. *Commissioner* – (2024) 14 Centax 146 (Mad.)]

Sale and buyback – ITC available when payment settled by book adjustment

The West Bengal AAR has held that in case of sale and buyback transactions, the ITC is admissible in respect of goods purchased from outsourced vendors, when payment is settled through book adjustment. The Applicant intended to manufacture footwear through independent outsource vendors under 'sale and buyback model' where raw materials for production were to be sold by the Applicant to the outsourced vendors and the Applicant will buy back the manufactured goods from the said vendors while settling the payment through book adjustment. The AAR observed that the term 'payment' is not defined in the CGST Act, 2017. It relied on the ruling of *Senco Gold Ltd.* [2019-VIL-133-AAR] and held that the settlement of mutual debts through book adjustment was a valid mode of payment under the CGST Act, 2017. The AAR held that ITC cannot be denied on the sole ground that consideration is paid through book adjustment. [In RE: *Paragon*

Polymer Products Private Limited – 2024 VIL 12 AAR West Bengal]

Printing of textbooks, notebooks, calendar and report cards – Supply when of 'goods' or 'services'

The West Bengal AAR has held that printing and supply of textbook to a State Council of Educational Research and Training is supply of goods and not printing services, as the Applicant involved in printing of books, also held the copyright of the content of the books. Para 4 of Circular No. 11/11/2017-GST dated 20 October 2017 was relied upon. Similarly, printing and supply of notebook was treated as supply of goods, as the predominant supply was that of goods with only basic details of colour and prints for the inner and cover page being supplied by the recipient of supply. The AAR however held that printing and supply of Bilingual Parental Calendar is supply of services, as the State Council provides the content for printing and the Applicant undertakes printing work using paper and ink purchased by him. Further, printing and supply of Comprehensive Report Progress Card to the Government of Assam was treated as supply of services, as the content of the Report was owned and supplied by the Assam Government.

The question of whether the printing activities will be eligible for exemption under Serial No. 3 of Notification No. 12/2017-Central Tax (Rate), was answered in negative by the AAR, after it noted that the supplies were not purely of service. [In RE: *Swapna Printing Works Private Limited* – 2024 VIL 14 AAR WEST BENGAL]

GST on canteen service to employees against recovery of nominal amount

The Uttarakhand AAR has ruled that the service of provision of food in the factory canteen to the employees against recovery of a nominal amount from the employees shall constitute a 'supply'. The AAR observed that as per Sl. No (1) of Schedule III of the CGST Act, 2017, only services by an employee to the employer in the course of or in relation to his employment were neither a supply of goods nor a supply of service. But in this case, supplies were being provided by the employer to the employees for consideration, though nominal, irrespective of the fact that the provision of food in canteen was on account of the mandate prescribed in the Factories Act, 1948. The Authority was also of the view that GST will be applicable on both the amounts, i.e., amount paid to the canteen service

provider and on the nominal amount recovered from the employees.

Further, the AAR answered in negative the question as to whether ITC will be available of the GST charged by the canteen service provider where it was obligatory to provide canteen to its employees. It ruled that since the Applicant was engaged in providing further similar 'restaurant services' (as were being supplied by the canteen service providers to the Applicant) to the employees/workers from the Applicant's premises and the said premises was not 'specified premises' as provided in Notification No. 11/2017-Central Tax (Rate), ITC for the said supply would be restricted in terms of the condition provided for supply of services at 5% in Entry No.7 (ii) of the Notification. [In RE: *Tube Investment of India Limited* – 2024 VIL 09 AAR Uttrakhand]

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Change in rate of tax during ongoing service – Effect

The Uttar Pradesh AAR has observed that consequent to the change in rate of tax during an ongoing continuous service, applicable rate of tax was to be decided in terms of Section 14 of the CGST Act, 2017. The works contract services provided by the Applicant was chargeable to GST at the rate of 12% *vide* Notification 11/2017-CT (Rate). However, subsequently *vide* Notification No. 03/2022, the rate of GST was enhanced to 18% with effect from 18 July 2022, during the ongoing service. The AAR hence ruled that in cases where advance for the works contract service was received or invoices were raised before 18 July 2022, GST rate applicable would be 12%. In cases where advance was received or invoices were raised after 18 July 2022, GST rate applicable would be 18%. [In RE: *PPS Builders Private Limited* – 2023 VIL 225 AAR Uttar Pradesh]

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Notifications and Circulars

Exemption to certain classes of deposits from payments from the Electronic Cash/ Credit Duty Ledger is now effective till 1 March 2024

The CBIC has extended the exemption from deposits for Specified Goods under Section 51A(4) of the Customs Act, 1962 till 1 March 2024. Earlier, the deadline for exemption from deposits for Specified Goods under Section 51A(4) was available up to 20 January 2024. Section 51A of the Customs Act pertains to repayment through an electronic ledger which can be used by the importer or exporter to discharge his liabilities against advance deposits. Notification No. 06/2024-Cus (N.T.) dated 19 January 2024 amends Notification No. 19/2022-Cus. (N.T.) for the purpose.

Import restrictions inapplicable to Desktop Computers, etc. falling under HS Code 8471

Vide Policy Circular No. 09/2023-24 dated 12 January 2024, the DGFT has clarified that the import restrictions for laptops, tablets, all-in-one personal computers, ultra small form factor computers and servers, are only for aforesaid five items. It has been clarified that requirement of valid import authorisation does not apply to any other goods such as desktop computers, and others falling under HS Code 8471.

Molasses resulting from the extraction or refining of sugar – Export duty of 50% imposed

By way of amendment to the Second Schedule to the Customs Tariff Act, 1975, export duty has been imposed on 'molasses resulting from the extraction or refining of sugar', and falling under CTH 1703. Accordingly, with effect from 18 January 2024, export duty of 50% of the value is to be imposed. Notification No. 01/2024-Cus., dated 15 January 2024 has been issued for the purpose.

Soya-bean, sunflower and palm oils – BCD and AIDC reduction extended till 31 March 2025

The exemption to goods specified under Table to Notification No. 48/2021-Cus. for crude soya-bean oil, edible soya-bean oil, palm oil, and crude or edible grade sunflower oil, has been extended up to 31 March 2025. Further, effective rate of Agriculture Infrastructure and Development Cess (AIDC) on crude soya-bean, palm and sunflower oils has also been extended up to 31

March 2025. Notification No. 2/2024-Cus., dated 15 January 2024 amends Notifications Nos. 48/2021-Cus. and 49/2021-Cus., for this purpose.

Urad and Tur – Imports 'Free' till 31 March 2025

Urad (Beans of the SPP Vigna Mungo (L.) Hepper) falling under ITC (HS) 0713 31 10 and Tur/Pigeon Beans (Cajanus Cajan) falling under ITC (HS) 0713 60 00 of Schedule- I (Import Policy), have been made freely importable up to 31 March 2025. Notification No. 54/2023, dated 28 December 2023 has been issued for the purpose.

Used IT assets (laptops, desktops, monitors, and printers) from SEZ to DTA – Import Policy notified

Import policy of used IT assets namely, laptops, desktops, monitors, and printers from SEZ to DTA has been notified under Para 2.31[I(e)] of the Foreign Trade Policy 2023. As per Notification No. 56/2023, dated 1 January 2024, imports of such goods in DTA are restricted. However, the notification also provides for certain relaxations like when the SEZ unit is relocating to DTA and where the goods are moved for use in their DTA operations, subject to other conditions like minimum usage of 2 years in SEZ and that the goods are not older than 5 years, etc.

Screws – Imports prohibited if CIF value is less than INR 129/kg

Import policy has been changed from 'Free' to 'Prohibited' for certain screws falling under HS Codes 7318 11 10, 7318 11 90, 7318 12 00, 7318 13 00, 7318 14 00, 7318 15 00 and 7318 19 00 of the ITC(HS) Classification. However, the import of such goods is 'Free' if the CIF value of such goods is INR 129/- or above per kilogram and subject to Policy Conditions Nos. 2 and 3 of Chapter 73 of ITC (HS). Notification No. 55/2023 dated 3 January 2023 has been issued for the purpose.

Silver imports – Policy Condition introduced to Chapter 71

Semi-manufactured silver paste, sheets, plates, strips, tubes, electrodes, wires, silver brazing alloys falling under HS Codes 7106 92 10 and 7106 92 90 when imported by Electrical, Electronics and Engineering industries including Glass and Solar industries for their manufacturing process (actual user), or when imported by Government or recognized research institutions for R&D Purposes, are 'free'. For other purposes, permission from Nominated Agencies as notified by RBI and DGFT shall be required. Notification No. 57/2023 dated 15 January 2024 has been issued for the purpose.

Non-Preferential Certificate of Origin – Date for mandatory e-filing through common digital platform extended till 31 December 2024

The DGFT has extended the transition period for mandatory filing of applications for non-preferential Certificate of Origin through the common digital platform till 31 December 2024. Accordingly, as per the existing system of processing non-preferential CoO applications, manual or paper mode is permitted in the interim period. Trade Notice No. 36/2023-24, dated 26 December 2023 has been issued for the purpose.

Ratio Decidendi

EPCG export obligation fulfilment in case of third-party exports – Amendment in HBP para 5.20(c) on 5 December 2017 read with Policy Circular dated 29 March 2019 is not applicable to Authorisations issued prior to 5 December 2017

The Gujarat High Court has held that amendment in paragraph no. 5.10(c) of Handbook of Procedures-2015-20 on 5 December 2017 read with Policy Circular No. 22/2015-20 dated 29 March 2019 is prospective in nature *qua* the EPCG Authorisation and would only be applicable to the exports made under EPCG Authorisation issued after 5 December 2017. According to the said amendment in the HBP, the shipments made from such date were to be counted towards export obligation only if the actual payment is realised through the normal banking channel from the third-party exporter's account to the authorisation holder's account. Before the amendment, the full realized value of the Shipping Bill was to be taken into consideration for fulfilment of export obligation. The Policy Circular had clarified that even if the EPCG authorisation is issued for third party exports prior to 5 December 2017, the EPCG authorisation holder would not be able to take benefit if actual payment is not realised through normal banking channel from third party exporter's account.

According to the Court, by this Policy Circular, the DGFT had in effect amended the FTP with retrospective effect, under the guise of mere procedural changes, in respect of EPCG Authorisations issued prior to 5 December 2017. Relying on various precedents, the Court noted that such power was available only with the Central Government. The Court was hence of the view that DGFT though has jurisdiction to amend the HBP but such amendment cannot affect the conditions stipulated in the EPCG Authoristion already issued. The amendment, so far as the same was made applicable to the EPCG authorisations issued prior to 5 December 2017, was thus held invalid. [*South Gujarat Warp Knitters Association* v. *Union of India* – (2024) 14 Centax 106 (Guj.)]

SEZ imports – Exemption from GST compensation cess is not available

The Andhra Pradesh High Court has rejected a claim for exemption from compensation cess in case of imports (leviable

under Section 3(9) of Customs Tariff Act, 1975) by a Special Economic Zone (SEZ) unit. Assessee's submission that customs duties which are exempted under Section 26(1)(a) of the SEZ Act, 2005 include all such duties enumerated in the Customs Tariff Act, 1975 including those mentioned in Sections 3(1) to 3(12) of the Customs Tariff Act, 1975, was thus rejected. Deliberating on the distinction between 'tax', 'duty' and 'cess', the Court noted that Section 26(1)(a) uses the word 'duty' alone and not the word 'cess'. According to the Court, a conjunctive study of Sections 26(1)(a) and 2(zd) of the SEZ Act, 2005 and Section 2(15) of the Customs Act, 1962 would confirm that the phrase 'duty of customs' used in Section 26(1)(a) only refers to duty leviable under the Customs Act, 1962 and that the said phrase does not include cess under GST. The High Court also rejected the contention that exemption of duty of customs under the Customs Act, 1962 or the Customs Tariff Act, 1975 or any other law on import of goods encompasses the Compensation Cess also merely because its rate of tariff is mentioned in Section 3(9). Madras High Court decision in *Flextronics Technolgies (India) Pvt. Ltd.* v. *State of Tamil Nadu*, was distinguished. [*Maithan Alloys Limited* v. *Union of India* – 2024 TIOL 17 HC AP GST]

Third-party invoicing under ASEAN-India FTA – 'Third country' includes any number of countries

The Customs AAR has held that the concept of third country invoicing envisaged within the phrase 'third country' includes any number of countries so long as the imported goods meet the origin criteria under the Rules of Origin. The issue before the Authority was the eligibility to exemption to imports from ASEAN countries under the ASEAN-India FTA in Third-party invoicing transaction when the transaction involved four parties in four countries. According to the Authority, third country invoicing does not limit to one country but is without numerical limits. The AAR in this regard also observed that the concept of third-party invoicing does not envisages a tripartite system with involvement of three countries only. ***Assessee was represented by Lakshmikumaran & Sridharan.*** [In RE: *Boston Scientific India Pvt. Ltd.* – 2024 VIL 01 AAR CU]

Penalty can be imposed on partnership firm

Relying upon the definition of 'person' in Section 3(42) of the General Clauses Act, the CESTAT New Delhi has held that the term includes a partnership firm. Accordingly, it was held that penalty under Sections 114 and 114AA of the Customs Act, 1962 can be imposed on a partnership firm. The Tribunal in this

regard observed that the Legislature has simplicitor used the word 'any person' to fasten the liability of a penalty under the said provisions. Further, it held that wrong mention or non-mention of the rule in the notice does not vitiate the proceedings especially when the allegations and charges are mentioned in the notice. [*Asfaque Abubaker Naviwala* v. Commissioner – Final Order No. 51635/2023, dated 12 December 2023, CESTAT New Delhi]

EOU – Board of Approval cannot refuse to fix wastage norms

The Delhi High Court has held that the Board of Approval cannot refuse to exercise this jurisdiction in respect of fixing the wastage norms. According to the Court, exercise of this power cannot be refused merely because the BOA is of the opinion that the product for which such norms are requested to be determined, would not be commercially viable, or due to the high quantity of wastage, such products should not be allowed in the EOU. The Court in this regard observed that as far as the commercial viability is concerned, it is for the assessee to decide whether the production of the products in question is commercially viable to it or not. Similarly, the Court was of the view that whether such products can be and should be allowed under EOU Scheme, is a matter of policy, which is to be determined by the concerned Ministry. [*Marble Art* v. *Union of India* – TS 659 HC 2023(DEL) EXC]

No recovery under Customs Section 28AAA until DGFT cancels duty credit scrip

The Madras High Court has held that until the DGFT takes any action for cancellation of the duty credit scrip, the Customs authorities cannot assume the jurisdiction in terms of Section 28AAA of the Customs Act, 1962 for the purpose of recovery of the customs duty, alleging that the scrips were obtained by means of collusion or wilful misstatement or suppression of facts. CBEC Circular No.334/1/2012-TRU, dated 1 June 2012, was noted by the Court for this purpose. Supreme Court's decision in *Titan Medical Systems (P) Ltd.* v. *Collector* was also relied by the Court while it distinguished another decision of the Apex Court in *Commissioner* v. *Pennar Industries Limited.* Allowing the writ petition, the Court noted that though DGFT had issued show cause notices and an order came to be passed by the DGFT placing the assessee under the Denied Entities List, the same was withdrawn in entirety by virtue of a subsequent letter. [*Jeena and Company* v. *Union of India* – TS 679 HC 2023(MAD) CUST]

'Flanges' when are classifiable under Heading 8503 and not under Heading 7307

The CESTAT Chennai has held that 'flanges' imported by the assessee for use in manufacture of gearboxes/gear motors, are classifiable under Heading 8503 of the Customs Tariff Act, 1975 as contended by the assessee and not under Heading 7307 *ibid* as submitted by the Department. The Tribunal for this purpose accepted the claim of the assessee that the flanges were imported for their specific use. It observed that the Additional Commissioner chose only to go by the word 'flanges', thereby seriously ignoring whether the same was for specific/special use or for general use. The Tribunal was also of the view that it was incumbent upon the Department to at least place on record that the flanges in question were in fact for general use alone. It in this regard observed that if every 'flange' available in the market could be used in any industry, then the classification under a single CTH would have served that purpose, but since one size does not fit all, different classifications are provided. [*SEW Eurodrive India Private Limited* v. *Commissioner* – 2024 (1) TMI 465-CESTAT Chennai]

Data Projectors are classifiable under TI 8528 62 00 – Presence of additional ports such as HDMI, etc., is immaterial

The Customs AAR has held that Data projectors also having certain additional ports such as HDMI, Audio Out, USB-A, RS-232, etc., which make them capable of being a video projector, are classifiable under Tariff Item 8528 62 00 of the Customs Tariff Act, 1975. The AAR in this regard drew Comparison between data projectors under consideration and the video projectors. It also noted that principal use of subject goods, based on functions and features, was with automatic data processing machines. According to the AAR, the presence of additional features cannot dis-entitle the goods from classification under Tariff Item 8528 62 00. Further, exemption under Sr. No. 17 of Notification No.24/2005-Cus., was also allowed. ***Assessee was represented by Lakshmikumaran & Sridharan.*** [In RE: *Ingram Micro India Pvt. Ltd.* – 2024 VIL 03 AAR CU]

Super Nuggets 570 G IP-Soy Protein Nuggets are classifiable under Customs TI 3504 00 91

The Customs AAR has held that Super Nuggets 570 G IP- Soy Protein Nuggets are classifiable under Tariff Item 3504 00 91 of the Customs Tariff Act, 1975 and not under Heading 2106 *ibid*. The AAR in this regard noted that the protein here was derived from plant source and contained relatively high protein levels. It was also noted that the product was *ejusdem generis* to the products classified under Heading 3504 as a protein isolate, and that Heading 2106 does not describe such a substance at GRE 1. ***Assessee was represented by Lakshmikumaran & Sridharan.*** [In RE: *Solae Company India Pvt. Ltd.* – 2023 VIL 39 AAR CU]

Central Excise, Service Tax and VAT

Ratio decidendi

- Facilitating booking of hotel rooms through online portal is covered under Tour Operator service – 90% abatement available – CESTAT New Delhi
- MRP based valuation not applicable when goods prohibited for retail sale and distributed by buyer after collecting some price – CESTAT New Delhi
- EOU – Valuation in case of DTA clearance to related unit – Value at 110% of cost of production is correct – CESTAT Ahmedabad
- Repacking and relabelling of spares of concrete mixers/pumps is not deemed manufacture – CESTAT Chennai
- No service tax when consideration absent – Resort to Valuation Rules for determination of value, is incorrect – CESTAT Bengaluru
- Cenvat credit – Not up to assessee to establish eligibility – Recovery must engage assessee with evidence – CESTAT Mumbai
- Sabka Vishwas (LDR) Scheme – Deposits against demand for one period can be adjusted against demand for another period – Karnataka High Court
- Clean Environment Cess not payable on stock of coal held on 30 June 2017 which was removed later after introduction of GST – CESTAT New Delhi

Ratio Decidendi

Facilitating booking of hotel rooms through online portal is covered under Tour Operator service – 90% abatement available

The CESTAT New Delhi has held that by facilitating booking of hotel rooms service to the hotel and customers, through the online portal/mobile application, the assessee (online portal) merely acted as a facilitator between the hotel and the customers (person booking hotel room) and thus service was covered as Tour Operator service. The Revenue Department had alleged that the service was covered under 'short-term accommodation' service taxable under Section 65(105)(zzzzw) of the Finance Act, 1994. Examining the relevant clauses of the 'Privilege Partnership Agreement' between the assessee and the hotel, and the 'User Agreement' between the assessee and the customer, the Tribunal observed that the assessee only provided access to an online platform to the customer for ease of booking hotel and charged commission on the hotel for the same while paying service tax on such commission. Rejecting the contention that assessee had rendered hotel accommodation service to the customers, the Tribunal also noted that as per Section 65(105)(zzzzw), short-term accommodation service must be provided to any person *by* a hotel and that the assessee cannot provide service of short-term accommodation in the absence of requisite licenses, infrastructure, thus the appellant cannot be said to be a hotel.

Further, the Tribunal also allowed the benefit of abatement of 90% as per Notifications dated 1 March 2006 (till 30 June 2012) and 20 June 2012 (from 1 July 2012). Contention of the Department that in respect of services relating to booking of accommodation, the assessee would not be a tour operator and hence ineligible for the abatement, was rejected. The Tribunal noted that what was required was the qualification of a tour operator itself (*qua* the person), and not as the services rendered (*qua* transaction). Definition of a 'tour operator' in terms of Notification No. 26/2012-ST, dated 20 June 2012 was relied upon to hold that the assessee engaged in the business of arranging tours, including accommodation through online portal would qualify to be a tour operator. ***Assessee was represented by Lakshmikumaran & Sridharan.*** [*Make My Trip (India) Private*

Limited v. *Additional Director General, DG GST Intelligence* - Final Order Nos. 50025-50027/2024, dated 10 January 2024, CESTAT New Delhi]

MRP based valuation not applicable when goods prohibited for retail sale and distributed by buyer after collecting some price

The CESTAT New Delhi has allowed assessee's appeal against a demand of central excise duty based on Retail Sale Price (RSP) on goods sold by the assessee in the market, in a dispute where the assessee was clearing goods (LED bulbs) to a buyer (a govt. undertaking) at a lower price and the buyer was selling these bulbs to users of electricity at almost the same price. The Tribunal noted that the said bulbs were not sold in the market but were only distributed by the buyer after collecting some price. It also observed that the purpose of not printing the RSP and further prohibiting their retail sale by printing that the bulbs were not for retail sale, was to prevent their diversion and sale in the market. Stating that '*how can a retail price by printed on the goods whose retail sale is banned*', the Tribunal held that the LED bulbs in question were not liable to be covered under the Legal Metrology Rules and Section 4A of the Central Excise Act, 1944. The Tribunal for this purpose also noted that the question of applicability of Legal Metrology Rules was referred to the Metrology Department and that the Department itself was not clear on the issue. The Revenue department had contended that since buyer of the goods was not using the goods by itself but was further selling them to practically everyone, unlike in case of Canteen Stores Department of armed forces where sale was to own employees, the buyer did not qualify as an 'institutional consumer'. ***Assessee was represented by Lakshmikumaran & Sridharan.*** [*Surya Roshini Ltd.* v. *Principal Commissioner* – 2024 VIL 70 CESTAT DEL CE]

EOU – Valuation in case of DTA clearance to related unit – Value at 110% of cost of production is correct

The CESTAT Ahmedabad has set aside the demand of Central Excise duty in a case involving clearance by an EOU to a related unit in DTA at a value 110% of the cost of production in terms of Rule 8 of Central Excise Valuation Rules, 2000. The Department had, after relying upon Section 14 of the Customs Act, 1962 and the Customs Valuation Rules, adopted the valuation on the basis of highest value of identical goods sold to unrelated parties. Rejecting the Department's contention, the Tribunal took note of Rule 4(3) of the Customs Valuation Rules according to which

only the lowest value of identical goods should be taken. It was held that since the assessee cleared their product a lower price than that adopted by the Department, there was no reason to disturb the value of goods. Further, according to the Tribunal, Rule 4 was wrongly invoked inasmuch as no value of actual import was used by the Department when it applied highest price of identical goods sold to unrelated party. According to the Tribunal, even if Rule 4 is applicable, aspects of different commercial levels, etc., have to be kept in mind.

Also, in case similar goods were not sold to unrelated parties, the Department had taken the profit margin as 40% to 80%, applying Rule 8 of the Customs Valuation Rules. The Tribunal however rejected the plea while it observed that the Rule was not applied sequentially. The Tribunal in this regard also observed that as per clause 8(b), profit of goods manufactured in country of exportation must be taken, while in the present case the goods were manufactured in India. It was hence of the view that therefore the most appropriate profit margin must be taken as 10% which is prescribed as notional profit in Rule 8 of the Central Excise Valuation Rules. ***Assessee was represented by Lakshmikumaran & Sridharan.*** [*Cadila Healthcare Ltd.* v. *Commissioner* – 2023 VIL 1288 CESTAT AHM CE]

Repacking and relabelling of spares of concrete mixers/pumps is not deemed manufacture

The CESTAT Chennai has set aside the demand of central excise duty in respect of repacking and labelling of alleged automobile parts in terms of Section 2(iii) [deemed manufacture] of the Central Excise Act, 1944 read with Sl. No. 100 of the Third Schedule thereof. The Department had alleged that the concrete mixers and concrete pumps produced by the assessee could not be sold as such and that these had to be fitted on chassis which made these products Special Purpose Vehicles, and therefore the spares sold by the assessee were nothing but spares of SPVs (automobiles) liable under the above-mentioned provisions. The contention was however rejected by the Tribunal while it observed that the said products were majorly sold for use on static platforms, rigs, etc. and could be used without being fitted to chassis or trucks. The Tribunal in this regard also noted that the assessee had not collected any value towards chassis or fitting of the concrete mixer on chassis. It was hence held that the allegation that the assessee was manufacturing SPVs was factually incorrect. CBEC Circular F.No. 167/38/2008, dated 16 December 2008 was distinguished for this purpose. Further, considering the facts of the case, the Tribunal also held that the

activity of repacking of spares from bulk into small packets in polythene bags and putting labels does not amount to manufacture under Section 2(iii). ***Assessee was represented by Lakshmikumaran & Sridharan.*** [*Schwing Stetter India Pvt. Ltd.* v. *Commissioner* – 2023 VIL 1348 CESTAT CHE CE]

No service tax when consideration absent – Resort to Valuation Rules for determination of value, is incorrect

The CESTAT Bengaluru has held that service tax is not payable by the assessee for providing services to the customers during warranty period through third party arrangement, under the taxable category of 'Management, Maintenance or Repair Service'. The Tribunal in this regard observed that no consideration was received by the assessee even though the defective parts were replaced. It was further of the view that determination of value in terms of Rule 3 of the Service Tax (Determination of Value) Rules, 2006, in absence of any consideration, is fallacious and is a misunderstanding of the very concept of levy of service tax. The Tribunal noted that it was not the case of the Department that the assessee though received value of the services but the same could not be quantified or ascertained, hence resort to the method of valuation becomes necessary. ***Assessee was represented by Lakshmikumaran & Sridharan.*** [*Hewlett Packard India Sales Private Limited* v. *Commissioner* – 2024 VIL 25 CESTAT BLR ST]

Cenvat credit – Not up to assessee to establish eligibility – Recovery must engage assessee with evidence

The CESTAT Mumbai has held that the observation of the adjudicating authority that it is up to the assessee to establish eligibility, is not a correct appreciation of the Cenvat Credit Rules, 2004. According to the Tribunal, recovery, initiated under Rule 14 of the Cenvat Credit Rules, 2004, must engage the assessee with the evidence to justify such recovery which is only then open to disputation. Remanding the matter back to the original authority, the Tribunal also observed that disallowance of credit cannot rest upon statements but must stand the test of definition of 'input service' in Rule 2(l) of Cenvat Credit Rules on facts which lacked in the impugned order. ***Assessee was represented by Lakshmikumaran & Sridharan.*** [*Wanbury Limited* v. *Commissioner* – 2024 VIL 40 CESTAT MUM CE]

Sabka Vishwas (LDR) Scheme – Deposits against demand for one period can be adjusted against demand for another period

The Division Bench of the Karnataka High Court has upheld that decision of the Single-Bench holding that any money deposited by a declarant under Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019, in respect of demand for one period can be adjusted in respect of demand for another period. Department's contention that SVLDR does not provide for adjustment, was thus rejected by the Court while it held that merely because the assessee has to file a separate declaration for each period, it cannot be said that mutual adjustment in respect of the very same assessee in relation to same subject matter or commodity for the two different periods is impermissible. The Court noted that there was absence of a specific bar or prohibition for consolidating or clubbing two cases and making mutual adjustment. CBIC circular No.1074/07/2019-CX dated 12 December 2019 was relied upon by the Court while it held that adjustment is permitted. [*Ministry of Finance, Government of India* v. *Brahmananda Sagar Jaggery Industries* – 2023 VIL 925 KAR CE]

Clean Environment Cess not payable on stock of coal held on 30 June 2017 which was removed later after introduction of GST

The CESTAT New Delhi has set aside the demand of Clean Environment Cess (CEC) on stock of coal of the assessee as on 30 June 2017, which was subsequently removed by the assessee on or after 1 July 2017, when GST was introduced along with compensation cess. It was held that though cess may be attracted when the article is produced, removal is the essence of the crystallization of the charge. The Tribunal held that there has to be removal from the specified place to attract the payment of cess and if there is no removal, there would be no question of payment of cess. The Tribunal was also of the view that Section 18(2) of the 2017 Taxation Amendment Act would also not come to the aid of the Department, as liability had not accrued or incurred. Supreme Court's decision in the case of *Vazir Sultan Tobacco* was distinguished here. The Department had contended that as the relevant date for determining the dutiability is the date of production, the assessee would have to pay CEC on the stock of coal as on 30 June 2017, even though the stock of coal may have been removed on or after 1 July 2017. [*South Eastern Coalfields Limited* v. *Commissioner* – Final Order No. 50001/2024, dated 3 January 2024, CESTAT New Delhi]

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