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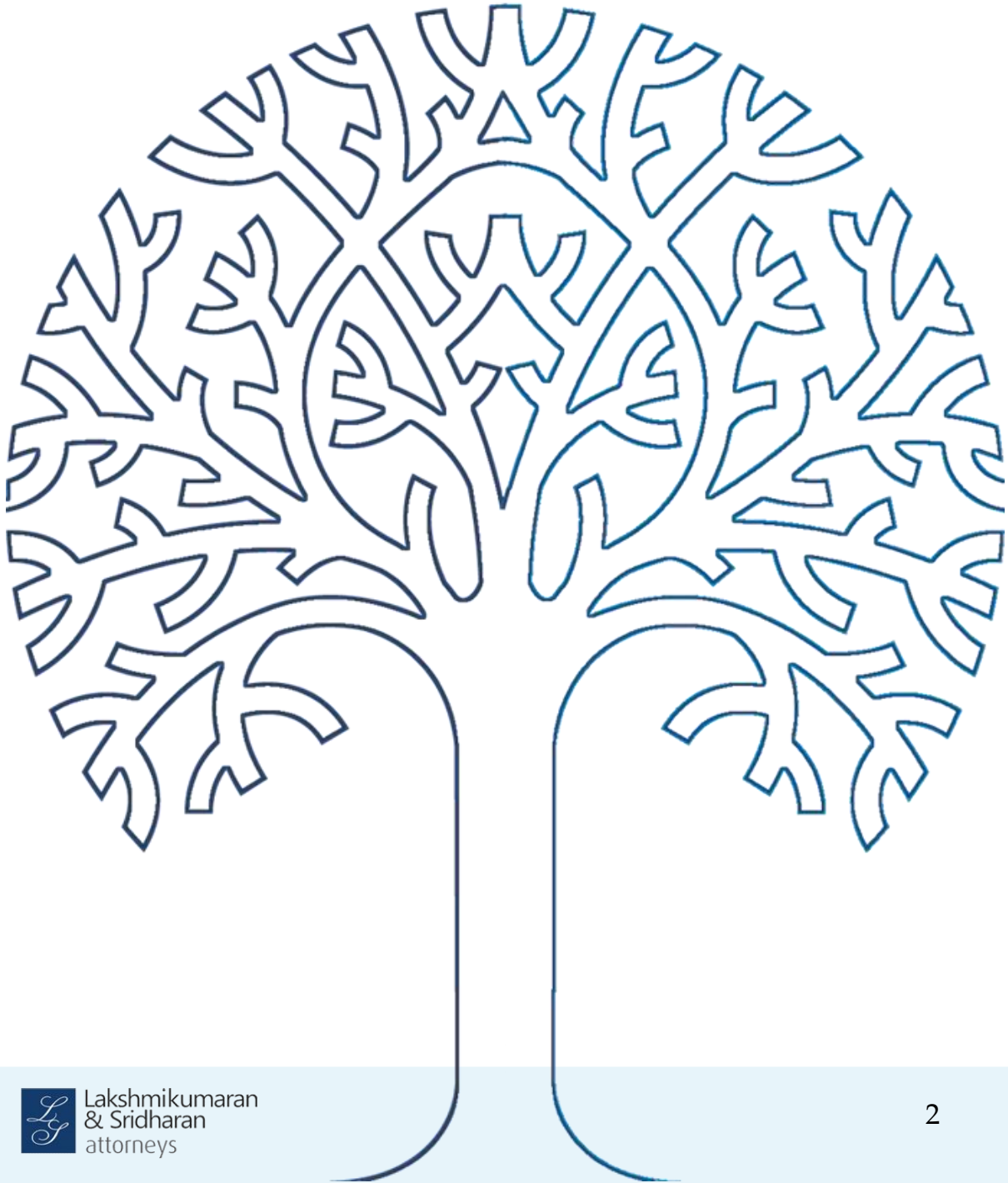

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Article

The ever-evolving advertising industry: Is GST ready for the same?

By **Nupoor Agrawal, Nivedita Agarwal and Vanshika Gupta**

Last few years have seen a huge surge in sports marketing, where companies sponsor leagues, display billboards during sports matches or display their logo on the players' jersey. The article in this issue of Tax Amicus highlights that one needs to examine whether sports marketing is in the nature of 'advertisement/sale of advertising space and time service' or 'sponsorship service'. According to the authors, considering the overlapping nature of advertisement and sponsorship services, taxing advertisement under forward charge and allowing full ITC of the expenses, while taxing sponsorship under reverse charge and disallowing credit of GST, is creating an artificial discrimination. They suggest that the government should clarify the scope of both kinds of services and additionally should also consider shifting liability under sponsorship services from mandatory reverse charge mechanism to an optional scheme, where supplier of service can opt to pay tax under forward charge.

The ever-evolving advertising industry: Is GST ready for the same?

By Nupoor Agrawal, Nivedita Agarwal and Vanshika Gupta

Traditionally, advertising primarily relied on conventional mediums such as print, television, radio, etc., which allowed the companies to increase the sales of their products. But, with the passage of time, the advertisement industry has evolved and expanded into many new forms. Companies now heavily rely on digital advertising through the internet, social media and in-mobile apps. A huge surge has also been seen in sports marketing where companies sponsor leagues, display billboards during sports matches or display the logo of the company on the jersey of the players. The last decade has seen heavy spending in sporting events with cricket, kabaddi and other leagues playing a key role in bringing brands and consumers closer. The sponsorship of Indian Premier League, 2024 edition by the Tata group for INR 2500 crore[1] or INR 100 crore incurred by PepsiCo India Ltd. to print the logo of its brand 'Slice' on the jersey of Mumbai Indians[2] are classic examples of the same.

With the introduction of GST in July 2017, supply of almost every kind of service has been made leviable to GST. Generally, the liability to discharge GST is on the supplier of such services as is the case for 'advertisement services'. However, the recipient of services is liable to pay GST on certain services under reverse charge mechanism. One such scenario is supply of 'sponsorship services'. Further, the supplier of sponsorship service is also required to reverse proportionate ITC pertaining to such sponsorship service on which GST is paid under reverse charge mechanism. In such a case, it becomes pertinent to examine whether sports marketing is in the nature of 'advertisement/sale of advertising space and time' service or sponsorship service.

Let us delve deeper into the activities undertaken as part of sports marketing to determine the relevant classification. In the sports industry, advertising is no longer restricted to in-stadia

[1] Tata to pay record-breaking Rs 2,500 crore for IPL title sponsorship rights (20.1.2024), The Economic Times, here.

[2] Gaurav Laghate, Mumbai Indians signs fintech brand Slice as principal sponsor in biggest ever deal (21.1.2024), The Economic Times, here.

display of advertisements on billboards/perimeter led loops. Advertisers are increasingly weaving the branding & promotion activity with consumer experiences such as selling signed merchandise of players and arranging meet and greet with players. In certain cases, it is easy to identify the nature of the supply as in the case of display of advertisement on billboards which evidently qualifies as 'sale of advertising space'. Yet in other cases, the nature of the activity continues to remain ambiguous. The scope of sponsorship services has also not been defined under GST. Resultantly, identifying the true nature of such services becomes a hair-splitting and onerous task for all players involved.

Even though GST was introduced with an objective to make it a seamless and simple tax regime, it seems that the overhang of the erstwhile service tax regime continues to persist as far as taxing sponsorship service under reverse charge mechanism is concerned. Taxing sponsorship under reverse charge at the time of its introduction in 2006 was understandable given the fact that the organisations receiving sponsorship were much smaller players than the sponsor and could escape the tax net. However, given the present landscape, the organisations receiving sponsorship have a prominent presence and incur significant expenditure for providing sponsorship service. In such a scenario, taxing sponsorship under reverse charge is detrimental to their interests as it involves reversal of huge amount of credits.

Considering the overlapping nature of advertisement and sponsorship service, taxing advertisement under forward charge and allowing full input tax credit of the expenses incurred and taxing sponsorship under reverse charge thereby disallowing credit of GST on expenses incurred is creating an artificial discrimination. Accordingly, in the context of changing business scenarios, a re-look is needed. In any case, the government needs to clarify the scope of both kinds of services.

Additionally, under GST, as part of rationalisation measures it is seen that the Government in the past has shifted certain service from mandatory reverse charge mechanism to an optional scheme, i.e. supplier of service can opt to pay tax under forward charge. If the supplier has not opted, the recipient is liable to pay tax under reverse charge mechanism. In certain other cases where liability to pay tax was cast on the e-commerce operator, it has been seen that the Government has shifted the liability to pay taxes on the supplier in case the supplier belongs to the organised sector. Keeping such a trend

in mind, the Government should also consider making a similar change in the case of sponsorship services which will allow the bigger players to pay tax under forward charge and retain the credits of the expenses incurred.

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Article

Game-changing Customs and FTP changes: What you need to know after the 2024 Interim Budget

By **Ratan Jain and Shobhit Jain**

The second article in this issue of the newsletter discusses few recent changes which one needs to know under Customs and Foreign Trade Policy. The Ministry of Commerce has extended the RoDTEP benefit to Advance Authorisation holders, Export Oriented Units and units in Special Economic Zone, and has relaxed the mandatory Quality Control Order compliance for import of inputs under Advance Authorisation and by EOU, for use in exports. Highlighting the key observations from the changes, the authors raise few pertinent questions which need immediate attention of the exporters/importers, in respect of both the changes.

Game-changing Customs and FTP changes: What you need to know after the 2024 Interim Budget

By Ratan Jain and Shobhit Jain

From Customs and Foreign Trade Policy ('**FTP**') perspective, the duty exemption/ remission schemes and the 'Make in India' program are playing a vital role in globalization of the Indian trade. The objective of the Government should be to further strength these schemes by way of attractive tax exemptions, concessions, etc., complying with the WTO norms for increasing the exports and elevate India to the world's third-largest economy.

After industry had flagged certain concerns, the DGFT has stepped in extending the RoDTEP benefit to Advance Authorisation holders, Export Oriented Units and units in Special Economic Zone, and has relaxed the mandatory QCO compliance for import of inputs under Advance Authorisation and EOU, meant for export.

The Interim Budget 2024 as anticipated did not make any significant changes in Customs law. The finance minister has announced that the same customs rates, including import duties, will be retained in the fiscal year 2024-25. Accordingly, no changes have been made in the basic rates of customs duties.

Recent developments

Relaxing mandatory QCO compliance for import of inputs under advance authorisation and by EOU and units in SEZ, meant for export

Import of various inputs into India are subjected to mandatory Quality Control Orders (QCOs) compliance under the BIS. Numerous QCOs on the other hand grant relaxation from its applicability on goods or articles meant for export.

There was a doubt as to whether inputs imported required for use in the manufacture of finished goods exported out of India would require compliance of BIS or not. It is given to understand that customs at various ports have been allowing inputs against Advance Authorization without insisting BIS compliance on the premise that such inputs would be used in export product. Thus, such inputs were/are getting exemption from registration which otherwise require BIS compulsory compliance.

Government *vide* Notification No. 71/2023 dated 11 March 2024 has now granted exemption from applicability of QCO, to imported inputs used in manufacture of export products.

Whether the relaxation / exemption granted *vide* Notification dated No. 71/2023 puts to rest the issue or it would open the pandora's box?

Before analyzing the implication of the notification, we would first see the key observations of the notification:

- The exemption has been granted to Advance Authorization (AA) holders, EOU and SEZs.
- Inputs imported under AA shall be utilized in manufacturing of export product (making normal allowance for wastage) and shall be exported under the same AA.
- Exemption from mandatory QCO to be specifically endorsed on the AA, on request of such AA holder.
- Exemption shall be available only to physical exports and not deemed exports.
- EO period shall be as per para 4.40 of HBP i.e., Export obligation period and its extension, except in case of textiles.
- Exemption shall be further subject to para 2.03 (c) of HBP i.e., the list of Ministries/Departments whose notifications on QCOs, that are exempted for goods to be utilized/consumed in manufacture of export products (*Appendix-2Y*). The updated Appendix 2Y at present lists Ministry of Steel, Department of Promotion of Industry and Internal Trade, and Ministry of Textiles, for this purpose.
- No DTA clearance of any unutilized inputs/imports or goods manufactured out of such inputs shall be allowed. Unutilized inputs/imports shall mean imports (without compliance with mandatory QCO) which have not been accounted for as per SION/Ad-hoc norms in the product exported under the same AA.
- Such unutilized inputs shall be regularised as follows:
  a. Destroyed in presence of jurisdictional GST/Customs Authorities who shall certify such destruction, or may be exported;
  b. Payment of duties/taxes/cesses exempted along with interest on unutilized exempted import plus composition fee equal to 10% of CIF value of such unutilized exempted import and;

c. Proof of such payment to be submitted to RA before grant of EODC.

- EOU is required to give an undertaking to the Customs authorities at the time of importation. A copy of such undertaking shall also be submitted to the Development Commissioner. Such inputs or products manufactured therefrom are not to be transferred to Domestic Tariff Area. Exemption is available only for physical exports.
- SEZ is required to give an undertaking to the Development Commissioner of the SEZ unit at the time of importation. Such inputs or products manufactured therefrom are not to be transferred to Domestic Tariff Area. Exemption is available only for physical exports.

The Notification therefore envisages the relaxation to those industries only, whose ministries fall under Appendix-2Y. In other words, the exemption is not applicable to all AA holders.

What will happen to other industries who import the inputs for manufacturing of finished goods against AA meant for exports. Therefore, the authors feel that the attempt to remove the ambiguity granting relaxation from applicability of QCO does not put to rest the issue, rather it could open pandora's box for other industries.

One interesting aspect as to what could be the basis to cover three Ministries only, leaving all other industries from the exemption category is not clear.

Authors feel that notification seems requiring one to one co-relation between inputs imported *vis-a-vis* finished goods exported. Further, whether relaxation / exemption would be applicable for the existing AA or for new AA holder may be an issue especially in order to comply with pre-import condition.

Extending RoDTEP benefit to advance authorisation holders, Export Oriented Unit and Special Economic Zone

The objective of RoDTEP is to refund the currently un-refunded duties/taxes/levies, at the Central, State and local level, borne on the exported product, including prior stage cumulative indirect taxes on goods and services used in the production of the exported product and such indirect duties/ taxes/levies in respect of distribution of exported product.

The scheme of RoDTEP was implemented in August 2021. Rates for RoDTEP were notified with effect from 1 January 2022. AA holders, EOU, Special Economic Zones were kept out of the scheme. Notification No. 70/2023 dated 8 March 2024

now extends the RoDTEP benefit to AA holders, EOU, SEZ units.

Key observations of the Notification:

- Ineligible categories mentioned at Sl. Nos. (viii), (x), (xi) and (xii) of Para 4.55 of FTP 2023 have been deleted.
- The RoDTEP benefit has now been granted to AA holders, EOU and SEZ too.
- Rates of rebate / value cap per unit under RoDTEP for exports of products manufactured by Advance Authorisation holders (except Deemed Exports), EOU and SEZ units are notified in Appendix 4RE.
- Benefit is available during the period from 11 March 2024 till 30 September 2024.
- To adhere to the budgetary framework as provided under Para 4.54 of FTP 2023, necessary changes including revisions or deletions, wherever necessary, will be made in Appendix 4R & Appendix 4RE as and when required. Thus, RoDTEP rate revisions in 25 HS Codes have been made in Appendix 4R.
- Extension of RoDTEP to SEZ units will take place on IT integration of SEZs with Customs Automated System (ICEGATE), which is expected to be operational from 1 April 2024. RoDTEP is to be extended from the date of implementation till 30 September 2024 only.
- The benefit of RoDTEP existing currently till 30 June 2024 has been further extended for exports till 30 September 2024.

It is observed that clause (x), which excluded AA holder, DFIA, Special Advance Authorisation holder, has been deleted, thereby covering in the inclusion of RoDTEP benefit. However, Sl. No. (vii) of Para 4.54 seems to extend benefit to AA/EOU/SEZ's. It, however, does not include DFIA / Special Advance Authorisation holder etc. Thus, Authors feel that in absence of inclusion in Para 4.54, department may raise dispute in granting RoDTEP benefit to DFIA/ Special Advance Authorisation holder. Authors, therefore, feel that such an anomaly may be cured by the DGFT soon or industry may make suitable representation seeking inclusion of these categories as well to avoid unnecessary hassle/ dispute at later point in time.

As envisaged in the scheme, the objective of RoDTEP is to refund the un-refunded duties/taxes/levies, at the Central, State and local level, borne on the exported product. Such duties/ taxes etc. are incurred at equal footing either by exporter operating under AA scheme or otherwise. Thus,

creating a separate Appendix for AA holder granting lower RoDTEP rates is desirable, or the same rate notified in Appendix-4R ought to have been granted to all.

Having said that, there is one more aspect of granting RoDTEP to MOOWR unit. Considering the objective of the scheme, i.e. to refund the un-refunded duties/taxes/levies, at the Central, State and local level, borne on the exported product, authors feel that the RoDTEP benefit ought to have been extended even to MOOWR unit as well especially when RoDTEP is not considered as incentive scheme contingent upon export performance.

India-EFTA Trade Deal

India has signed an important trade agreement with the European Free Trade Association (EFTA), which consist of 4 countries - Switzerland, Norway, Iceland and Liechtenstein. The new Free Trade Agreement will promote duty-free import and export between India and those countries along with investments. It will be interesting to see the impact on trade with these countries.

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Goods & Services Tax (GST)

Ratio decidendi

- Non-claim of ITC in GSTR-3B return is not fatal – Madras High Court
- Interest on delayed refund is mandatory and is payable automatically – Claim by assessee is not required – Delhi High Court
- Refund under Section 54 can be granted even in case where levy is held unconstitutional – Gujarat High Court
- Refund of ITC on exports – Withholding of claims despite precedents and in absence of any change in circumstances, is wrong – Allahabad High Court
- Refund due to inverted duty structure – Limitation, when amount set off against demands which subsequently set aside – Character of amount changed to tax recovered – Patna High Court
- Cancellation of registration – Not mandatory for authorities to issue order within 30 days of reply to SCN – Delhi High Court
- Provisional attachment order should disclose reasons/circumstances and grounds for issuance of such order – Telangana High Court
- Demand – Section 74 is not applicable if tax paid under Section 73(5) before SCN – Telangana High Court
- E-way bill – Furnishing of documents subsequent to interception does not prove absence of intention to evade – Allahabad High Court
- No penalty for a typographical error in e-way bill if intention to evade absent – Mistake of more than 2 digits is also condonable – Allahabad High Court
- Deposits made at 3 AM during search operation that lasted till 5 AM, is not voluntary – Amount to be refunded with interest – Delhi High Court
- Demand – Assessee to be mandatorily provided opportunity under Section 73(5)/(8), providing for non-imposition of penalty when tax along with interest is paid within 30 days of notice – Kerala High Court
- Appeal to Appellate Authority – Non furnishing of physical copies or deficiencies in documents uploaded is not material – Bombay High Court
- Input Tax Credit is not available for construction of godowns meant for renting out – AAR Tamil Nadu
- E-commerce – Receipt of commission as percentage of value of sales through one's online platform would not qualify it as 'agent' – AAR Karnataka
- ITC is not available of differential IGST paid after on-site audit by Customs authorities post clearance of imported goods – AAR Tamil Nadu

Ratio Decidendi

Non-claim of ITC in GSTR-3B return is not fatal

The Madras High Court has quashed the order wherein the ITC claim of the assessee was rejected by the Department entirely on the ground that the GSTR-3B returns did not reflect the ITC claim. The Court in this regard observed that when the registered person asserts that he is eligible for ITC by referring to GSTR-2A and GSTR-9 returns, the assessing officer should examine whether the ITC claim is valid by examining all relevant documents, including by calling upon the registered person to provide such documents. The assessee had in this case by mistake filed nil GSTR-3B while ITC was duly reflected in GSTR-2A and subsequently in GSTR-9. The matter was remanded for reconsideration. [*Sri Shanmuga Hardwares Electricals* v. *State Tax Officer* – (2024) 15 Centax 502 (Mad.)]

Interest on delayed refund is mandatory and is payable automatically – Claim by assessee is not required

The Delhi High Court has held that even though the assessee may not have claimed interest in the refund applications, claim of interest cannot be denied under Section 56 of the Central Goods and Services Tax Act, 2017 as the same is mandatory and is payable automatically in terms of the provisions of the Act. The Court noted that payment of interest under Section 56, being statutory, is automatically payable without any claim, in case the refund is not made within 60 days from the date of receipt of the application, and that the same cannot be denied on the ground of waiver on the claim of interest in Form GST RFD-01. [*Raghav Ventures* v. *Commissioner* – (2024) 16 Centax 69 (Del.)]

Refund under Section 54 can be granted even in case where levy is held unconstitutional

The Gujarat High Court has allowed a writ petition against the order of the jurisdictional authority which had held that refund as a result of levy being held unconstitutional can be claimed only by way of suit or writ petition and that the same cannot be granted under Section 54 of the Central Goods and Services Tax Act, 2017. Department's contention that such refund claim would not fall under any category of refund prescribed under Section 54 and hence would be outside the scope of and purview of such section, was thus held as not sustainable. The Court observed that once the Apex Court declares a notification

as *ultra vires* and unconstitutional, such law becomes the law of land and is liable to be followed by the Department without raising any objection. The dispute involved refund claim filed pursuant to the Supreme Court decision holding notification levying IGST on ocean freight as unconstitutional. [*Jupiter Comtex Pvt. Ltd.* v. *Union of India* – (2024) 16 Centax 68 (Guj.)]

Refund of ITC on exports – Withholding of claims despite precedents and in absence of any change in circumstances, is wrong

The Allahabad High Court has held that arbitrary withholding of refund claims for specific periods, despite precedents from past and subsequent periods, and in the absence of any material change in circumstances, is contrary to the principles of fairness and equity. The Court observed that while the principle of *res judicata* does not apply to taxation matters, it is incumbent upon the Department to take a consistent approach when dealing with similar factual and legal circumstances. The High Court noted that the Department had withheld the refund for the periods of July-September 2019 and October-December 2019, though refund claims arising from precisely similar facts and circumstances for previous and subsequent assessment periods were duly sanctioned.

Allowing the writ petitions, the Court also held that the specific goods used for R&D and software development are essential for providing IT services, and therefore, qualify as inputs under the CGST Act, 2017, and that any order passed by the Department which ran contrary to the grounds taken in the show cause notice, cannot be sustained. The show cause notice and refund rejection orders had stated that goods were not consumed in provision of output service and hence cannot be treated as inputs. The orders impugned before the Court however held that the goods were required to be capitalised as per AS-10, and hence, the same were covered under capital goods. [*Samsung India Electronics Private Limited* v. *State of U.P.* – 2024 (3) TMI 631-Allahabad High Court]

Refund due to inverted duty structure – Limitation, when amount set off against demands which subsequently set aside – Character of amount changed to tax recovered

The Patna High Court has allowed assessee's writ petition in a case where the assessee had sought refund due to the inverted duty structure pertaining to the period from October 2018 till March 2019, in April 2023 which was well after the prescribed limitation period. The Court in this regard noted that before the

limitation period for filing a refund application expired, the amounts were set off against the demands raised for the Financial Years 2018-19 and 2019-20, and that the said demands were subsequently set aside (and amount recredited back to credit ledger) in adjudication and confirmed before Appellate Authority whose order was received on 15 August 2022. The Court hence held that when the amounts remaining in the credit ledger were set off against the demand, the character of the said amounts changed and acquired the status of tax recovered by the department. Directing refund of the said amount, the Court also noted that what now remained in the credit ledger of the assessee was the amount of tax recovered which was enabled for refund as per the appellate order. The Department was also directed to consider physical application under clause (2) to second Explanation to Section 54. [*Induvarna LPG Bottling Private Limited* v. *Union of India* – 2024 VIL 207 PAT]

Cancellation of registration – Not mandatory for authorities to issue order within 30 days of reply to SCN

The Delhi High Court has held that the expression 'shall issue an order….within 30 days' in Rule 22(3) of the Central Goods and Services Tax Rules, 2017 is not mandatory but only directory. The Court hence did not agree with the assessee's submission that the Departmental Authorities had lost the right to pass an order after the lapse of 30 days of filing of reply by the assessee to the show cause notice issued under Rule 21. Relying upon a Supreme Court decision in the case of *May George* v. *Tahsildar*, the Court was of the view that the fact that there is no stipulation of an automatic forfeiture of the right to pass an order implies that the condition in Rule 22(3) is not mandatory but directory. The High Court in this regard also noted that if the provision is held mandatory, it would lead to an anomalous situation where assessee himself applies for cancellation of registration. [*Fayiz Nangaparambil* v. *Union of India* – 2024 (3) TMI 744-Delhi High Court]

Provisional attachment order should disclose reasons/circumstances and grounds for issuance of such order

The Telangana High Court has reiterated that the fact that Section 83 of the Central Goods and Services Tax Act, 2017 provides for formation of an opinion before issuance of order of provisional attachment itself, is sufficient to accept that it is required under law that attachment order should disclose the

reasons/circumstances and grounds which in the opinion of the Principle Commissioner required issuance of such order. Allowing the writ petition in the case involving alleged fraudulent availing of ITC by the assessee, the Court also observed that once when Rule 159(5) of the CGST Rules, 2017 provides for filing an objection, the person who intends to file an objection must know the reasons and grounds under which the order was passed. Setting aside the provisional attachment order, the Court noted that except for the words 'in order to protect the interest of revenue' there was no reflection of the grounds/reasons/circumstances that compelled the Principal Commissioner to pass the provisional attachment order. [*Adil Trading* v. *Superintendent* – 2024 VIL 200 TEL]

Demand – Section 74 is not applicable if tax paid under Section 73(5) before SCN

The Telangana High Court has held that applicability of Section 74 of the CGST Act, 2017 (extended period for demand) would come into play only if the conditions stipulated in Section 73 has not been met with by the taxpayer, i.e., in the event if the conditions stipulated in sub-section (5) of Section 73 is not honored by the taxpayer in spite of the tax liability being brought to his knowledge. Section 73(5) stipulates that if the taxpayer clears all the tax liability along with interest at any day, prior to the issuance of show cause notice, they would not be liable for any further additional taxes, penalty, etc. The assessee in this case had, much before the final audit report was published, paid the entire tax liability along with interest, while the Department had issued a show cause notice under Section 74. The High Court was of the view that the element of fraud or misstatement or suppression of fact with an intention of evading tax would arise only in the event if the taxpayer fails to meet the provisions of Section 73(5). The Court was also of the view that Section 73(5) refers to even those payments/cases which were otherwise termed as wrongfully availed ITC. Both show cause notice and the adjudication order thereafter were set aside by the Court while allowing the writ petition. [*Rays Power Infra Private Limited* v. *Superintendent of Central Tax* – (2024) 16 Centax 329 (Telangana)]

E-way bill – Furnishing of documents subsequent to interception does not prove absence of intention to evade

The Allahabad High Court has held that mere furnishing of the documents subsequent to the interception of goods by the Department cannot be a valid ground to show that there was no intention to evade tax. The High Court noted that it was an

admitted fact that neither invoice nor e-way bill were accompanying the goods at the time of interception by the authorities, and that in such situation, burden of proof for establishing that there was no intention to evade tax shifted to the assessee. The Court was also of the view that this contravention of rules cannot be treated as a mere common mistake and that there must be some reasonable grounds to justify the non-production of documents at the proper time. [*Jhansi Enterprises* v. *State of U.P.* – 2024 VIL 195 ALH]

No penalty for a typographical error in e-way bill if intention to evade absent – Mistake of more than 2 digits is also condonable

The Allahabad High Court has held that a 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 e-way bill in the dispute showed the document/invoice No.2224 (which was the bilty number) instead of 0401. The Department had pleaded that non-imposition of penalty is available only in cases where there is a mistake of two digits in the vehicle number, and no further. Allowing the writ petition, the Court however held that the law is not to remain in a vacuum and has to be applied equitably in appropriate cases. The Court was of the view that in case of a minor error, as in the present case, imposition of penalty under Section 129 is without jurisdiction and illegal in law. The High Court in this regard also relied upon number of precedents and observed that presence of *mens rea* for evasion of tax is a *sine qua non* for imposition of penalty. [*Deco Plywood Industries* v. *State of U.P.* – 2024 VIL 224 ALH]

Deposits made at 3 AM during search operation that lasted till 5 AM, is not voluntary – Amount to be refunded with interest

The Delhi High Court has held that the fact that the assessee was made to deposit the amount at 3:10 and 3:18 AM before the search ended and the officers left at 5:00 AM shows that the deposit was not voluntary and was contrary to the CBIC Instruction No. 01/2022-23, dated 25 May 2022. The Court in this regard also noted that no material was placed on record by the Department to show as to why the assessee would voluntarily deposit the amount when there was no claim made against them as on the date of the deposit. Amount deposited, except for the amount deposited from electronic credit ledger, was directed to be refunded with interest @6%. However, no

interest was allowed on the amount deposited from the electronic credit ledger, unless an application had already been made, prior to said non-voluntary deposit, claiming refund or adjustment towards tax due, of such amount present in credit ledger. [*Sushil Kumar* v. *Delhi State GST* – 2024 (3) TMI 270-Delhi High Court]

Demand – Assessee to be mandatorily provided opportunity under Section 73(5)/(8), providing for non-imposition of penalty, when tax along with interest is paid within 30 days of notice

The Kerala High Court has allowed assessee's writ appeal in a case where the adjudication order was passed by the Department without granting the opportunity to the assessee to deposit tax along with interest within 30 days of show cause notice to avoid payment of penalty. According to the Court, it virtually amounted to non-compliance with the mandatory procedure envisaged under the statute – Section 73(5)/(8) of the CGST Act, 2017. It may be noted that the High Court also observed that the defect was not possible to be cured now as any fresh order passed under Section 73(9) would now be beyond 31 December 2023 which was the last date for such passing order. [*Vadakkoot Chackoo Devassy* v. *Assistant State Tax Officer* – 2024 (2) TMI 353-Kerala High Court]

Appeal to Appellate Authority – Non furnishing of physical copies or deficiencies in documents uploaded is not material

The Bombay High Court has held that appeal to appellate authority is not to be rejected merely on the ground that physical copies of appeals were not furnished or that some deficiencies on documents to be uploaded, were not complied by the assessee-appellant. According to the Court, any deficiency in filing the appeal/application, like failure to file physical documents, cannot make the appeal, registered on the online portal within the prescribed period of limitation, to be held as barred by limitation. The Court in this regard also observed that any deficiency in the appeal can be removed later on, as the law does not provide that the proceeding be strictly filed *sans* deficiency, and only then, the proceedings would be valid. It was also of the view that anything contrary would result in gross injustice, prejudicially affecting the legitimate rights of persons to a legal remedy. [*Yogesh Rajendra Mehra* v. *Principal Commissioner* – 2024 VIL 187 BOM]

Input Tax Credit is not available on construction of godowns meant for renting out

The AAR Tamil Nadu has answered in negative the question as to whether Input Tax Credit is available on the inputs and input services used by the assessee for construction of godowns which they are proposing to rent out for commercial purposes to registered tenants. The applicant had argued that Section 17(5)(d) of the CGST Act, 2017 is not applicable to them as they are not constructing the godowns for furtherance of business, but the building itself is the source of income for them, without which their business does not exist. The Authority ruled that a law (Rules/Act) cannot be changed/amended applicant to applicant, as the suitability and requirement of taxpayer keeps varying. Thus, it is mandatory for the taxpayers to adhere to the restrictions prescribed in Act and Rule. [In RE: *Suswani Foundations Private Limited* – 2024 (3) TMI 673-AAR Tamil Nadu]

E-commerce – Receipt of commission as percentage of value of sales through one's online platform would not qualify it as 'agent'

The AAR Karnataka has answered in negative the question as to whether the Applicant who just collects commission as a percentage of the value of digital gold sold through its platform under a distribution agreement, qualifies as an 'Agent' under GST Laws, and thereby is not covered under Section 52 of the Central Goods and Services Tax Act, 2017 as an e-commerce operator. The Authority observed that the distribution agreement entered between the parties was on principal-to-principal basis and had specified that neither the applicant nor the other company were agents of each other. The Authority in this regard also held that post-sale conditions such as responsibility of delivery of digital gold, vaulting of gold, etc., does not alter the fact that the sale of product is done through the applicant's platform and that the sale consideration is collected by the applicant. It was thus held that the applicant fulfilled all the conditions of Section 52 and hence was liable to compulsorily register. [In RE: *Changejar Technologies Private Limited* – 2024 (3) TMI 261-AAR Karnataka]

ITC is not available of differential IGST paid after on-site audit by Customs authorities post clearance of imported goods

The AAR Tamil Nadu has answered in affirmative the question as to whether the provisions prescribed under GST law imposes any restriction on availment of ITC of the differential

IGST paid post on-site audit by Customs authorities. The Authority in this regard has ruled that the law imposes restriction on the availment of ITC under Section 17(5) of the CGST/TNGST Act, 2017, in respect of any tax 'not paid / short paid' in accordance with Section 74, irrespective of the fact as to whether the proceedings are initiated on the basis of audit or on the basis of an anti-evasion operation, and irrespective of the fact whether a show cause notice is issued. The AAR noted that goods were mis-classified by the applicant initially, pointing out that it had resorted to willful-misstatement to evade tax, which came to light only when the transaction of the applicant's unit was taken up for audit. [In RE: *Mitsubishi Electric India Private Limited* – 2024 VIL 39 AAR]

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Customs

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- Classification of goods imported in SKD condition – No authority to separate different parts and components – Supreme Court
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- Power to issue supplementary show cause notice implicit in Section 124 even before insertion of second proviso – Calcutta High Court
- Pumps for lotion dispenser are classifiable under TI 8424 89 90 and not under Headings 8413 and 9616 – CESTAT New Delhi

Notifications and Circulars

RoDTEP benefit extended to exports by Advance Authorisation holders and by EOU and SEZ units

The Ministry of Commerce and Industry has extended the benefit of Scheme for Remission of Duties and Taxes on Exported Products ('**RoDTEP**') on exports by Advance Authorisation holders, and by Export Oriented Units and units in Special Economic Zones. It may be noted that the RoDTEP scheme itself has also been extended beyond 30 June 2024 and will now be valid till 30 September 2024. Key highlights of the changes as notified by Notification No. 70/2023, dated 8 March 2024 and Notification No. 74/2023, dated 11 March 2204, are as follows.

- Benefit available to Advance Authorisation holders and EOUs from 11 March 2024 till 30 September 2024.
- However, benefit on export of certain goods by AA holders and by EOUs, falling under Chapters 71 (Precious stones and metals, etc.), 96 (certain pens) and 97 (works of art, collectors' pieces and antiques) will be available only from 1 April 2024.
- SEZ units will be eligible for this benefit once IT integration of SEZ units with ICEGATE takes place (expected from 1 April 2024), till 30 September 2024.
- List of eligible export items, rates and per unit value caps for exports by Advance Authorisation holders, EOUs and units in SEZ, is available in new Appendix 4RE.
- RoDTEP rates have also been revised for 25 export items in Appendix 4R (for exports other than those falling under current relaxation).

It may be noted that consequential changes have also been made in the customs Notification No. 24/2023-Cus. (N.T.) by Notification No. 20/2024-Cus. (N.T.), dated 11 March 2024.

Imports under Advance Authorisations, and by EOUs and SEZ units – Compliance with certain QCOs relaxed

The Ministry of Commerce and Industry has relaxed the compliance requirements under Quality Control Orders ('**QCOs**') issued by the Ministry of Steel, the Department for Promotion of Industry and Internal Trade (DPIIT) and the

Ministry of Textiles in case of imports by holders of Advance Authorisations ('**AA**'), Export Oriented Units ('**EOUs**') and units in Special Economic Zones ('**SEZs**') for utilization/consumption in manufacture of export products. Key highlights of this recent relaxation as notified by Notification No. 71/2023, dated 11 March 2024 inserting a new paragraph 2.03(A) in the Foreign Trade Policy 2023, and Public Notice No. 50/2023 also of the same date, revising new Appendix 2Y of the Handbook of Procedures, are available here.

Electric vehicles of minimum CIF value USD 35000 – 15% BCD and nil SWS if imported under Scheme to promote manufacturing of electric passenger cars in India

The Ministry of Finance has reduced basic customs duty on import of electric vehicles of minimum CIF value USD 35,000 to 15% if the same are imported under the 'Scheme to promote manufacturing of electric passenger cars in India' as notified by the Ministry of Heavy Industries (MHI) on 15 March 2024. Amendments in this regard have been made in Sl. No. 526A of Notification No. 50/2017-Cus. by Notification No. 19/2024-Cus., dated 15 March 2024. This reduced BCD is available till 31 March 2031. Similarly, amendments have been made in Sl. No. 57 of Notification No. 11/2018-Cus. related to exemption from Social Welfare Surcharge (SWS), by Notification No. 20/2024-Cus., dated 15 March 2024 to provide for total exemption from SWS on such imports.

As per the Scheme, EV passenger cars (e-4W) can initially be imported with a minimum CIF value of USD 35,000, at a duty rate of 15% for a period of 5 years from the date of issuance of approval letter by MHI. The maximum number of e-4W allowed to be imported at the aforesaid reduced duty rate shall be capped at 8,000 nos. per year and carryover of unutilized annual import limits would be permitted. The approved applicants will be required to setup manufacturing facilities in India with a minimum investment of INR 4,150 crore (USD 500 million), for manufacturing of e-4W, which shall be made operational within a period of 3 years from the date of issuance of approval letter and achieve minimum domestic value addition of 25% within the same period.

Free Trade Agreements – Fourth tranche of India-Mauritius CECPA and third tranche of India-UAE CEPA to be effective from 1 April 2024

The Ministry of Finance has further reduced basic customs duty on import of goods under the India-Mauritius Comprehensive

Economic Cooperation and Partnership Agreement (CECPA) and those imported under India-UAE Comprehensive Economic Partnership Agreement (CEPA). Tables in Notifications Nos. 25/2021-Cus. (relating to India-Mauritius Agreement) and 22/2022-Cus. (relating to India-UAE Agreement) have been accordingly revised by Notifications Nos. 18/2024-Cus., dated 14 March 2024 and 21/2024-Cus., dated 15 March 2024, respectively. The changes will come into effect from 1 April 2024.

Onions – Export prohibition extended beyond 31 March 2024

Prohibition to export onions falling under HS Code 0703 10 19 has been extended till further orders. The prohibition was supposed to expire on 31 March 2024. Ministry of Commerce has issued Notification No. 81/2023, dated 22 March 2024 for this purpose.

Ratio Decidendi

Classification of goods imported in SKD condition – No authority to separate different parts and components

The Supreme Court has affirmed the CESTAT Chennai decision which had held that if the goods are presented in SKD condition, Department does not have authority of law to separate different parts and components and classify them differently in view of Rule 2(a) of General Rules for Interpretation of the Customs Tariff. The Tribunal had further observed that if the Department wishes to remove certain parts from the SKD package and classify differently, then it must establish that remaining parts, if assembled together have essential character of final product. It was noted that no such evidence was brought forward by the Department. The assessee had imported various parts and accessories in SKD condition for further use in the assembly and manufacture of Colour Doppler-SSD 4000 Ultrosound Scanner and classified them under Tariff Item 9018 19 90 of the Customs Tariff Act, 1975. The Department was of the view that the consignment had various components and some of them if separately classified would fall under Chapters 84 and 85, thus not eligible for exemption from additional duty of customs. ***Assessee here was represented by Lakshmikumaran & Sridharan Attorneys.*** [*Commissioner* v. *Aloka Trivitron Medical Technologies Pvt. Ltd.* – (2024) 16 Centax 383 (S.C.)]

Warehousing – Unloading of imported goods outside bonded warehouse but within factory premises – Customs duty when not payable

The Supreme Court has allowed assessee's appeal in a case where imported machinery parts were partly unloaded in a shed outside the Customs bonded warehouse but were within the factory premises of the assessee. The imported goods were unloaded in this way to protect them from damage due to being lying in the open and getting exposed to the elements, etc. Setting aside the demand of customs duty and interest, the Apex Court noted that Superintendent had granted permission to unload a portion of the cargo outside the open space notified as public bonded warehouse, but within the factory premises of the assessee, and that the said permission was not cancelled/revoked later. It was also noted that the period of

warehousing had not expired and continued to remain operational in terms of the proviso to Section 61 of the Customs Act, 1962. The Supreme Court hence held that the Department's decision to invoke Section 71 and thereafter levy interest on such goods under Section 28AB was not justified. It was also of the view that in such cases Section 15(1)(c) and not Section 15(1)(b) would be attracted. [*Bisco Ltd.* v. *Commissioner* – (2024) 16 Centax 358 (S.C.)]

Appeal to Appellate Tribunal – Limitation for review by Committee of Commissioners

Considering that the period of 10 months, taken by the Committee of Commissioners to decide on filing of appeal before the Appellate Tribunal, was covered by the Covid-19 pandemic, the Supreme Court has rejected the plea that review order passed by the Committee of Commissioners under Section 129A(2) of the Customs Act, 1962 was time-barred. The Apex Court in this regard also noted that no specific time-period has been prescribed for the Committee of Commissioners to exercise the power under Section 129A(2), unlike Section 129D(3) which imposes a time-period of 3 months to review adjudication orders passed by Principal Commissioner. The Court was of the view that considering the extraordinary circumstances prevailing in those days due to Covid-19, the decision was taken within a reasonable time. [*Global Technologies and Research* v. *Principal Commissioner* – TS 88 SC 2024 CUST]

Adjudication of SCN – Period of limitation under Customs Section 28(9)(a)/(b) is mandatory and imperative

The Jharkhand High Court has observed that provisions of Section 28(9)(a)/(b) of the Customs Act, 1962, particularly after omission of the words 'where it is possible to do so', are mandatory in character. Setting aside the order-in-originals passed on 19 November 2018, the Court observed that provisions of Section 28(9)(a) [applicable in cases other than suppression, etc.] became mandatory on 29 March 2018.

It may be noted that while allowing the writ petitions, the High Court also ruled that Rule 5 of the Customs (Finalisation of Provisional Assessment) Regulations, 2018 applies only to provisional assessment made after 14 August 2018, and hence in case of finalization of provisional assessments before such date, Para 3 of Chapter 7 of the CBIC Manual will be applicable, which prescribed time-period of 6 months. [*Bihar Foundry & Castings Ltd.* v. *Union of India* – 2024 VIL 222 JHR CU]

Power to issue supplementary show cause notice implicit in Section 124 even before insertion of second proviso

The Calcutta High Court has held that even prior to insertion of second proviso to Section 124(c) of the Customs Act, 1962 on 29 March 2018, the power to issue supplementary show cause notice was implicit and inbuilt in Section 124. The High Court for this purpose relied upon several decisions holding that provisos are clauses of exception, excepting something out of the enactment, which but for the proviso would be within it. The submission that since the second proviso to Section 124 came into force from 29 March 2018, a supplementary notice issued prior to said date is without jurisdiction, was thus rejected. Further, looking at the term and tenor of the second proviso, the Court was also of the view that the said provision is merely declaratory of the previous law, for which retrospective operation is generally intended. Setting aside the CESTAT decision, the Court also observed that the supplementary show cause notice, though termed as supplementary, was an independent show cause notice which was issued after few more facts emerged during investigation after the original SCN. [*Commissioner* v. *Sandeep Kumar Dikshit* – 2024 (3) TMI 511-Calcutta High Court]

Pumps for lotion dispenser are classifiable under TI 8424 89 90 and not under Headings 8413 and 9616

The CESTAT New Delhi has held that plastic pump for lotion dispenser is correctly classifiable under Tariff Item 8424 89 90 of the Customs Tariff Act, 1975 and not under Headings 8413 and 9616 *ibid*. It was observed that the product in question was a pump not merely for displacing the liquid, as covered under Heading 8413, but also for dispersing the same. The Tribunal was of the view that pumps which simply displace the liquid are different from pumps which disperse liquid, and hence cannot be classified together under general entry of pumps if there is a category more specific. Coverage under Heading 9616 was rejected by the Tribunal while it observed that Chapter Note (d) of Chapter 84 excluded scent sprays and similar toilet sprays of Heading 9616 out of Heading 8424 and dispersing or spraying appliances of Heading 8424 are excluded from Heading 9616. [*Principal Commissioner* v. *Aptar Pharma India Pvt. Ltd.* – 2024 (3) TMI 139-CESTAT New Delhi]

Central Excise, Service Tax and VAT

Ratio decidendi

- Valuation – Additional consideration – Notional cost of specification drawings received free of cost by the manufacturer from the buyer, before issuance of letter of intent identifying former as the supplier, is not includible – CESTAT New Delhi
- Manufacture – Strapping together of tyres, tubes and flaps for catering to replacement market, is not covered under Central Excise Section 2(f)(iii) – CESTAT Mumbai
- Manufacture – Affixing revised MRP tags at showrooms on goods cleared initially from area-based exemption units, is not 'deemed manufacture' – CESTAT Chennai
- Sabka Vishwas (LDR) Scheme – Filing of rectification application is not at par with filing of appeal – Case not to be considered under 'pending appeal' – Madras High Court
- Lease of wagons by private companies to Railways under various schemes is not covered under Supply of Tangible Goods service – CESTAT Larger Bench
- Cenvat credit is not available on inland haulage charges from ICD to the seaport if LEO issued at ICD in case of FOB exports – CESTAT New Delhi

Ratio Decidendi

Valuation – Additional consideration – Notional cost of specification drawings received free of cost by the manufacturer from the buyer, before issuance of letter of intent identifying former as the supplier, is not includible

The CESTAT New Delhi has held that the notional cost of specifications in the form of drawings and designs supplied free of cost by a company to its vendors (component manufacturers) is not includible in the assessable value of parts or components manufactured by such vendors and cleared to the company. The Tribunal in this regard observed that specifications of drawings and designs were supplied by the company to the potential vendors free of cost before the letter of intent was issued and was for the purpose of short-listing the vendors for supply of components. It was hence of the view that no additional consideration towards sale was received by the assessee (vendor/component manufacturers) from the company, as anything which is supplied by the buyer to the manufacturer before even identifying the potential manufacturer as the supplier can never be treated as an additional consideration for sale.

The Tribunal, for this purpose, also noted that the goods involved in the dispute were engineering goods and that unless the potential vendor was made aware of the requirement by way of design and drawing, the vendor would not have been in a position to quote a price for the supply. It observed that manufacture of components was not possible from the specification and designs supplied by the buyer (which were merely layout or dimensions of the desired components) and that the assessee was responsible and had to prepare detailed drawings and designs for which it received technical support from its parent company abroad and paid service tax on royalty. The Tribunal hence held that these specification drawings could not be said to be used in the production of the components or necessary for the production of the components in terms of Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

The CESTAT further drew comparison of Explanation (1) to Rule 6 of the Excise Valuation Rules with Rule 10(1)(b) of the Customs

Valuation Rules, 2007 borrowed from Article 8.1(b) of the WTO's Agreement on Implementation of Article VII of the General Agreement of Tariffs and Trade. It observed that expression 'necessary for the production of the imported goods' appearing in clause (iv) of Rule 10(1)(b) has been interpreted in the context of 'assists', not to include those design which merely specify the requirement of a buyer or dimension of the product. ***Assessee here was represented by Lakshmikumaran & Sridharan Attorneys.*** [*Denso India Private Limited* v. *Additional Director General (Adjudication)* – Final Order Nos. 55140-55337/2024, dated 12 March 2024, CESTAT New Delhi]

Manufacture – Strapping together of tyres, tubes and flaps for catering to replacement market, is not covered under Central Excise Section 2(f)(iii)

The CESTAT Mumbai has held that strapping together of tyres, tubes and flaps, referred as 'TTF', at the premises of logistics service provider, for dispatch to dealers for catering to replacement market for bus/lorry operators, is not 'manufacture' under Section 2(f)(iii) of the Central Excise Act, 1944. The adjudicating authority had in this case concluded that strapping at three places, affixing of hologram (after inspection and quality ascertainment) and offer of warranty, amounted to 'treatment' in the definition of 'manufacture' in Section 2(f). Allowing the appeal, the Tribunal observed that price of aggregate was the sum of price of the three disaggregated products. Submission that inspection done at logistics service provider's premises fell within Section 2(f)(iii), was also found not tenable, as it implied that the same was lacking at prior stage. Further, observing that Section 2(f)(iii) used the expression 'marketable' and not 'more marketable', the Tribunal rejected the Department's plea of hologram affixing. According to the Tribunal, this proposition also presupposes lack of marketability in the absence of hologram. ***Assessee here was represented by Lakshmikumaran & Sridharan Attorneys.*** [*Michelin India Pvt. Ltd.* v. *Additional Director General* – 2024 VIL 214 CESTAT MUM CE]

Manufacture – Affixing revised MRP tags at showrooms on goods cleared initially from area-based exemption units, is not 'deemed manufacture'

The Chennai Bench of CESTAT has held that activity of attaching revised MRP tags to the watch straps and revised MRP labels to watch boxes does not amount to 'deemed manufacture' under

Section 2(f)(iii) of the Central Excise Act, 1944. The period involved in the dispute was from 2008 till 2009. Allowing the appeal, the Tribunal also observed that it was not the Department's case that assessee had for the first-time mentioned brand name or any such new detail while fresh MRP stickers. The Tribunal in this regard relied upon its earlier case in *Commissioner* v. *Panchsheel Soap Factory* and other disputes and noted that the products were already marketable before the revised MRP stickers were affixed at the showrooms and premises of CFAs after clearance from units availing area-based exemption. ***Assessee here was represented by Lakshmikumaran & Sridharan Attorneys.*** [*Titan Company Ltd.* v. *Commissioner* – 2024 (3) TMI 588-CESTAT Chennai]

Sabka Vishwas (LDR) Scheme – Filing of rectification application is not at par with filing of appeal – Case not to be considered under 'pending appeal'

The Madras High Court has rejected the contention of the assessee that filing of rectification is at par with the filing of appeal. The Court in this regard drew differences between appeal and rectification and was of the view that although rectification proceeding may also result in reversal of the decision sought to be rectified, it cannot be considered as appellate proceeding. The assessee had contended that since it had filed an application for rectification of adjudication order under Section 74 of the Finance Act, 1994, its case should be considered as under 'pending appeal' [and not arrears case] under Section 124(1)(a)(ii) of the Finance Act, 2019. Dismissing the petition, the Court held that pendency of rectification application cannot be considered as the case in which one or more appeals was pending as on 30 June 2019. [*Goodearth Maritime Ltd.* v. *Designated Committee* – 2024 (3) TMI 925-Madras High Court]

Lease of wagons by private companies to Railways under various schemes is not covered under Supply of Tangible Goods service

The Larger Bench of the CESTAT has answered in negative the question as to whether the supply of wagons by private players to Railways in terms of 'Own Your Wagon Scheme' or 'Wagon Investment Scheme' or 'Liberalized Wagon Investment Scheme', is a taxable service classified under Supply of Tangible Goods service as defined by Section 65 (105)(zzzzj) of the Finance Act, 1994. According to the Tribunal, lease of wagons to the Railways

transferred the right of possession and effective control of the wagons to the Railways and, therefore, cannot be subjected to service tax under Section 65(105)(zzzzj). It was noted that the wagons were in the exclusive use of the Railways, with Railways and not the assessee determining movement of such wagons. It was observed that the Railways could provide any wagons for transportation and not necessarily the wagons leased. The Larger Bench was also of the view that mere right under the Agreement for guaranteed transportation of specified amount of goods would not mean that the assessee was in possession or effective control of the wagons. The fact that the assessee had paid VAT on the transaction was also noted by the Larger Bench in this dispute pertaining to the period from 2008-09 to December 2011. [*Rashtriya Chemicals & Fertilisers Ltd.* v. *Commissioner* – Interim Order No. 04/2024, dated 15 March 2024, CESTAT Larger Bench]

Cenvat credit is not available on inland haulage charges from ICD to the seaport if LEO issued at ICD in case of FOB exports

The CESTAT Delhi has held that Cenvat credit of service tax paid on inland haulage charges paid for transportation of export goods from the Inland Customs Depot ('**ICD**') to the seaport, is not available. The Tribunal in this case observed that the Let Export Order ('**LEO**') was issued at the concerned ICD. It was noted that once the LEO is issued in a FOB transaction, the goods become the responsibility of the shipper acting on behalf of the person abroad for whom the goods are being exported. Supreme Court's decision in the case of Ispat Industries Ltd. was relied upon by the Tribunal here while it observed that there was no evidence by the assessee that it continued possession even after LEO, as that of inspection or of handling of goods in any other manner. Assessee's appeals were dismissed observing that the charges were incurred beyond the place of removal. [*Honda Motorcycle and Scooter India Pvt. Ltd.* v. *Commissioner* – 2024 VIL 240 CESTAT DEL CE]

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