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An e-newsletter from
Lakshmikumaran & Sridharan, India

April 2018 / Issue – 82

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April
2018

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Relevance of amortization for valuation under GST law

By **Brijesh Kothary and Nikhil Agarwal**

As G. F. Stanlake states in his book 'Introductory Economics', a person who spends his or her time performing one relatively simple task becomes extremely proficient at that particular operation. It is true that constant repetition leads to great dexterity and efficiency.

The most interesting feature of an economic activity in modern times is the fact that in most cases, a manufacturer never makes a complete product on his own. The activity of outsourcing a part of the production is referred to as job work in trade parlance, wherein the principal sends inputs and / or capital goods to the job worker for undertaking certain treatment or process on such goods.

One of the most common transactions in cases of job work is provision of moulds and dies, jigs and fixtures or tools by the principal to the job worker for use in the job work activity. In this regard, we would like to analyse whether the job worker is required to include the amortised value of mould in the job work charges for the purpose of discharging GST.

The provisions relating to value of taxable supply are covered under Section 15 of the Central Goods and Services Tax Act, 2017 ('*CGST Act*', for brevity). Section 15(1) *inter alia* provides that the '*price actually paid or payable*' shall be the value of supply if such price is the sole consideration for that supply.

Unlike Central Excise law, GST law does not specifically provide for treatment of value of moulds, etc., as 'additional consideration'. Section 2(31) of CGST Act provides meaning for the term 'consideration' in relation to the supply of goods or services or both to include:

(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government.

The definition of consideration in clause (*a*) includes:

- Any payment made or to be made in money or otherwise,
- In respect of, in response to, or for the inducement of the supply,
- Whether by the recipient or by any other person.

The definition of consideration in clause (*b*) relates to additional consideration flowing from the recipient to the supplier in the form of services and hence the same has no relevance here.

It may be construed that the consideration need not necessarily be paid to the supplier to determine the value of supply under GST law. In a scenario where the mould is handed over by the principal to job worker, the value thereof cannot be regarded as 'payment' made by principal to job worker, otherwise than in 'money'.

Also, a payment takes the colour of consideration only when it is made in respect of, in response to or for the inducement of supply. The fact that mould is used by job worker for manufacture of finished goods for the principal, cannot lead to an inference that the

same represents payment in respect of, in response to or for inducement of supply.

The argument that provision of mould by principal to job worker cannot be regarded as an inducement, motivation or obligation, can be appreciated by identifying the scope of supply in a job work transaction. For example, if the principal provides the raw materials as well as mould to job worker for manufacture of finished goods, the job worker is only obliged to supply services and not goods. Even though the job worker cannot carry out the activity without the mould, neither the value of materials nor the cost of moulds, can be regarded as 'consideration' for supply.

Reference can be made to the decision of Supreme Court in the case of *Moriroku UT India Private Limited* v. *State of U.P. & Ors*, dated 3-3-2008 [MANU/SC/7350/2008] under the provisions of the U.P. Trade Tax Act, 1948, where it was held that amortization cost of tooling supplied by the principal free of cost to the vendor to enable it to manufacture automobile components is not includible in the sale price of the component. The relevant extract of the judgement is as follows:

"Before concluding, it may be clarified, that, in the present case, moulds were manufactured by the buyer/principal so that the auto components could be manufactured by the appellant in terms of the specifications given by the buyer. Therefore, the cost of manufacture of these moulds was incurred by the buyer/principal and not by the appellant. In our judgment, we have termed the "amortisation cost" as notional in the sense that it is not the cost in the hands of the appellant. As stated above, Rule 6 of Excise Valuation Rules, 2000 refers to items of additional consideration. But for Rule 6 it was not possible for the Department under the 1944 Act to load such items to the transaction value of the final product. It is for above reasons, particularly because cost of manufacture is not incurred by the appellant but by the principal, such cost cannot be added to the price of the final product, particularly when there is no law to that effect."

From the above decision and analysis, it can be inferred that amortised value of moulds supplied by principal to job worker is not required to be included in the value of conversion charges for the purpose of discharging GST, in the absence of a specific statutory provision to that effect.

CBIC has recently issued Circular No. 38/12/2018, dated 26-3-2018 wherein it is clarified that the value of services would be determined in terms of Section 15 of the CGST Act and would include not only the service charges but also the value of any goods or services **used by job worker** for supplying the job work services, **if the same is recovered from the principal**. It is therefore clear that the question of additional consideration comes into picture only when the same is recovered from the principal.

The circular thereafter specifically addresses the issue of value of job work services when moulds and dies, jigs and fixtures or tools are provided by the principal to the job worker and used by the latter for providing job work services. It is clarified in the said circular that in terms of Section 15 of the CGST Act, any amount that the supplier is liable to pay in relation to the supply but which has been incurred by the recipient will form part of value for that particular supply, provided it has not been included in the price for such supply and accordingly, **the value of moulds and dies, jigs and fixtures or tools needs to be included in the value of job work services if its value has not been factored in the price for the supply of such services by the job worker**.

It may be noted that while on one hand the circular provides that the value of only those goods or services, which are recovered from the principal, are required to be included in the value of taxable supply; on the other hand, it says that the value of moulds, etc. must be included in the value of job work services if their value has not been factored in the price for the supply of such services by the job worker, thereby indicating an apparent contradiction.

The view in the second part of the circular may be relevant only in a scenario where the job worker

places order for supply of mould to a vendor for use of such mould in his job work and the consideration for supply of such mould is paid by the principal on behalf of the job worker. In such case, it can be said that the value of job work services is suppressed to the tune of additional consideration flowing from the principal to the job worker, through the vendor.

In our view, mere provision of mould by principal to job worker cannot be regarded as additional consideration. Therefore, the amortized value of mould is not required to be included in the value of job work charges. However, the recent circular seems to adopt contradictory position, indirectly requiring the amortised value of mould to be included in the value of job work charges for discharging GST on job work services.

In view of the above inconsistency drawn from joint reading of Section 15 and the circular, non-inclusion of the amortized value of mould in the job work charges by job worker may be prone to litigation. In all fairness, CBIC should come out with a clarification quickly and demonstrate to the trade and industry that they sincerely intend to have a Good and Simple Tax.

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Goods and Services Tax (GST)

Notifications and Circulars

IT Grievance Redressal Mechanism put in place to address grievances due to technical glitches: Central Board of Indirect Taxes and Customs (CBIC) has set up IT Grievance Redressal Mechanism whereby nodal officers will be appointed to address issues relating to technical glitches on GST portal. Taxpayers have to file application along with evidence on bona fide attempt to comply with law. Nodal officers will forward the applications to GSTN which will verify and forward the same to IT Grievance Redressal Committee with suggested solutions. It is stated that only problems relating to Common Portal (GST Portal) and affecting a large section of taxpayers will be addressed through this mechanism. Circular No. 39/13/2018-GST, dated 3-4-2018 issued for this purpose also states that where such glitch (problem on GST portal) is the reason for failure in return filing, consequential fine and penalty will be waived. Further, TRAN-1, not filed or revised due to such issues, can now be filed (by identified taxpayers) by 30-4-2018.

Exports – LUTs deemed to be accepted on generation of acknowledgment bearing ARN: Letter of Undertaking (LUT) will be deemed to have been accepted as soon as an acknowledgement for the same, bearing the Application Reference Number (ARN), is generated online. CBIC Circular No. 40/14/2018-GST, dated 6-4-2018, while amending earlier Circular No. 8/8/2017-GST, also states that no document is required to be physically submitted to the jurisdictional officer for acceptance of a LUT. At present exporters have to submit LUT online in Form GST RFD-11 on the common portal. According to the circular, the clarification was required as LUTs are not visible (in the online interface) to the jurisdictional officers.

Job work under GST clarified: Various issues relating to job work under the GST regime have been clarified by the authorities. According to Circular No. 38/12/2018-GST, dated 26-3-2018, supply of goods from job worker's premises is to be considered as supply by the principal, and that principal is required

to furnish job work details in Form GST ITC-04 quarterly. It has also been clarified that job worker is required to obtain registration only if his aggregate turnover, to be computed on all India basis, in a financial year, exceeds the specified threshold limit. This circular further explains the procedure for movement of goods from principal to job worker and from one job worker to another or in case of supply by the principal from the job worker's premises. It also states that value of moulds, dies, jigs and fixtures or tools may not be included in the value of job work services provided their value has been factored in the price for the supply of such services by the job worker. Liability to issue invoice, determination of place of supply and availability of ITC have also been clarified.

GSTR-1 – Due dates for filing GSTR-1 for next three months notified: In a systematic reduction of extended timelines for filing GSTR-1, due date for GSTR-1 monthly return will be brought back to the original date (10th of next month), for suppliers having more than Rs. 1.5 crore turnover. According to Notification No. 18/2018-Central Tax, dated 28-3-2018 while due date for such return for April 2018 is 31st of May, it has to be filed by 10th of next month for the months of May and June 2018, i.e. by 10th of June and July, respectively. Due date for quarterly return for the period April to June 2018, by suppliers having turnover up to Rs. 1.5 crore will however be 31st of July, 2018 as per Notification No. 17/2018-Central Tax issued also on 28-3-2018.

GSTR-6 – Due date for filing GSTR-6 extended: Input service distributors (ISD) can now file GSTR-6 return for the months of July, 2017 to April, 2018, by 31st May, 2018. It may be noted that this return was to be filed by 31st of March, 2018 according to Notification No. 8/2018-Central Tax which has now been superseded by Notification No. 19/2018-Central Tax, dated 28-3-2018 to extend the time limit for furnishing the said return.

GST TRAN-2 can be filed till 30-6-2018: Period for filing FORM GST TRAN-2 under Rule 117(4)(b)(iii) of the CGST Rules, 2017 has been extended till 30th June, 2018. Order No. 1/2018-Central Tax, dated 28-3-2018 has been issued for this purpose.

GST rates on supply of food and drinks in trains and at platforms clarified: Ministry of Finance has clarified that GST rate on supply of food and drinks by the Indian Railways or Indian Railways Catering and Tourism Corporation Ltd., or their licencees is 5%, without Input Tax Credit (ITC). According to the Press Release dated 6-4-2018 and the Order No. 2/2018-GST, dated 31-3-2018 (letter issued to the Railway Board), the said rate is applicable in both trains and at platforms (static units).

Refund claim by UN agency, consulate or embassy can be filed within 18 months: Refund claim in respect of inward supplies can now be filed by embassies or consulates of foreign countries, UN agencies, Multilateral Financial Institution and Organisation notified under the United Nations (Privileges and Immunities) Act, 1947, within 18 months from the last date of the quarter in which such inward supply was received. Hitherto, this claim was to be filed within 6 months. Notification No. 20/2018-Central Tax, dated 28-3-2018 extending the time period, observes that the facility for filing such refund claim under Section 55 of CGST Act has been made available on the common portal only recently.

Reverse charge exemption, E-way Bill and GSTR-3B: CBEC [now CBIC] has issued notifications to implement certain recommendations of the GST Council as decided by the latter on 10-3-2018. While GSTR-3B will have to be filed by 20th of next month for the months of April, May and June 2018, exemption from liability under reverse charge in respect of supplies received from unregistered suppliers has been extended till 30-6-2018. Notification Nos. 16/2018-Central Tax and 10/2018-Central Tax (Rate), both dated 23-3-2018 have been issued for the said purpose. Further, new e-way bill provisions in CGST Rules, 2017 have come into effect from 1st April, 2018 as per Notification No. 15/2018-Central Tax.

Ratio decidendi

Transitional credit – Restriction of one year for ITC on stock of goods, valid: Bombay High Court has upheld the constitutional validity of clause (iv) of sub-section (3) of Section 140 of the Central Goods and Services Tax Act, 2017. It rejected the plea that the provisions, restricting the transitional credit (input tax credit on stock of goods) to only cases where such goods were purchased after 30-6-2016, are *ultra vires* Articles 14 and 19(1)(g) of the Constitution of India and are unenforceable *qua* the first stage dealer. The provision was also held as not in violation of principles of promissory estoppel. It was observed that when imposition of the condition has a clear nexus with the object sought to be achieved, it cannot be termed as being in violation of the said principle.

Further, the Court relied on Sections 16, 17 and 18 of the CGST Act to counter the argument that input tax credit in the new regime is unconditional or without any restriction. Going through various provisions of the Central Excise Rules, 2002 and Cenvat Credit Rules, 2004, it upheld the contention of the Revenue Department that Cenvat credit is a mere concession and it cannot be claimed as a matter of right. It was held that if right to availment of Cenvat credit itself is conditional and not absolute, then, the right to pass on that credit cannot be claimed in absolute terms. The Court in this regard distinguished the Apex Court decision in the case of *Eicher Motors*.

Contention that repeal of certain Acts as mentioned in Section 174(1) would not affect any right accrued under such repealed Acts, was also rejected observing that if rights are conferred with conditions under the existing law, then, they are saved by the CGST Act with such conditions only and not otherwise. [*JCB India Limited* v. *Union of India* – Writ Petition No. .3142 of 2017 and Ors., decided on 19/20-3-2018, Bombay High Court]

Supply of UPS along with battery for a single price is "mixed supply": UPS and batteries supplied for a single price cannot be regarded as "composite supply" as these are not naturally bundled. Authority for Advance Ruling, West Bengal, while holding so, observed that standalone UPS and battery can be supplied in a retail setup and that both have separate commercial value as goods. The Authority in this regard noted that goods are naturally bundled in a supply contract if the contract is indivisible, and that the contract for supply of a combination of UPS and battery, if not built as a composite machine, is not indivisible. The supply of UPS and battery was hence held to be covered as "mixed supply" within the meaning of Section 2(74) of the CGST Act, as they are supplied under a single contract at a combined single price. [*Switching AVO Electric Power Ltd.* – Advance Ruling dated 21-3-2018 in Case No. 4 of 2018, WB AAR]

Skin Care Preparations – Classification as medicaments or as cosmetics: Only those skin care preparations which are used to cure from, or for treatment of, or for prevention of a specific skin disease are be treated as a medicament classifiable under Heading 3004, unless specifically included under Heading 3304. West Bengal Authority for Advance Ruling, Goods and Service Tax in this regard held that skin care preparations not offered primarily as medicaments are to be classified under Heading 3304. The authority held that a skin care preparation, unless specifically included under Heading 3304, should first be examined for its inclusion as a medicament in Heading 3004 by applying the twin tests laid down by the Supreme Court in *Puma Ayurvedic Herbal (P) Ltd.*, and if it fails the tests, it should be classified under Heading 3304. [*Akansha Hair & Skin Care Herbal Unit Pvt Ltd.* – Advance Ruling dated 9-4-2018 in Case No. 01 of 2018, WB AAR]

Recovery of food expenses from employees for canteen services provided by company liable to GST: Authority for Advance Ruling, Kerala has held that recovery of food expenses from employees for canteen services provided by the company comes under the definition of "supply" and is liable to GST. The applicant contended that such

services are not taxable as the same are not in the course or furtherance of its business, and that they are only facilitating supply of food to its employees as per the statutory requirement of the Factories Act, 1948 while recovering only the actual expenditure incurred without making any profit. The authority however set aside the contentions by ruling that such supply would come under clause (b) of Section 2(17) of CGST Act as a transaction incidental or ancillary to the main business where consideration exists in the form of the cost of food recovered from employees. It was noted that exemption similar to that earlier provided in Notification No. 25/2012-S.T., to service of supply of food or beverages by a canteen maintained in a factory covered under the Factories Act, was not available under GST law. It was observed that even though there is no profit on the supply of food to employees, there is "supply". [*Caltech Polymers Pvt. Ltd.* - Order No. CT/531118-C3, dated 26-3-2018, Kerala AAR]

No GST on sale of goods procured and directly supplied outside India, without importing to India at any point: Observing that the goods are liable to IGST when they are imported into India and the IGST is payable at the time of importation of goods into India, Authority for Advance Ruling, Kerala has held that GST will not be payable in case of sale of goods procured and directly supplied outside India. The applicant was held as not liable to GST either on the sale of goods procured from China and directly supplied to the party in USA or on the sale of goods stored in the warehouse in Netherlands, after being procured from China, to customers in and around Netherlands. It was noted that the goods are not imported into India at any point of time. CBEC Circular No. 33/2017-GST, dated 1-8-2017 was relied for this purpose. [*Synthite Industries Ltd.* - Order No CT 12275/18-C3, dated 26-3-2018, Kerala AAR]

'Block Joining Mortar' is to be classified under Tariff Item 3214 90 90: West Bengal Authority for Advance Ruling, Goods and Services Tax has held that Block Joining Mortar is to be classified under Tariff Item 3214 90 90 and is therefore taxable under Serial No. 24 of Schedule IV to Notification No. 1/2017-Central Tax (Rate), dated 28-6-2017. The authority noted set aside the applicant's contention of classifying the product under TI 3824 50 90. The authority that Block Joining Mortar is a ready to use grey cement based water resistant mortar used for joining masonry units. It was observed that the product needs to be mixed with water before applying a thin uniform layer of the paste using trowel for joining masonry units and is therefore a bonding compound, and thus satisfies the general characteristics of the products to be classified under HSN 3214 90 90 as per the Explanatory Notes to HSN. [*SIKA India Pvt. Ltd.* - Advance Ruling dated 9-4-2018 in Case No 03 of 2018, WB AAR]

Rubber trees agreed to be severed before supply taxable @ 18%: Authority for Advance Ruling, Kerala has held that rubber tress which are agreed to be severed before the supply come under the definition of 'goods' as per the CGST Act, 2017. The applicant contended that there is no GST liability on standing rubber trees which fall under the HSN 06. The authority however did not accept such contention observing that the applicant was under contract to cut and remove rubber trees and thus after cutting, standing rubber trees no longer remain as such and therefore are to be treated as wood in rough form. Noting that there is no differentiation between soft wood and hardwood in GST, the authority ruled that rubber wood fall under the HSN 4403 and will be taxable @18%. [*N.C. Varghese* - Order No. CT/3270/18-C3, dated 26-3-2018]

EU VAT – Limitation not applicable for claiming VAT refund/adjustment when not possible for assessee to claim same earlier: The Court of Justice of European Union has held that benefit of right to claim VAT refund cannot be denied on the ground that the limitation period started from date of supply and had expired before submission of refund application. The goods were supplied during 2004-2010, however the supplier drew up invoices, including VAT, not before 2010. The Court while

holding so, noted that there was no lack of diligence on the part of the assessee and that there was absence of fraudulent collusion. It was also observed that it was not possible for the assessee to exercise right to refund earlier as supplier did not make an adjustment of the VAT till 2010 when they drew up invoices including the VAT, sent supplementary tax returns to the authority and paid due VAT. [*Volkswagen* v. *Finance Directorate of Slovak Republic* – Judgement dated 21-3-2018 in Case C-533/16, CJEU]

EU VAT – No input VAT deduction for period when registration revoked: CJEU has held that authorities had rightly refused deduction of input VAT when VAT identification of such person was revoked and authorities had no access to information during the said period for ascertaining that deduction was proper or not. The assessee had continued to issue invoices including VAT even after cancellation of its VAT registration. On inspection the tax authorities issued tax demand for the period during which it was not registered for VAT. The assessee however filed for input VAT deductions. [*Întreprinderea Individuală Dobre M. Marius* v. *Ministerul Finanţelor Publice* – Judgement dated 7-3-2018 in Case C-159/17, CJEU]

Customs

Notifications, Public Notices and Circulars

Demand for duty or interest - Pre-notice Consultation Regulations notified: Ministry of Finance has notified Pre-notice Consultation Regulations, 2018 under the Customs Act, 1962. It provides for consultations with the proper officer, prior to issue of SCN to the person chargeable with duty or interest. According to the new Regulation, pre-notice consultation must be initiated at least 2 months prior to due date for issuance of SCN, and conclude within 60 days from date of communication of grounds. Further, proper officer shall proceed to issue SCN if no response is received from assessee within 15 days. The new provision was part of Budget 2018 proposals, and amendment to Section 28 of the Customs Act came into effect from 29-3-2018 when Finance Bill 2018 was assented by the President of India.

Exemptions from IGST and Compensation Cess extended till 1-10-2018: Both CBIC and DGFT have on 23-3-2018 extended the exemption available to EOUs from IGST and Compensation Cess payable on imports, till 1-10-2018. The extension is consequent to the recommendations of the GST Council in this regard. While on the Customs side, Notification No. 52/2003-Cus. has been amended, DGFT has issued notification to revise Para 6.01(d)(ii) of the Foreign Trade Policy 2015-20, for this purpose. The exemption is also available on procurements from bonded warehouses in DTA or from international exhibition held in India.

Further, the exemption from IGST and Compensation Cess in respect of imports under Advance Authorisation and EPCG scheme has also been extended till 1st October, 2018. Notification No. 35/2018-Cus., dated 28-3-2018 amends various Customs notifications for this purpose. DGFT in this regard has issued Notification No. 54/2015-20 on 22-3-2018 amending Para 4.14 and Para 5.01(a) of the Foreign Trade Policy 2015-20.

BCD increased on certain parts for use in manufacture of cell phones: Import duty has been increased on camera modules, connectors and certain printed circuit boards for use in manufacture of cellular mobile phones. According to amendments effective from 2-4-2018, Basic Customs Duty on these goods will be 10% instead of nil. Inputs or parts

for manufacture of these products, including sub-parts for manufacture of parts for these goods, however will continue to enjoy exemption from Basic Customs Duty. Amendments for this purpose have been made in Notification Nos. 57/2017-Cus., 24/2005-Cus., 25/2005-Cus. and 50/2017-Cus. by Notification Nos. 37-40/2018-Cus., all dated 2-4-2018. Further it may be noted that by Notification No. 36/2018-Cus., also dated 2-4-2018, the tariff rate of BCD for Tariff Item 8517 70 10 has been increased from nil to 10%.

Monetary limit for departmental appeals extended to classification and refund cases: Monetary limit for challenging a judgement pronounced not in favour of the Revenue Department is now applicable in respect of judgements / orders on classification and refund cases as well. CBIC has withdrawn the exclusion earlier provided to "classification and refunds issues which are of legal and/or recurring nature". Hitherto, these cases were to be contested irrespective of amount involved. Further, field formations have been directed to withdraw cases pending before the Commissioner (Appeals) where Supreme Court has decided the issue and the same has been accepted by the Department. Instruction dated 4-4-2018 from file F. No. 390/Misc/116/2017-JC has been issued for this purpose.

Second-hand goods can be freely imported for repairs: Ministry of Commerce has revised import policy in respect of second-hand goods imported for the purpose of repairs, etc. According to the new Para 2.31(iii) inserted by Notification No. 58/2015-20, dated 28-3-2018, second-hand goods imported for repair, re-furbishing, re-conditioning or re-engineering can be imported freely subject to conditions. The benefit is however available only if the waste generated during such repair, etc. is treated as per the domestic laws and the imported item is re-exported according to the Customs notification.

Japan - Customs duty reduced on specified imports therefrom: Customs duty has been reduced on import of specified goods from Japan, in case they are imported in compliance with the Country of Origin Rules. Notification No. 34/2018-Cus., dated 27-3-2018 substitutes the table containing 806 entries in Notification No. 69/2011-Cus. The reduction/amendment has come into effect from 1st of April, 2018. It may be noted that India has a Comprehensive Economic Partnership Agreement with Japan, and the Rules issued for this purpose provide for a method to determine country of origin.

Pepper import policy revised – MIP prescribed: Ministry of Commerce and Industry has revised import policy for pepper classifiable under Chapter 09 of ITC (HS). Import of pepper having CIF price over and above Rs. 500/kg only is now free. Pepper with CIF price below this has been prohibited for import. However, according to DGFT Notification No. 53/2015-20, dated 21-3-2018, import of light black pepper under Advance Authorisation Scheme would be exempted from said Minimum Import Price (MIP) condition when import is for extraction of oleoresin for re-export by the manufacturer exporters only, subject to certain conditions.

Pneumatic tyres for buses/lorries, from China – CVD investigation initiated: Ministry of Commerce and Industry has initiated Countervailing (anti-subsidy) investigation in respect of import of new pneumatic tyres for buses and lorries, from China. According to notification dated 27-3-2018, Chinese government provides benefits in the form of grants to producers/exporters through 72 identified programs. DGAD notes that there is *prima facie* evidence of 'injury' to domestic industry by such subsidized imports. New/unused pneumatic radial tyres used in buses and lorries/trucks, are liable to anti-dumping duty at present.

Apple imports allowed without port restrictions: Port restrictions in case of import of apples (TI 0808 10 00) have been removed. Ministry of Commerce has issued Notification No. 56/2015-20, dated 27-3-2018 to revise the import policy condition specified in Chapter 08 of the ITC (HS). Hitherto, apples could be imported only through seaports and

airports in Kolkata, Chennai, Mumbai and Cochin and land port and airport in Delhi, and through India's land borders.

Jute products from Nepal – Exemption from Additional Customs duty: Jute products falling under Headings 5310 and 6305 of Customs Tariff have been exempted from Additional Customs Duty for the period from 17-7-2015 to 15-12-2016. As per Notification No. 30/2018-Cus. (N.T.), issued under Customs Section 28A, there was a general practice of non-levy of additional duty of customs during the said period. Interestingly, India at present imposes anti-dumping duty on certain jute products imported from Nepal on the ground that dumped imports from Nepal are causing injury to domestic industry.

Solar panels/modules equipped with bypass and/or blocking diodes – Classification: CBIC has clarified that solar panels or modules equipped with bypass diodes are to be classified under Heading 8541. Solar panels/modules equipped with blocking diodes are however to be covered under Heading 8501 of the Customs Tariff. Instruction No. 8/2018-Cus., dated 6-4-2018 further clarifies that solar panels or modules equipped with both blocking diodes and bypass diodes are to be classified under Heading 8501. The Board in this regard deliberated upon the functioning of bypass and blocking diodes with reference to the decisions of World Customs Organization.

Ratio decidendi

Exemption to import of inputs when contract for final product cancelled: Observing that dispute between assessee-importer and their customers was pending for arbitration, CESTAT Delhi has remanded the matter, relating to exemption to imports, to original authority for decision after arbitration. The assessee had imported components, under Notification No. 39/96-Cus., for manufacture of machinery to be supplied to Ministry of Defence. The contract with Research Centre Imarat, DRDO, Ministry of Defence was however cancelled subsequent to import. The Tribunal in this regard observed that matter regarding validity of purchase order was still to be resolved by due process. It was noted that at the time of import, the claim for exemption was supported by due documents provided by DRDO. [*Aron Hurley Koncepts Pvt. Ltd.* v. *Commissioner* - Final Order Nos. 51062-51064/2018, dated 14-3-2018, CESTAT Delhi]

Importer – Name in Bill of Lading not conclusive proof of 'importer': CESTAT Delhi has held that in case the assessee denies import of goods and does not hold himself to be an importer, it is for the Revenue Department to establish that the assessee was indeed the owner/importer of goods. The Tribunal in this regard observed that except for the bill of lading which itself was disputed as a mistaken transaction by the shipper, there was no other evidence on record to hold the assessee as importer or the person behind importation of such goods. It noted that there was no evidence that the assessee/appellant received the invoices, packing list or remitted the money towards said goods. The original authority had emphasised the fact that the bill of lading was bearing the name of the appellant which was handed over to the CHA by an employee of assessee. [*R.S. Impex* v. *Commissioner* – 2018 (359) ELT 593 (Tri. – Del.)]

'Use' of product when not to be sole consideration for its classification: US Court of Appeals for the Federal Circuit has rejected Revenue Department's appeal against classification of certain screws as self-tapping screws. The Court declined to consider 'use' of a product as the sole consideration in interpreting classification. It relied on common and commercial meaning and upheld US Court of International Trade's reliance on Explanatory notes, dictionary definitions and expert testimonies. Interestingly the CoA had earlier remanded the matter to consider 'use' of the product. Department's plea of classification as wood screws was hence rejected. [*GRK Canada Ltd*. v. *United States* – Decision dated 20-3-2018 in 2016-2623, United States Court of Appeals for the Federal Circuit]

Central Excise and Service Tax

Ratio decidendi

Export of service – Advisory for investing in real estate firms in India: In a case involving advisory in respect of investment opportunity in Indian real estate companies, where the job of the assessee was limited to research and analysis, CESTAT Delhi has allowed benefit of exports. Department's contention that service was in relation to evaluation of real estate and hence not covered for export benefit, was rejected. The Tribunal agreed with the plea that by investing in a company in real estate sector, investor does not acquire real estate itself. The service was held to be covered under Management or Business Consultant Service and not Real Estate Advisory Service in respect of immovable properties in India. [*SITQ India Pvt. Ltd.* v. *Commissioner* - Final Order No. 50963-50967/2018, dated 13-3-2018, CESTAT Delhi]

Cenvat credit on capital goods used in mines when waste cleared therefrom to others: CESTAT Chennai has rejected department's appeal in a case involving Cenvat credit on capital goods used in mines when some inferior quality of limestone was cleared from the mines to other manufacturers. Department's contention that mines cannot be considered captive mines inasmuch as waste or inferior quality of goods were sold outside for commercial exploitation, was hence rejected. It was held that such disposal of waste, after permission from the State government, will not make the mines non-captive mines. [*Commissioner* v. *India Cements Ltd.* - Final Order No. 40589/2018, dated 7-3-2018, CESTAT Chennai]

Cenvat credit - Notification prescribing time limit applicable prospectively: Mumbai Bench of CESTAT has held that Notification No. 21/2014-C.E. (N.T.) prescribing time limit for taking Cenvat credit is only applicable when invoices are issued on or after 11-7-2014, i.e. the date of said notification. The Tribunal in this regard observed that no time limit was available at the time of issuance of invoices. It was also noted that though credit was not entered in RG23A Part-II, same was recorded in books of accounts, which is to be considered as recorded, and hence there was no delay. Allowing assessee's appeal, the Tribunal also observed that limitation period was further revised/relaxed in 2015 and that the invoices issued in 2014 became eligible then. [*Voss Exotech Automotive Pvt. Ltd*. v. *Commissioner* - Order No. A/85346/2018, dated 16-2-2018, CESTAT Mumbai]

SEZ – Exemption from Service tax when service also used outside SEZ: CESTAT Chennai has held that merely because facility of mobile phone was used outside SEZ unit also, exemption under Notification No. 4/2004-S.T. was not deniable. This notification provided exemption from Service Tax in respect of services provided to a SEZ unit. Tribunal in this regard also observed that it was not department's case that subscribers were outside SEZ units. Relying on provisions of Special Economic Zones Act, 2005, it was held that denial of exemption was unjustified. [*Bharti Airtel Ltd.* v. *Commissioner* - Final Order Nos. 40585-40588/2018, dated 7-3-2018, CESTAT Chennai]

Valuation – Reimbursable expenses not includable prior to 14-5-2015: Observing that amendment in Section 67 of the Finance Act, 1994 with effect from 14-5-2015, was a substantive change and therefore was prospective in nature, Supreme Court has held that reimbursable expenses were not includible in the value of service before the said date. The Apex Court in this regard upheld the Delhi High Court's view that value of taxable service was the

gross amount charged by the service provider 'for such service' and that the valuation of tax service cannot be anything more or less than the consideration paid as *quid pro qua* for rendering such a service. The Court was of the view that expression 'such' occurring in Section 67 was of importance for this purpose both before and after amendment in 2006, and that Rule 5 of the Service Tax (Determination of Value) Rules, 2006 went much beyond the mandate of Section 67. [*Union of India* v. *Intercontinental Consultants and Technocrats Pvt. Ltd.* – 2018 (10) GSTL 401 (SC)]

SSI exemption on use of brand name on packing material when not available: In a case involving brand name of packing material and not the brand name of goods contained in such packing material, CESTAT Delhi has denied SSI exemption under Notification No. 8/2003-C.E. as amended in 2010. The Tribunal rejected reliance on clause 4(e) allowing benefit if a brand name of another person was used on packing material. It was held that exemption was only with reference to material used for packing branded goods, and hence was not relevant here. The Tribunal however reduced redemption fine to 15% of value of confiscated goods. [*Kenplast Industries* v. *Commissioner* - Final Order No. 50098/2018, dated 1-1-2018, CESTAT Delhi]

Commercial Training or Coaching service – Sale of prospectus not covered: Observing that students by way filling of prospectus do not become entitled to get coaching from the assessee providing Commercial Training or Coaching service, CESTAT Mumbai has held that the same cannot be considered as part of such service. It was noted that the prospectus was only for the purpose of screening of students by way of Admission Screening Examination and was not a part of the services. Reliance in this regard was also placed on an earlier order in the case of *Balaji Society* holding that sale of prospectus was not part of the Commercial Training or Coaching Services. [*True Education Institute Pvt. Ltd*. v. *Commissioner* - 2018-TIOL-1082-CESTAT-MUM]

Technical Testing & Analysis services – Liability on import of service before and after 1-4-2011: CESTAT Mumbai has held that the Technical Testing and Analysis service performed abroad and received by recipient in India was liable for Service Tax under Reverse Charge Mechanism only from 1-4-2011 onwards. The Tribunal in this regard was of the view that after omission of clause (zzh) w.e.f. 1-4-2011, Technical Testing and Analysis service even though only performed outside India shall be liable as per clause (iii) of Rule 3 of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006. Further noting that no part of the testing was provided in India for the reason that the testing agency was located outside India, it set aside the liability under said service category for the period prior to 1-4-2011. [*EMI Transmission* v. *Commissioner* - Order No. A/85726/2018, dated 23-3-2018, CESTAT Mumbai]

Fabric based blinds coated with polymer classifiable under Heading 6303: CESTAT Chennai has held that fabric based blinds impregnated with chemical are classifiable under Heading 6303 of the Central Excise Tariff. Classification under Chapter 39 and under Heading 5903 was rejected observing that while all plastics are formed by polymerization and every polymer is not a plastic. The goods were impregnated with a chemical coating predominantly consisting of synthetic polymer which surrounded each fibre providing a dust proof quality. The Tribunal was of the view that the chemical which may have a polymeric composition like scotch gard, used for impregnating fabric, but which is capable of being poured, sprayed, coated, impregnated and does not have any specific retained shape, is not covered as plastic. [*Hunter Douglas India* v. *Commissioner* - Final Order Nos. 40479-40483/2018, dated 9-2-2018, CESTAT Chennai]

Excise Section 35 cannot take down powers of High Court under Article 226: Full Bench of Andhra Pradesh High Court has held that constitutional power of judicial review vesting in High

Court under Article 226 of the Constitution cannot be whittled down or be made subject to statutory restrictions. It agreed with the Gujarat High Court decision holding that no piece of legislation, including Excise Section 35 could dilute this power. The Court was of the view that writ petition would lie against Order-in-Original, against which appeal was dismissed as time-barred or no appeal was preferred as it would have been time-barred, provided sufficient grounds are made out. [*Electronics Corporation of India* v. *UOI* - 2018-VIL-124-AP-CE-FB]

VAT

Ratio decidendi

Kerala VAT - Ice cream when not covered under 'cooked food', and revision of deemed approval: Observing that there was a specific entry in the statute relating to ice cream, Kerala High Court has held that there was no intention of the legislature to include all cooked foods, in common parlance, under the compounding scheme. It observed that ice cream may in general terms be understood as cooked food, food, or a sweet, however common parlance test has no relevance when there is a specific entry. The Court however set aside the penalty observing that assessee made a bonafide attempt to be included under the compounding scheme on the reasonable presumption that "ice-creams" would also be "cooked food".

Further, on the question of deemed approval for compounding, since the department had not responded to the application for compounding, the Court was of the view that the department should have taken up the matter for *suo motu* revision under Section 56 of the Kerala VAT Act. It observed that when there is deemed permission then there is a deemed order which can be revised. [*Commercial Tax Officer* v. *Milano Ice Cream Private Limited* – Judgement dated 5-3-2018 in WA.No. 387 of 2018, Kerala High Court]

Karnataka VAT – Input Tax credit when invoices not in the name of assessee: In a case involving lease of motor vehicles by the assessee-lessor, where invoice pertaining to purchase of the vehicle mentioned name of the lessee, the Karnataka High Court has held that input tax credit cannot be denied merely for the reason that the assessee-petitioner's name is shown as lessor in the tax invoice. The Court in this regard observed that the department has to examine whether the registration certificate standing in the name of the employee of the lessee company can be accepted for refund/adjusting input tax credit. The assessee had contended that as per provisions of Motor Vehicles Act, 1988 lessee has to be shown as the registered owner for all practical purposes. It was observed that lessee was regularly paying taxes on the lease rentals in terms of the lease agreement, and that though it was a subsequent transaction, department was required to examine genuineness of the claim.

Further, allowing the writ petition, overruling objections of alternative remedy, the Court noted that relegating the petitioner to appellate forum would not be appropriate in rendering substantial justice. Observing that the quasi-judicial authority arrived at the decision without assigning any reason and had not considered the documents or the reply filed by the petitioner, the Court remanded the matter to the authority to redo the re-assessment. [*Clix Finance India Pvt. Ltd.* v. *State of Karnataka* - 2018-VIL-151-KAR]

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