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Expenses incurred on CSR - Not so GST friendly?

By **Koushal Sonthalia**

One of the major advantages under the GST regime is the unlocking of tax credits, a lot of which was not available in the erstwhile Indirect tax regime. While the earlier legislations imposed numerous restrictions on credits, such conditions are now a lot relaxed with Section 17(5) of the CGST Act mentioning a list of supplies for which credit is not available.

ITC provisions under CGST Act

We will now discuss ITC implications of expenses incurred for meeting obligations under certain other laws. According to Section 16(1) of the CGST Act, every registered person is entitled to take input tax credit on supplies of goods or services or both used in the course or furtherance of business. This is unlike the erstwhile Cenvat credit regime where credit was available only if the goods/ services were covered by the definition of inputs, input services or capital goods. Further, according to Section 17(5) of the CGST Act, input tax credit is not available in respect of supplies listed therein, notwithstanding anything contained in Section 16(1) of the CGST Act.

Therefore, based on the above-mentioned provisions it can be said that input tax credit is available for any inward supply which is used in the course or furtherance of business, unless it is covered by the negative list mentioned under Section 17(5) of the CGST Act. The expression 'course or furtherance of business' appears to be very wide in scope and therefore, it is said that the a lot of tax credits are now available under GST which were not available earlier. Let us now discuss whether credit can be availed for expenses incurred in meeting various statutory obligations.

Mandatory nature of CSR and business purpose

One such obligation is that of corporate social responsibility ('CSR'). According to Section 135 of Companies Act, 2013, every company subject to a specified threshold has to spend atleast 2% of its net profit for CSR. Companies may incur expenses either on procurement of goods or services for distribution. Given that GST regime is that of minimum exemptions, most of such procurements involve a GST component as well. Therefore, if credit is not available for any such expense, it will amount to an additional cost on account of CSR.

CSR is mandatory under Companies Act, 2013 and accordingly, non-compliance with such requirements can have implications for businesses. Therefore, one may argue that such expenses are incurred in the course or furtherance of business.

Cenvat credit on CSR under earlier regime

In the case of *Essel Propack* v. *Commissioner* [2018-TIOL-3257-CESTAT-Mumbai], CESTAT observed that CSR is not in the nature of charity as it has got a direct bearing on the manufacturing activity of the company which is largely dependent on smooth supply of raw materials. Further, it augments the credit rating of the company and its standing in the

corporate world. The Tribunal thus held that such expenses are incurred to win the confidence of the stakeholders and shareholders. It also noted that CSR which was a mandatory requirement for the public sector undertakings, has been made obligatory also for the private sector and unless the same is to be treated as input service in respect of activities relating to business, production and sustainability of the company itself would be at stake. Hence, Cenvat credit was allowed to the appellant.

Advance ruling on CSR in GST regime

The authorities have however not been so generous under GST. In the case of *Polycab Wires Pvt Ltd* reported at 2019-VIL-100-AAR, the applicant had distributed electrical goods to people affected by flood in Kerala against discharge of its CSR obligations. The Kerala AAR held that the applicant distributed electrical items on free basis without collecting any money and for these transactions input tax credit would not be available as per Section17(5)(h) of the KSGST Act and CGST Act. Therefore, it can be seen that the provisions of Section 17(5)(h) of the CGST Act are invoked to deny ITC of goods distributed free of cost for meeting CSR obligations.

ITC on services used for CSR

Let us now discuss the provisions of Section 17(5)(h) of the CGST Act. According to this sub-section, ITC is not available for "*goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples*". It is to be seen that the said sub-section merely places ITC restriction on free distribution of goods and does not restrict ITC on provision of services for free. In the case of *CIT* v. *Ajax products Ltd* reported at (1965) 55 ITR 741, the Apex Court had held that there was no scope for intendment where the words used by the legislature were clear and unambiguous. Therefore, the restriction under Section 17(5)(h) cannot be made applicable on free provision of services.

Therefore, two different tax treatments appear to apply for the very same nature of expense - goods and services. The scope of ITC was already wide in GST and has been further widened under the CGST (Amendment) Act. It is time that the government brings in benevolent amendment to ensure that ITC is allowed for distribution of goods and services alike for CSR. This will encourage the industry to come forward for taking up similar projects of CSR which otherwise requires government support.

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Goods and Services Tax (GST)

Notifications and Circulars

New regime for residential realty sector implemented: CBIC has issued notifications, effective from 1-4-2019, for the implementation of GST rate of 1% in case of affordable houses and 5% on construction of houses other than affordable houses. The new rates are mandatorily applicable for new projects commencing from 1st April. For on-going projects which had commenced before 1st April, promoters will have to exercise option by 10th May if they wish to continue to pay tax at the old

rate. It may be noted that otherwise, it will be deemed that they have opted to adopt the new rate. Few conditions however, must be adhered to if the new lower rate is chosen. While ITC is not available in case of new rates, promoters are also required to purchase from GST-registered suppliers and if such purchases fall below 80% of the value of inputs and input services, GST will be required to be paid by the promoter under reverse charge mechanism at the rate of 18%. GST at rate of 28% is however required to be paid by the promoter if cement is procured from unregistered suppliers, even in case where condition of 80% inputs and input services from registered suppliers is fulfilled. A promoter is also required to maintain project wise account of inward supplies from registered and unregistered suppliers and calculate tax payments on the shortfall at the end of the financial year.

Further, Transfer of Development Rights (TDR) and payment of upfront amount payable in respect of grant of long term lease, on or after 1st of April by the landowner to the developer will be exempt. Such exemption, however, is not available on the part of the value of such rights attributable to units remaining un-booked at time of receipt of completion certificate. In these cases, GST will be payable on TDR and upfront amount for lease, on proportionate basis under RCM by the promoter. Notification Nos. 3 to 8/2019-Central Tax (Rate), all dated 29-3-2019 and effective from 1-4-2019 have been issued in this regard.

Composition scheme for suppliers of goods or services or both – Reversal of ITC availed: As per Notification No. 2/2019-Central Tax (Rate), suppliers of goods or services or both upto an aggregate turnover of Rs. 50 lakh, can opt to pay GST @ 6% (3% CGST + 3% SGST) and not collect any tax from the recipient on such supplies. Benefit of ITC is also not available to suppliers taking benefit of this notification. Now this notification has been amended by Notification No. 9/2019-Central Tax (Rate), dated 29-3-2019 (effective from 1-4-2019) to provide for payment of tax equivalent to the credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock and on capital goods. New clause 8 also states that the balance of input tax credit, if any, lying in the electronic credit ledger will lapse.

Further, as per new clause (iii) in the Explanation, CGST Rules, 2017, as applicable to a person paying tax under CGST Section 10, shall apply to a person paying tax under Notification No. 2/2019-Central Tax (Rate). Also, as per Circular No. 97/16/2019-GST, dated 5-4-2019, a registered person who wishes to opt for benefit of said notification shall file intimation in Form GST CMP-02 by selecting the category of registered person as “Any other supplier eligible for composition levy”. Such person would also be required to furnish a statement in Form GST ITC-03.

Refund of accumulated ITC to merchant exporter clarified: Refund of accumulated input tax credit to merchant exporter where supplies are received by him after availing benefit under Notification No. 40/2017-Central Tax (Rate) or 41/2017-Integrated Tax (Rate) has been clarified by CBIC. According to Circular No. 94/13/2019-GST, dated 28-3-2019, this refund of accumulated ITC under CGST Rule 89(4B) must be applied under the category ‘any other’ instead of ‘refund of unutilized ITC on account of exports without payment of tax’. Refund claim shall be filed in the Form GST RFD-01A.

E-way Bill – New forthcoming system for extension: Provision to extend e-way bill, when goods are in transit, are being incorporated in the next version of e-way bill system. According to an update on website ewaybill.nic.in, during the extension, user will be prompted to answer

whether the consignment is in transit or in movement. On selection of *in transit*, address details of transit place are required, while place and vehicle details are required on selection of *in movement*. In both scenarios, destination pin code will be considered from Part-A for calculation of distance for movement and validity date.

E-way Bill – Auto calculation of distance: Government has released an update on forthcoming changes in e-way bill system. The system is being enabled to auto calculate route distance for movement of goods, based on postal pin codes of source and destination. User would however be allowed to enter actual distance, which will be limited to 10% more than displayed distance. According to update released on 25-3-2019 on website ewaybill.nic.in, in case, source PIN and destination PIN are same, the user can enter up to 100 km. If the PIN entered is incorrect, the system would alert the user.

Transfer of ITC in case of death of sole proprietor – Clarification: CBIC has clarified that transfer or change in the ownership of business will include transfer or change in the ownership of business due to the death of the sole proprietor. It is also stated that the transferee / successor shall be liable to pay any tax, interest or any penalty due from the transferor in cases of transfer of business due to death of sole proprietor. Circular No. 96/15/2019-GST, dated 28-3-2019 further clarifies that in case of transfer of business on account of death of sole proprietor, the transferee / successor shall file Form GST ITC-02 in respect of the registration which is required to be cancelled on account of death of the sole proprietor, before filing the application for cancellation of such registration by the legal heirs.

Ratio decidendi

Confiscation when case on search validity pending before HC, not correct: Observing that CGST Section 130(4) prescribes grant of hearing opportunity prior to confiscation, Allahabad High Court has remanded the matter for fresh adjudication. The assessee in this case had requested the authorities to defer adjudication on confiscation as issue of validity of search was engaging High Court's attention. The High Court held that the authorities should have awaited outcome of the challenge. It also observed that substantive due process under Section 67 is essential before a search and that the Court in exercise of powers under Article 226 of the Constitution cannot go on sufficiency of reasons. [*Rimjhim Ispat* v. *State of UP* - Writ Tax No. 619 of 2018, decided on 15-3-2019, Allahabad High Court]

Fraudulent availing of ITC - Summon justified on MD: Rajasthan High Court has upheld the summons issued to MD of a company in a case of ITC availment on the basis of fake invoices. Plea of residing in USA and not involved in day-to-day activities was rejected, observing that petitioner was receiving managerial remuneration from the company since 2012 and became its MD in 2018. Dismissing the petition with costs, the High Court also observed that allegation of fraudulent ITC was not controverted, and that determination of tax was not required in an offence under Section 132. Delhi High Court decision in *Make My Trip*, was distinguished. [*Bharat Raj Punj* v. *Commissioner* – 2019 VIL 113 RAJ]

No GST on interest free deposit if not withheld at completion of lease: In a case involving interest free security deposit, taken from lessee as security against damages during lease of premises, Maharashtra AAR has held that deposit received is not a consideration for supply

made by assessee-applicant and hence no GST is payable. It observed that applicant will not apply such deposit as consideration as entire amount is returned back to the lessee. The AAR, however, observed that if at time of completion of lease tenure, the amount or part of it is withheld as charge against damages, then that amount would be liable to GST. [In RE: *E-Square Leisure Pvt. Ltd.* – 2019 TIOL 121 AAR GST]

Exemption available only to clinical establishments providing healthcare: Madhya Pradesh AAR has held that exemption provided under S.No.74 of Notification No.12/2017-Central Tax (Rate) is service specific and service provider specific, therefore to qualify an establishment must satisfy the dual condition of providing healthcare services as well as being a clinical establishment. The applicant had pleaded that it is ancillary to other clinical establishment accredited by National Accreditation Board for Testing and Calibration Laboratories (NABL). However, the AAR held that mere involvement in sophisticated testing and consultancy will not be sufficient to qualify as a clinical establishment. It was also observed that applicant was functioning as sub-contractors to the said accredited companies and not as an independent clinical establishment. [In RE: *J C Genetic India Pvt. Ltd.* – 2019 VIL 108 AAR]

Exemption from GST on reverse charge basis under Section 9(4) not retrospective: Maharashtra AAR has held that Notification No. 38/2017-Cental Tax (Rate), dated 13-10-2017 exempting supply of goods and services received from unregistered person, which are liable under reverse charge mechanism under CGST Section 9(4), is not available for the period prior to 13-10-2017. It was held that RCM is applicable on the transactions effected from 1-7-2017 till 12-10-2017. The AAR observed that if the notification does not clearly stipulate that it is retrospective, it shall be considered as prospective. Supreme Court's decision in *Garikapatti Veeraya v. N Subbiah Choudhury* was relied on. [In RE: *Famous Studios Ltd.* – 2019 VIL 109 AAR]

Works contract pertaining to railways – Lower tax rate for sub-contractor: In a case involving works contract services provided by a sub-contractor to the main contractor in respect of work relating to railways, AAAR has held that benefit under Sl. No. 3(v) of Notification No. 11/2017-Central Tax (Rate) as amended by Notification No. 1/2018-Central Tax (Rate) is available to the sub-contractor. AAAR Maharashtra held that composite supply of works contract is ultimately going to the use of railways without being subjected to any change or modification, and thus said works contracts is 'pertaining to the railways'. The work was hence held as eligible for concessional rate of GST. Department's contention that there is no specific mention of sub-contractor providing services in Sr. 3(v), was rejected. [In RE: *Shree Construction* – 2019 VIL 33 AAAR]

ITC available only on discounted invoice value: In a case involving post-invoice discount where discount cannot be pre-determined or recorded in invoices and supply of goods is made, AAR Tamil Nadu has held that buyer can avail ITC only on proportionate GST as applicable on invoice value less the discounts. Proviso to CGST Section 16 on payment towards value of supply along with tax amount to supplier within 180 days was relied on. The Authority in this regard held that Section 15(3) will not apply where discount is given after invoices are raised and supply of goods is made. The AAR observed that if ITC is availed on full tax amount, difference should be reversed to avoid liability. The applicant had argued that since the discount was not eligible for exclusion from taxable value and tax would be paid on full invoice value, no credit was reversible and the entire tax amount would be available as credit. [In RE: *MRF Ltd.* – 2019 VIL 71 AAR]

IGST liable on hospitality services provided in SEZ to visitors from DTA: Gujarat AAAR has upheld the AAR ruling on GST liability of a hotel located in non-processing zone of SEZ in respect of hospitality services provided to visitors from DTA. Plea that IGST is not applicable since SEZ is deemed to be outside the territory of India, was hence rejected. Rejecting the appeal, Appellate AAR observed that clarification with regard to SEZ being deemed as port under Section 7 of the Customs Act will not be applicable as it was issued for customs bonded warehouse. Reliance placed by the appellant on Section 53(2) of the SEZ Act, 2005 and Circular Nos. 46/2017-Cus., dated 24-11-2017 and 3/1/2018-IGST dated 25-5-2018 in their appeal, was not accepted. [In RE: *Sapthagiri Hospitality (P) Ltd.* - 2019 VIL 19 AAAR]

No ITC if goods supplied under CSR activity on FOC basis: Referring to Section 17(5)(h) of the CGST Act, 2017 which restricts ITC with respect to goods that are disposed of by way of gift or free samples, Kerala AAR has held that ITC will not be available to the manufacturer on supply of electrical items to the flood affected people under CSR activity on FOC basis. The Authority, however, held that the distributors of the applicant-manufacturer who had supplied goods to Kerala State Electricity Board on the instructions of the applicant will be entitled to avail ITC on such goods as the goods were supplied to KSEB and GST was paid to the Government by the distributors with respect to the goods. [In RE: *Polycab Wires Pvt. Ltd.* – 2019 VIL 100 AAR]

No ITC on goods supplied free under sales promotion scheme: Maharashtra AAR has held that ITC is not available to the assessee on procured gold coins to be distributed to its customers for free of cost under a sales promotion scheme at the end of scheme period for achieving the stipulated lifting or payment criteria. It was held that only use of goods in the course of furtherance of business as mentioned in Section 16(1) of CGST Act does not entitle one to avail ITC since Section 17(5) starts with "Notwithstanding anything contained in sub-Section (1) of Section 16". The Authority was of the view that considering the bar to avail credit by virtue of Section 17(5)(h), even in a case where the goods are used in the course or furtherance of business, ITC shall not be available on distribution of gold coins for free as gifts under a sales promotion scheme. It also elaborated on the meaning of "gifts" as assigned under the Gift Tax Act, 1958 and observed that gift was a transfer of property without consideration which was given voluntarily. [In RE: *Biostadt India Limited* – 2019 VIL 60 AAR]

Job work – Dispatch of consumables to job worker is not 'supply': The question before the Authority was whether dispatch of consumable materials (zinc, furnace oil, nickel, etc.) for galvanization, would be treated as supply from the principal to the job worker, if they were not returned within the time allowed under Section 143(1)(a) of the CGST Act, 2017. Answering this question, the AAR West Bengal held that as the goods were consumed in the process, the return of the galvanized goods to the applicant would satisfy the condition of receiving back the inputs in accordance with Section 143(1)(a). It was also held that as the goods were consumed in the process of galvanizing and became inseparable from the galvanized goods, they shall not be treated as supply in terms of Section 143(3) provided they have been entirely used up in the process of galvanizing. [In RE: *Ratan Projects & Engineering Co. Pvt. Ltd*. – 2019 VIL 91 AAR]

ITC available on cars further leased out: Madhya Pradesh AAR has held that applicant, providing cars on lease and charging outward GST, is eligible to claim ITC as it falls under exception of 'further supply of such vehicles or

conveyance' under CGST Section 17(5) and satisfies the conditions before and after amendments from February 2019. It held that the term 'further' prefixed to 'supply' does not differentiate it from the term 'supply' as construed under GST, making the applicant eligible for availing ITC on supply of tax paid motor vehicles on monthly lease. It was, however, held that held that at the termination of lease agreement, if the vehicle is not further leased to same or other customer, the applicant will be liable to reverse the ITC so availed as per the law. [In RE: *Narsingh Transport* – 2019 VIL 107 AAR]

ITC of Compensation Cess paid on motor vehicles not available for supply of rental service: The applicant was engaged in supply of renting of motor vehicles and then their disposal after some time. The Kerala AAR has held that such applicant was eligible to claim ITC of Compensation Cess paid at the time of purchase of motor vehicles but would be required to reverse proportionate amount of ITC of such cess every month based on the turnover of rental service as the same was an exempt supply, not being liable to cess under GST (Compensation to States) Act, 2017. It held that such ITC can be utilized for discharging liability of Compensation Cess arising at the time of sale of such vehicles. The Authority in this regard relied on Section 2(p) of the GST (Compensation to States) Act which defines the term "taxable supply" under the said Act and referred to definition of 'exempt supply' as provided in CGST Act. [In RE: *Orix Auto Infrastructure Services Limited* – 2019 VIL 98 AAR]

Fabrication of body on chassis supplied by principal is supply of service: Kerala AAR has held that the activity of fabrication of a body is in the nature of adding a structure (any treatment done) on the chassis owned by the customer, and hence even when the job worker used his own material to do the fabrication on the chassis, it will be considered as supply of service and will be classified under SAC Code 9988, thereby attracting 18% GST. The Authority observed that chassis was a semi-finished good owned by the principal and any treatment done by any other party on the chassis of the principal was in the nature of job work activity. [In RE: *Kondody Autocraft (India) Pvt. Ltd.* – 2019 VIL 97 AAR]

EU VAT - Place where educational course takes place is 'place of supply': CJEU has held that the place where educational courses were organised will be considered as actual place of supply for VAT purposes, irrespective of place where registration and payments for said course took place. The Court held that the expression 'services in respect of admission to events' with respect to five-day course on accountancy will be included in the meaning of common system of VAT as per which place where educational event is held will be considered as place of supply. [*Skatteverket (Swedish Tax Authorities)* v. *Srf Konsulterna AB* – Judgement dated 13-3-2019 in Case C-647/17, CJEU]

UK VAT – Supply of skates along with right to admission, separate supply: UK's Upper Tribunal (Tax and Chancery Chamber) has set aside the First-tier Tribunal (Tax Chamber) decision which had held that supply of 'skating with skates' package involved two separate supplies, the standard-rated supply of admission to ice rink and a separate zero-rated supply of hire of children's skates. The assessee provided various options where all constituents of the package could be purchased separately, however a single unbroken price was charged for the package. The matter was remitted to FTT for reconsideration. [*Commissioner HMRC* v. *Ice Rink Company Limited* – Decision dated 8-4-2019 in Appeal number: UT/2017/0180, UK's Upper Tribunal (Tax and Chancery Chamber)]

Customs

Notifications and Circulars

Customs duty reduced on import of specified goods from Japan: Rate of Customs Duty on specified goods imported from Japan has been considerably reduced with effect from 1-4-2019. The new rates will be applicable to goods falling under 806 tariff lines as specified in Notification No. 69/2011-Customs. Notification 10/2019-Customs, dated 28-03-2019 has been issued for this purpose. This concessional rate is available only if the importer proves that the goods for which exemption is being claimed are of the origin of Japan as per the rules notified for this purpose.

Rebate of State and Central Taxes and Levies scheme – FTP and HoP amended: Scheme for Rebate of State and Central Taxes and Levies (RoSCTL), as notified by the Ministry of Textiles Notification No. 14/26/2016-IT(Vol II), by issuance of scrips to support textile sector (garments and made-ups) has been incorporated in the FTP and Handbook of Procedures Vol.1. As per Paras 4.95 and 4.96 inserted in HoP by DGFT Public Notice No. 83/2015-20 dated 29-03-2019, rates of RoSCTL are notified as Schedules to Notification dated 8-3-2019 of the Textile Ministry. Duty credit scrips with a validity of 24 months, if registered at EDI port, can be used at any EDI port.

Transport and Marketing Assistance for agri. products – FTP and HoP amended: Provisions relating to Transport and Marketing Assistance for specified agricultural products to specified destinations have been notified by the DGFT through Chapter 7(A) in FTP and HoP Vol.1. Aayaat Niryaat Form 7A(A) has also been notified. As per chapters inserted by Notification No. 58/2015-20 and Public Notice No. 82/2015-20, both dated 29-03-2019, assistance will be paid only to exporter who receives payment in foreign currency. Application shall be filed online on DGFT website and will not be maintainable after completion of one year from the quarter in which exports were made.

Physical copies of MEIS/SEIS scrips phased out for EDI ports: Physical copies of MEIS or SEIS duty credit scrips will not be issued by the DGFT from 10-4-2019 onwards, in cases where the port of registration is an EDI port. As per CBIC Circular No. 11/2019-Cus. dated 9-4-2019, the scrips will continue to be transmitted electronically by the DGFT to the Customs system and would be visible to concerned officers involved in imports. While no TRA shall be issued in respect of these paperless scrips issued electronically, DGFT will continue to issue scrips in physical form as per current practice for non-EDI ports.

Advance authorisation, EPCG and EOU - IGST and Cess exemption extended: Exemption from Integrated tax and Compensation Cess for imports under Advance authorisation, EPCG scheme and by EOUs has been extended again. This time the exemption has been extended for full one year, and would now be available till 31st of March 2020, instead of 31st March 2019. Amendments have been made in Paras 4.14, 5.01(a) and 6.01(d)(ii) of the Foreign Trade Policy by DGFT Notification No. 57/2015-20, issued on 20-3-2019. Ministry of Finance has also issued notifications to amend the Customs notifications.

Peas and pulses - Import of certain quantities relaxed from 1-4-2019: Ministry of Commerce has relaxed import of Moong, Urad and Peas. Such products will be subject to annual (fiscal

year) quota of 1.5 Lakh Metric Tonne. Import of Toor Dal shall be subject to an annual quota of 2 Lakh MT as per procedure notified by DGFT. Import of these products was earlier fully restricted. As per DGFT Trade Notice dated 1-4-2019, Ministry of Commerce Notifications S.O. 1478(E), 1479(E), 1480(E) and 1481(E) amend the import policy conditions of certain items in Chapter 07, and are effective from 1-4-2019.

Ratio decidendi

Rectification in Bill of Entry under Customs Section 154 on error by importer: In a case where the importer accidently paid duty twice on same invoice, Madras High Court has remanded the matter to assessing officer to pass order after exercising power under Section 154 of the Customs Act. The High Court observed that the error was apparent on the face of the order and the bill of entry should have been verified to avoid litigation. It observed that powers of Section 154 can be exercised by the authority when error is pointed out by an importer/exporter for reasons attributable to latter, but only in respect of clerical/arithmetical error. [*Commissioner* v. *Symrise (P) Ltd.* - 2019-VIL-141-MAD-CU]

Advance authorisation – Use of surplus inputs for goods cleared in DTA: In a case where actual use of inputs in export goods was less than SION norms and surplus was used in the manufacture of domestic goods, CESTAT Ahmedabad has allowed benefit of advance authorisation. Observing that export obligation was fulfilled and off-grade goods, considered as waste, were cleared in DTA, the demand on ground of use of inputs being less than that prescribed in SION was set aside. The Tribunal placed reliance on Para 4.1.5 of FTP and the Tribunal decision in the case of *Areva T & D India Ltd.* [*K L J Organics Ltd.* v. *Commissioner* - 2019-VIL-208-CESTAT-AHM-CU]

DFIA scheme – Import of popcorn maize – Word 'maize' is not generic: Bombay High Court has allowed the benefit of DFIA scheme for import of popcorn maize against export of maize starch powder. The Court accepted the contention that SION entry for import inputs mentioned only 'maize', and hence any quality of maize was importable. It noted that actual user condition was absent. Department's view that non-mentioning of specific input in shipping bill violated FTP Para 4.12(i), was rejected, noting that term 'maize' was not generic but specific, and that popcorn was capable of use in manufacture of export goods. [*Shah Nanji Nagsi Exports* v. *UoI* – Judgement dated 29-3-2019 in Writ Petition No. 8268/2017, Bombay High Court]

Demurrage charges are justified unless waiver mandated by Rules: Delhi High Court has held that the warehousing service provider was justified in not waiving and returning demurrage charges deposited in a case where detention was held justified, even when penalty and confiscation by Customs were set aside. The High Court held that fee payable for duration for which warehousing was done cannot be removed by the court unless rules or relevant policy provided for the same. It observed that even otherwise warehousing is a commercial activity for which service provider invests in resources, deploys manpower and creates infrastructure. [*International Lease Finance Corp.* v. *UoI* - Order dated 27-3-2019 in W.P.(C) No. 6490/2018, Delhi High Court]

Skin barrier Micropore Surgical Tapes - Customs exemption: CESTAT Chennai, by a majority order, has allowed benefit of Notification No. 21/2002-Cus. (Sl. 363A, List 37, Entry 22) to skin barrier Micropore Surgical Tapes which are not exclusively used as Ostomy products. Department's argument on non-availability of exemption on the ground that surgical tapes were general purpose tapes and not exclusively for

Ostomy use, was rejected by Tribunal. It noted that notification does not refer to end-use of tapes, and that exemption is not deniable merely because the tapes are being used as multiple use items. [*Sutures India P. Ltd.* v. *Commissioner* - 2019-VIL-221-CESTAT-CHE-CU]

Difference between 'wrench' and 'plier' – Classification in USA: US Court of Appeals for the Federal Circuit has affirmed US CIT's interpretations of the term 'wrenches' in 8204.12.00 and 'pliers' in 8203.20.6030. According to CIT, wrenches are hand tools having a head with jaws or sockets having surfaces adapted to snugly or exactly fit and engage the head of a fastener and a singular handle with which to leverage hand pressure to turn the fastener. Plier was held as a hand tool with two handles and two jaws on a pivot, which must be squeezed together to enable it to grasp an object. [*Irwin Industrial Tool Company* v. *United States* – Decision dated 9-4-2019 in 2018-1215, United States Court of Appeals for the Federal Circuit]

Central Excise and Service Tax

Ratio decidendi

Excise valuation – Dharmada charges not includible: Larger Bench of the Supreme Court has held that 'Dharmada' collected as optional payment from buyer, cannot be part of transaction value for goods. It held that the amount to be credited to charity and not forming part of income was not includible. The Court held that no amount not paid as consideration *for* goods can go to make transaction value and if an amount paid at the time of sale transaction was for a purpose other than the price of the goods, it cannot form part of transaction value as such payment is not for transaction of sale i.e. for transfer of possession of goods. Observing that payment of dharmada was meant for charity and was received and held in trust by the seller, the Court was of the view that if such amounts were meant to be credited to charity and did not form part of the income of the assessee they cannot be included in the transaction value or assessable value of the goods. [*D.J. Malpani* v. *Commissioner* – Judgement dated 9-4-2019 in Civil Appeal No. 5282 of 2005, Supreme Court]

NCCD exemption available to units exempted from Excise duty: Supreme Court has held that manufacturing units in special category States which were exempt from Central Excise duty would also be exempt from National Calamity Contingent Duty (NCCD), since NCCD was of the nature of an excise duty. The Court held that same view on this exemption would apply as taken for Education Cess and Secondary & Higher Education Cess by the Court in the case of *SRD Nutrients (P) Ltd.,* even if NCCD was levied on the product and not on the excise duty payable. The Apex Court in this regard was of the view that exemption notifications, like the one in question must be read in a manner that give them a liberal interpretation, provided that no violence is done to the language employed. [*Bajaj Auto Ltd.* v. *UoI* – Judgement dated 27-3-2019 in Civil Appeal No. 3239 of 2019, Supreme Court]

Service tax audit after introduction of GST – Saving clause under CGST Section 174(2)(e): Jharkhand High Court has *prima facie* rejected the contention that saving clause in CGST Section 174 did not protect Service Tax Rules and hence action taken pursuant to such rules was without authority of law, after introduction of GST. Dispute pertained to inquiry/audit under Rule 5A. The Court however *prima facie* held that the expression 'instituted' in CGST Section 174(2)(e) implied that proceeding stood already instituted at time of repeal of Finance Act, 1994. Decisions of Gujarat and Delhi High Courts were referred while directing status quo till next date of hearing. [*Sulabh International* v. *UoI* – Order dated 4-4-2019 in W. P. (T) No. 1599 of 2019, Jharkhand High Court]

Construction exclusively or primarily for commerce alone liable to service tax: Bombay High Court has held that if primary use of construction was non-commercial, even if 1/3rd of the constructed area was used for commercial purpose, service tax would not be attracted under Section 65(25b) of Finance Act 1994 for services of commercial and industrial construction. The High Court upheld CESTAT ruling that construction of sports complex for Commonwealth Youth Games on land owned by Govt. of Maharashtra was not for commercial purposes. Affidavit by Director of Sports and Youth Services that stadium would be used for non-commercial purposes even after games, was noted. [*Commissioner* v. *B.J. Shirke Construction Technology* – Judgement dated 15-3-2019 in Central Excise Appeal No. 186 of 2017, Bombay High Court]

Omission/substitution included in meaning of 'repeal': Reiterating that omission/substitution would fall within 'repeal' of a provision and relying on Central Excise Section 38A(c), Bombay High Court has held that notice dated 17-1-2000 under the Modvat Rules would be valid even post 1-4-2000 when Cenvat Rules were introduced. The Court however remanded the case observing that order, without cross examination and without supplying relied-upon documents, was in the breach of natural justice. It observed that statement that superior goods were diverted after taking credit, needs to be tested through cross examination. [*Commissioner* v. *Milton Polyplas* – Judgement dated 1-4-2019 in Central Excise Appeal No. 142 of 2005, Bombay High Court]

Cenvat credit refund – CESTAT when can interpret GST transitional provisions: In a case of partial denial of refund of Cenvat credit, CESTAT Hyderabad, relying on proviso to CGST Section 142(3) has upheld the denial. It rejected the plea that if assessee had taken back the credit, after rejection of refund, before CGST Act came into force, they could have transferred it as ITC and hence should now be paid-back in cash. The Tribunal observed that in transitional cases, CESTAT has to interpret and apply provisions of CGST Act, to the extent they modify provisions of Central Excise Act and Finance Act, 1994. It however held that other transitional provisions such as transfer of Cenvat credit lying in balance as input tax credit under GST is purely a provision of the CGST Act and CESTAT has no role in interpreting or applying such provisions. [*United Seamless Tubular Pvt. Ltd.* v. *Commissioner* - 2019-VIL-210-CESTAT-HYD-CE]

Mere consumption of goods during service cannot turn it into work contract: CESTAT Ahmedabad has held that consumption of goods by a service provider during the provision of service does not automatically convert the service into a works contract. The Tribunal observed that if the scope of work contract was extended to include consumables then there would be no service which can fall outside the purview of works contract. It also observed that even consultancy service provided by an

engineer or an advocate involves consumables like paper, ink, pen, etc. [*Krishna Engineering Works* v. *Commissioner* – 2019 (22) GSTL 409 (Tri. – Ahmd.)]

Supply of electricity in the absence of licence, exigible to service tax: Observing that petitioner was not a person authorised to transmit, supply, distribute or undertake trading in electricity, Calcutta High Court has ruled that receiving high-tension electricity and converting into low-tension for supply to occupants of a mall, was classifiable as services. It held that any interpretation that violates Electricity Act, should be avoided. The Court held that although electricity is goods, in the absence of licence under Section 12 of the Electricity Act, would be termed as a service liable under Section 65B(23) of the Finance Act, 1994. [*Srijan Realty Pvt. Ltd.* v. *Commissioner* – 2019 TIOL 594 HC KOL ST]

No automatic vacation of stay after 6 months: Distinguishing the Supreme Court judgement in *Asian Resurfacing of Road Agency* vacating stay on all pending proceedings on expiry of 6 months, CESTAT Bangalore has held that officials are to approach the Tribunal for vacation of stay. It held that the Supreme Court judgement was restricted to original courts and that the Tribunal is not a trial court but an authority. The Tribunal held that in the absence of application for vacation of stay, the stay order will continue till disposal of appeal. Larger Bench decision in the case *Haldiram India* was relied on. [*Vijayanagar Sugars (P) Ltd.* v. *Commissioner* – Misc. Order No. 20104-20106/2019, dated 7-3-2019, CESTAT Bangalore]

Supply of tangible goods - Possession and effective control are relevant: In a case involving lease of computer system and provision of IT Assistant, CESTAT Delhi has set aside demand under Supply of Tangible Goods services. It noted that lessor could not remove, at their discretion, any assets, while lessee could direct him to re-assign equipment from one place to another. The Tribunal observed that both equipment and the Assistant worked under direct physical possession and effective control of lessee. It held that this fulfilled the requirements of exclusion clause. [*Compucom Software Ltd.* v. *Commissioner* - Final Order No. 50167/2019, dated 4-2-2019, CESTAT Delhi]

Value Added Tax (VAT)

Ratio decidendi

Karnataka Sales Tax – Turnover not limited to 'taxable turnover': Supreme Court has held that levy under Section 6B of the Karnataka Sales Tax Act, must be on the total turnover and not only on the taxable turnover. It rejected the contention that 'total turnover' in Section 6B(1) for purpose of turnover tax, cannot include turnover on which State has no power to levy tax. Applying strict rule of interpretation of taxing statutes, the Court held that except the deductions provided under the first proviso to Section 6B(1), nothing else can be deducted from total turnover as defined under Section 2(u-2). [*Achal Industries* v. *State of Karnataka* – Judgement dated 28-3-2019 in Civil Appeal No(s). 4837 of 2011 and Ors., Supreme Court]

Rusk and toast are bread as per composition, hence not liable to VAT: Chhattisgarh High Court has held that Rusk and Toast are to be treated as Bread under Entry-7 of Schedule-I to the Chhattisgarh VAT Act making them tax free goods. The goods were held not classifiable under the residuary entry of Part IV of Schedule II of the Act. Upholding the single Judge Order, the Court observed that as per judicial precedents, it was required to find out if contents of the product fits the description of the basic entry and only if the same was not possible, residuary entry can be taken as a resort. [*State of Chhattisgarh* v. *Saj Food Product (P) Ltd.* - 2019-VIL-138-CHG]

Mobile crane wire rope classifiable as part of mobile crane: Supreme Court has held that wire ropes used in mobile cranes are a part of such cranes and liable to 4% tax as per Entry 155 of Schedule IV to Rajasthan VAT Act. The Apex Court observed that in order to make mobile cranes operational, use of wire ropes was essential and hence mobile crane wire rope was an essential part of the mobile crane. Relying on judgement in *Annapurna Carbon Industries*, the Court reiterated the test that a thing is a part of the other if the other cannot function without it. [*Commissioner* v. *Prasoon Enterprises* – Judgement dated 26-3-2019 in Civil Appeal No. 3198 of 2019 and Ors., Supreme Court]

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