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Article

Refund of GST under Inverted Duty Structure

By **Koushal Sonthalia**

Goods and Services Tax (GST) was launched in India on July 1, 2017 after about a decade from the time it was first proposed. Approximately 17 transaction taxes and 23 Cesses were replaced with GST. The new tax regime sought to achieve numerous objectives such as removing the cascading effect of taxes under the erstwhile regime, enabling seamless flow of credits, promoting 'Ease of doing business' by simplifying the procedures etc.

The new tax regime has completed first anniversary last month. The Government must be given due credit for being responsive to various demands of the Industry in having accommodated many amendments to the "as implemented version". But there are still host of some issues which need attention and one of them is refund of accumulated credit arising due to inverted duty / tax structure.

While the easiest form of implementation could have been to have a one rate structure all across, in the words of the Union Finance Minister himself, "a BMW and Hawai Chappal can't have the same tax". India therefore chose to adopt a multi-rate structure giving due regard to the "socio-economic considerations". With this arose a situation where while, in certain cases, the final supply attracted a lower rate of say 5% or 12%, procurements (inputs, input services or capital goods) were / are subject to a higher rate of say 18% or 28%, resulting in credit accumulation. While the legislation was drafted to accommodate for refund of such accumulated credit, it is the interpretation of the provision and subsequent amendments in CGST Rules which created a bit of confusion in the minds of the members of industry.

Relevant provisions

First proviso to Section 54(3) of the CGST Act, 2017, states that,

"no refund of unutilised input tax credit shall be allowed in cases other than—

(i) zero rated supplies made without payment of tax;

(ii) where the credit has accumulated ***on account of rate of tax on inputs being higher than the rate of tax on output supplies*** *(other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council."*

The formula for maximum refund amount prescribed under Rule 89(5) of the CGST Rules, 2017 included turnover for inverted rated supply of goods only (inverted rated supply of services was initially not included therein). Further, explanation to Rule 89(5) stated that for the purpose of the sub-rule, the expression "Net ITC" shall have the same meaning as assigned to it for refund of accumulated ITC on account of zero rated supplies under Rule 89(4). According to Rule 89(4), "Net ITC" means input tax credit availed <u>on inputs and input services</u> during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both. Thus, it appeared that refund of GST under Inverted duty structure is

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available only to supplier of goods, but for both Inputs and input services.

The amendments

According to Instruction No. 8 to Form GST RFD-01 (form for claiming refund), such net ITC was to include Inputs only for the purposes of refund under inverted duty structure creating a confusion as to whether the expression "inputs" used in Section 54(3) should be interpreted in terms of the definition of inputs under Section 2(59) and if so, refund for capital goods and input services cannot be availed or, should the provision be interpreted as if refund of all of the unutilized ITC is permitted once credit has been accumulated on account of rate of tax on inputs being higher than that of output?

Thereafter, Rule 89(5) was amended by way of Notification No. 21/2018-Central Tax dated 18th April, 2018 wherein, the formula for maximum refund amount was amended to specifically include the turnover of inverted rated supply of services as well in a welcome move for service providers. However, the Notification also amended the scope of expression "Net ITC" to specifically remove Input services therefrom (earlier cross reference to Rule 89(4) was removed). This was a strong signal to restrict the refund in respect of input services under inverted duty structure. Thereafter, a retrospective amendment was carried out to the CGST Rules (by Notification No. 26/2018-Central Tax dated 13th June 2018) to substitute the formula for "Maximum refund amount" and the scope of "Net ITC" under Rule 89(5) with effect from July 1, 2017.

Does 'inputs' include 'input services'

Restricting refund under inverted duty structure to inputs only is unreasonable and may not have been intended. It can be said so considering the specific relief provided by the government to include inverted rated supply of services as well in the formula for calculation of maximum refund amount. Under the Central Excise or Service Tax regime, there were no provisions for refund under an Inverted duty / tax structure. While GST sought to provide relief to such suppliers of service by allowing refund, who are such suppliers of service who predominantly use inputs for supplying services? While construction industry could have been one such example, such services have been specifically restricted from refund by way of Notification No. 15/2017-Central Tax (Rate) dated 28th June 2017. Other service providers which predominantly use inputs can be job workers, works contractors etc. However not all job workers and works contractors would be covered under inverted rate as lower rate on output has been prescribed only for specific use (say works contract for Railways, job work in relation to textiles etc). Further, such a provision for refund may not have been drafted keeping in mind only a select few out of all the inverted rated suppliers, but for a large mass. Therefore, who are the intended beneficiaries?

It may further be noted that Section 54(3) uses the expression "inputs" which are not defined under the CGST Act as the word 'input' alone has been defined. While it is a general principle that a word defined in the statute will also include the meaning in plural sense, however if such an interpretation is adopted it would imply that no refund would be allowable for input services. It is however to be noted that Section 2 of the CGST Act begins with the expression *"unless the context otherwise requires".* The Supreme Court has in the past noted that there may be instances when the meaning assigned to a word in the statute may have to be departed from when the context so requires.

In the case of *Printers (Mysore) Ltd. v. Assistant Commercial Tax Officer* reported at

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[1994] 93 STC 95 (SC), the Supreme Court allowed the appeal of the appellant to allow submission of Form C for procurement of raw materials required for printing and publishing newspapers. The authority had sought to disallow the claim for concessional rate on procurements on the ground that concessional rate of 4% is prescribed only for goods purchased by the dealer for use in the manufacture or processing of goods for sale. Newspapers were specifically excluded from the definition of goods under Section 2(d) of the Central Sales Tax, 1956 (hereinafter referred to as the CST Act, 1956) and accordingly, they are not covered under "for manufacture or processing of goods for sale". The Apex Court noted that Section 2 of the CST Act, 1956 begins with "*unless the context otherwise requires*".

"This shows that wherever the word "goods" occurs in the enactment, it is not mandatory that one should mechanically attribute to the said expression the meaning assigned to it in clause (d). Ordinarily, that is so. But where the context does not permit or where the context requires otherwise, the meaning assigned to it in the said definition need not be applied. If we keep the above consideration in mind, it would be evident that the expression "goods" occurring in the second half of section 8(3)(b) cannot be taken to exclude newspapers from its purview".

"…Even apart from the opening words in section 2 referred to above, it is well-settled that where the context does not permit or where it would lead to absurd or unintended result, the definition of an expression need not be mechanically applied."

In another case of *Commissioner of Sales Tax, Gujarat* vs. *Union Medical Agency* reported at [1981] 47 STC 170 (SC), the Apex Court had noted that where the context makes the definition clause inapplicable, a defined word when used in the body of the statute may have to be given a meaning different from that contained in the interpretation clause. The court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words in a particular section.

By relying on the above judgements, it can be said that the context of refund under inverted duty structure requires interpretation of the expression "inputs" as all procurements including input services used in making outward supplies. Accordingly, even input services should be eligible for refund therein. Considering that goods and services are taxed equally, the refund provision should also equally apply for input services as well and restricting refund on input services merely because they are not covered by the expression "inputs" may be unreasonable and absurd.

Not refunding duty attributable to input services is resulting in accumulation of ITC, which goes against the intention of free flow of ITC under GST and is adding to the cost of making such supplies. While a host of amendments to the CGST Bill have been passed recently by the Parliament recently, Section 54(3) still remains the same- even after demands from the industry to either amend the law or issue appropriate clarification. A writ petition has also been filed before the Rajasthan High Court challenging the provisions of Rule 89(5). It is time that the government either brings in suitable amendments or issue appropriate clarification to ensure that refunds are allowed for input services also under inverted duty structure to remove the unreasonable hardship for the industry.

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Goods and Services Tax (GST)

Notifications and Circulars

Bills to amend GST Acts passed by Lok Sabha: Lok Sabha (lower house of the Indian Parliament) has on 9-8-2018 passed the 4 GST Bills, namely, Central GST (Amendment) Bill, 2018, IGST (Amendment) Bill, UT GST (Amendment) Bill, and GST (Compensation to States) (Amendment) Bill, as were introduced by the government on 7th of August. The Bills seek to amend CGST and other Acts to bring into force certain amendments as approved by the GST Council in its 28th meeting held in July. According to Statement of Objects and Reasons to the CGST (Amendment) Bill, CGST Act is being amended to implement the new return filing system and to overcome many difficulties faced by industry.

Reverse charge liability on supplies from non-registered supplier deferred till 30-9-2019: Notification No. 8/2018-Central Tax (Rate) has been again amended to extend the date for implementation of GST liability under reverse charge mechanism in case of supplies from a non-registered supplier. According to amendment by Notification No. 22/2018-Central Tax (Rate), dated 6-8-2018 issued for this purpose, the new date would be 30-9-2019. It may be noted that according to the CGST (Amendment) Bill 2018 as passed by Lok Sabha, Section 9(4) is set to be amended to remove such liability under said provisions, and instead the same would be applicable to only specified goods in case of certain notified classes of registered persons.

GST Returns – Due dates for months of July 2018 till March 2019 notified: Form GSTR-1 containing details of outward supplies can now be filed till 11th day (instead of 10th) of the next month by suppliers having aggregate turnover of more than Rs. 1.5 crore. Smaller suppliers (aggregate turnover up to Rs. 1.5 cr) would be required to file the same return quarterly by the last day of the month following the quarter. GSTR-3B will continue to be filed by 20th of next month for this period, i.e. for months of July 2018 till March 2019. Notification Nos. 32, 33 and 34/2018-Central Tax have been issued on 10-8-2018 for this purpose.

Due dates for filing GSTR-3B and GSTR-1 (in specified cases), extended: Last date for filing of return GSTR-3B for July, 2018 has been extended till 24-8-2018 for all class of taxpayers. Notification No. 35/2018-Central Tax, dated 21-8-2018 has been issued for the purpose. As per reports, this is being done in order to facilitate filing of easy GST returns. It may be noted that, as per reports, in view of the disruption caused due to severe floods in Kerala, Mahe (Puducherry) and Kodagu (Karnataka), the due dates for filing GSTR-1 and GSTR-3B by taxpayers in Kerala, Mahe and Kodagu have also been extended.

GST return by Input Service Distributor – Date extended again: Form GSTR-6 for the months of July, 2017 to August, 2018 can now be filed by Input Service Distributor till 30th of September, 2018. Notification No. 30/2018-Central Tax, dated 30-7-2018 has been issued in this regard in supersession to Notification No. 25/2018-Central Tax which prescribed the last date as 31st of July 2018 for this return for the months of July, 2017 to June, 2018.

Fertilizers supplied for manufacturing complex fertilizer attract GST @ 5%: Central Board of Indirect Taxes and Customs has clarified that the fertilizers supplied for direct use as fertilizers or supplied for use in manufacturing

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of other complex fertilizers for agricultural use (soil or crop fertilizer) will attract 5% GST. Circular No. 54/28/2018-GST, dated 9-8-2018 in this regard states that phrase “other than clearly to be used as fertilizers” in Notification No. 1/2017-Central Tax (Rate) would not cover such fertilizers that are used for making complex fertilizers for use as soil or crop fertilizers. According to the circular, tax structure on fertilizers in the GST regime has been prescribed on the lines of pre-GST tax incidence.

GST on vocational training provided by private ITIs: Services provided by a private Industrial Training Institute (ITI) in respect of designated trades notified under Apprenticeship Act, 1961 are exempt from GST under Sl. No. 66 of Notification No. 12/2017-Central Tax (Rate). Circular No. 55/29/2018-GST, dated 10-8-2018 issued for the purpose also clarifies that services provided in respect of other than designated trades would however be liable to GST. Further, it has also been clarified that GST is exempt in respect of designated trades for the services provided by private ITIs for conduct of examination and service relating to admission.

Rate of tax on various products and services: CBIC has issued an elaborate circular to clarify on rate of GST on various products, namely, fortified toned milk, refined beet and cane sugar, tamarind kernel powder (modified & un-modified form), drinking water, plasma products, wipes using spun lace non-woven fabric, real zari kasab (thread), marine engine, quilt and comforter, and disc brake pad.

According to Circular No. 52/26/2018-GST, dated 9-8-2018, fortified toned milk and drinking water for public purposes (if not supplied in a sealed container) would not be liable to GST. However, same would be payable @ 5% on refined beet and cane sugar, and tamarind kernel powder (both plain and treated). The circular also states that a quilt filled with cotton constitutes a cotton quilt, irrespective of the material of the cover of the quilt, and that Disc Brake pad for automobiles, are appropriately classifiable under heading 8708 of the Customs Tariff Act, 1975 thus attracting 28% GST.

Further, it has also been clarified that in case of fabrication of body on chassis provided by the principal (not on account of body builder), the supply would merit classification as service, and GST would be payable at 18%.

Special procedure for completing GST migration: CBIC has laid down a special procedure for completing migration of taxpayers, who could not complete the migration process till 31st December, 2017. As per CGST Notification No. 31/2018-Central Tax, dated 6-8-2018, persons who did not file the complete FORM GST REG 26 of the Central Goods and Services Tax Rules, 2017 but received only a Provisional Identification Number may now apply for Goods and Services Tax Identification Number. Upon completion of the process, the taxpayers will be deemed to have been registered with effect from 1-7-2017.

UK proposes to amend law to address ‘looping’ of financial services: United Kingdom has on 19-7-2018 released a draft amendment to deal with a particular version of VAT avoidance involving ‘looping’ financial services *via* non-VAT territories. Amendment is proposed in Value Added Tax (Input Tax) (Specified Supplies) Order 1999. At present provisions allow reclaim of input VAT while exporting certain financial services, though it cannot be reclaimed when services are provided inside EU. According to Explanatory Memorandum, the said Order is currently being exploited by companies to re-supply or ‘loop’ these services back to consumers in UK.

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Ratio decidendi

Services by employees of corporate office, to other units in other States, is 'supply': Activities by employees at corporate office in course of or in relation to employment such as accounting, administrative and IT system maintenance, for units located in other states, i.e. distinct persons as per Section 25(4) of CGST Act, is 'supply' of service in terms of Entry 2 of Schedule I to the said Act. The applicant had contended that activities by employees to other units are covered by Entry I of Schedule III to the said Act (Services by an employee to the employer in the course of or in relation to his employment) and hence not liable to GST. The AAR however held that employees in corporate office have no employer-employee relationship with other offices at least as per the Goods and Service Tax Acts, even if they are belonging to the same legal entity. [*Columbia Asia Hospitals* - Advance Ruling No. KAR ADRG 15/2018, dated 27-7-2018, AAR Karnataka]

E-Commerce Operator liable to GST on amount charged by cab operators for transportation: Karnataka AAR (GST) has held that the electronic commerce operator (ECO) is liable to tax on amounts billed by them on behalf of taxi operators for service of transportation of passengers in accordance with Section 9(5) of Central GST Act, 2017 read with Notification No. 17/2017-Central Tax (Rate). AAR held that the money paid by the customer to driver of the cab for services of the trip is liable to GST. It was held that applicant is liable, being deemed supplier of such service by the taxi operator as the service of transportation was supplied to the customers through them. [*Opta Cabs* - Advance Ruling No. KAR ADRG 14/ 2018, dated 27-7-2018, AAR Karnataka]

Generic terms indicating quality when to be construed 'brand name': Appellate Authority for Advance Rulings, Maharashtra (GST) has upheld the findings of Authority for Advance Rulings that the applicant is not eligible for exemption under Notification No. 2/2017-CT (Rate) even after removal of registered brand name / logos in a case when the surrounding environment is kept intact. It was held that such removal of logos would not render the products unbranded as the appellant would continue to enjoy the advantage attached to the brand names. Further, the Appellate Authority was also of the view that use of words 'Value', 'Choice' or 'Superior' on the proposed packing, without altering the surrounding environment to take advantage of brand 'MORE', would be construed as 'brand name' for the purpose of exemption notification. [*Aditya Birla Retail* – Order No. MAH/AAAR/SS-RJ/05/2018-19, dated 7-8-2019, AAAR Maharashtra]

Conversion of EVR (diamond in vault) to securities and vice-versa attract GST: Karnataka AAR (GST) has held that conversion of Electronic Vault Receipts representing diamonds held in vaults to e-units (securities) and similar conversion of e-units into diamonds will constitute 'supply' of diamonds, which is taxable under GST. The Authority however also ruled that derivative contracts in e-units and settlement thereof are transactions in securities as it involves only e-units with no physical diamonds, and hence would remain out of scope of GST. Mere deposit of diamond with safe vaults acknowledged by EVR was also held as not liable. [*Rajarathnams' Jewels* - Advance Ruling No. KAR ADRG 16/2018, dated 27-7-2018, AAR Karnataka]

Supply of beverages by coffee vending machines to SEZ units is not covered under 'zero rated supply': Observing that the applicant failed to establish that activity undertaken by them is certified as an 'authorised operation' by proper officer of SEZ, Karnataka AAR (GST) has held that supply of non-alcoholic beverages/ingredients to such beverages to SEZ units using coffee vending machines do not

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qualify as zero rated supply, as defined under Section 16 of IGST Act. The Authority in this regard observed that the CGST Rule 89 relating to refund stipulates that supply should necessarily be for authorised operations, and that according to the SEZ Act any special benefit accruing to the units located in the SEZ is strictly to be in respect of the authorised operations only. It was observed that the same is implicit under Section 16(1)(b) of the IGST Act. [*Coffee Day Global* - Advance Ruling No. KAR ADRG 13/2018, dated 26-7-2018, AAR Karnataka]

Supply of diesel engines and repair services to units located in SEZs are zero rated: Observing that supplies are for units and developers of Special Economic Zones, AAR West Bengal (GST) has held that provisions of Section 16 of IGST Act will be applicable and tax liability will be zero rated. It noted that applicant can supply without paying tax under Section 16(3)(a) or can supply on payment of tax and claim refund subsequently under Section. 16(3)(b) of IGST Act. The applicant intended to supply diesel engines and their spare parts along with services either on AMC basis or on as required basis to units and entities located in Kolkata SEZ. [*Garuda Power* – Order No. 14/WBAAR/2018-19, dated 1-8-2018, AAR West Bengal]

'Truck Mounted Crane' when classifiable under Heading 8705 as SPVs: AAR GST in Haryana has held that product 'truck mounted crane' (TMC) which is used for loading/unloading of heavy materials is classifiable under Heading 8705. The applicant used to mount/fix cranes manufactured by them on readymade bought-out trucks. They sought advance ruling on classification of TMC under Heading 8426 or 8705. The Authority in this regard relied on CESTAT's decision in *Automotive Coaches & Components* to conclude that TMC are special purpose vehicles (SPVs) and not works trucks mounted with cranes. The concerned jurisdictional officer had proposed classification under Heading 8426 of the Customs Tariff. [*Action Construction Equipment* – Advance Ruling No. HAR/HAAR/R/2017-18/5, dated 10-4-2018, AAR Haryana]

GST on sourcing services provided to associate company abroad: AAR Haryana has held that services like market research, purchase of goods and trademark protection, identification of suppliers, negotiation with suppliers, inspection and quality control and logistics provided by an Indian subsidiary to its associate in Hong Kong is a taxable service and attracts GST @ 18%. The AAR however held that the question as to whether, the activity qualifies as export of service and accordingly as zero rated supply, is out of jurisdiction of the Authority. The Authority was of the view that determination as to whether activity is 'exports' will involve examination of 'place of supply' which is outside the jurisdiction of AAR. The applicant was engaged as sub-contractor to provide sourcing services. [*Esprit India Pvt. Ltd.* – Advance Ruling No. HAR/HAAR/R/2018-19/6, dated 11-4-2018, AAR Haryana]

Fitting of bus-bodies (principal supply) on chassis is composite supply: Activity of fabrication and fitting/mounting of bus bodies on chassis supplied by other party is a composite supply with supply of goods, i.e., bus-bodies, being principal supply (HSN Code 8707). AAR Haryana while holding so, rejected the plea that activity was job-work. Perusing the contract between parties, AAR observed that only chassis is provided by customer and all inputs required for fabrication of bus body are used by applicant from own account. Activity of fitting/mounting was held ancillary to principal activity of supply of bus-body. [*Paras Motor* – Advance Ruling No. HAR/HAAR/R/2018-19/8, dated 26-4-2018, AAR Haryana]

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Exam support services are composite supplies attracting GST @ 18%: Services of sourcing and managing test centre venues, maintaining supply of test materials, providing back office support relating to financial controls, etc. for conducting IELTS exams are so bundled with each other that these cannot have an independent existence, hence, are composite supplies. The AAR Haryana in this regard held that such services as classifiable under Service Code 999299 as education support services, with principal supply being conducting exams. The applicant provides such services to its holding company British Council. [*BC Examinations and English Services India* – Advance Ruling No. HAR/HAAR/R/2017-18/11, dated 1-6-2018, AAR Haryana]

Customs

Notifications, and Circulars

Petroleum coke import policy revised – Import for fuel prohibited: Ministry of Commerce and Industry has amended import policy related to petroleum coke by allowing its import only to cement, lime kiln, calcium carbide and gasification industries for use as feed stock or in manufacturing process on actual user condition. Import of pet coke for fuel has been prohibited. Ministry of Environment, Forest and Climate Change in consultation with Customs and DGFT will bring out detailed guidelines on regulating and monitoring imports. Policy Condition No. 6 has been inserted in Chapter 27 of ITC (HS) 2017 by DGFT Notification 25/2015-2020 dated 17-8-2018.

Solar cells imports to be provisionally assessed – Safeguard duty stayed: In compliance with the interim directions of the Orissa High Court, the Ministry of Finance has decided not to insist on safeguard duty on imports of solar cells whether or not assembled in modules or panels. According to CBIC Instruction No. 12/2018-Cus., dated 13-8-2018, said goods will be assessed provisionally on furnishing of simple letter of undertaking/bond, in respect of safeguard duty. It may be noted that safeguard duty was imposed by a notification dated 30-7-2018, at specified rates, for a period of two years.

Textile products - Customs duties increased on various textile products: India has increased customs duty on number of textile products from 7th of August. This time the list of products include carpets and textile floorings, and various articles of apparel and clothing accessories, covered by Chapters 57, 61 and 62 of Customs Tariff. The move is seen as primarily to extend protection to domestic industry. It may be noted that India recently increased import duties on mobile phones and ink cartridges, and Japan has, according to some reports, registered a formal protest with the Indian government.

Indian retaliatory measures against USA to cover trade loss, postponed: Ministry of Finance had by Notifications dated 20-6-2018 amended First Schedule to Customs Tariff and revised the jumbo exemption notification, to increase import duty on goods under Chapter 7, 8, 28, 38, 72 and 73 from USA, with effect from 4-8-2018. This additional duty on commodities such as almonds, apples fresh and other diagnostic reagents, etc., will now be effective from 18-9-2018. The increase of import tariffs is

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in connection with certain measures by the United States of America on import of certain aluminium and steel articles from India.

MEIS benefit extended to specified goods - List in Appendix 3A deleted: DGFT has deleted the list of items which were till now not allowed to be imported under Export From India Schemes under Chapter 3 of the Foreign Trade Policy, unless otherwise specified. DGFT Public Notice No. 24/2015-20, dated 26-7-2018 issued for this purpose, deletes Serial Nos. 1 to 7 in the list specified under Appendix 3A to the FTP Handbook of Procedures Vol. I. Accordingly, duty credit scrips are now allowed to be debited for import of items, including certain capital goods which were earlier not permitted.

Courier and postal exports – Value limit for MEIS benefit enhanced: Ministry of Commerce has placed a value limit of Rs. 500,000 per consignment for exports through courier or post. On similar lines, the value limit of such exports for the benefit of Merchandise Exports from India Scheme (MEIS) has also been revised to Rs. 500,000 per consignment from the hitherto applicable limit of Rs. 25,000. Further, limitation of port of export for such benefit has been removed. Paras 2.47 and 3.05 of FTP have been amended by DGFT Notification No. 22/2015-20, dated 26-7-2018 for this purpose.

TED refund on supplies to projects funded by JICA till 31-3-2015: DGFT has issued Policy Circular No. 11/2015-20, dated 23-7-2018 to allow refund of Terminal Excise Duty in cases where exemption from payment of TED under relevant Central Excise notifications was not available, in respect of supplies made to the projects funded by JICA, etc., (other than IBRb, IDA and ADB). This benefit would however be available only for supplies made up to 31-3-2015. Circular also advises regional authorities to dispose TED refund claims in respect of supplies made under Para 8.2(d) of FTP 2009-14.

Refund to exporters – CBIC extends facility of officer interface: For refund of IGST to exporters, CBIC has extended rectification facility to Shipping Bills filed up to 30-6-2018. This alternative mechanism with an officer interface to resolve invoice mismatches was earlier available only for shipping bills filed till 30-4-2018. CBIC Circular No. 22/2018-Cus., dated 18-7-2018 also extends this facility to SBs filed till 30-6-2018, where exporter has wrongly declared that shipment is not under IGST payment, though had paid tax. Issue where exporter has mentioned PAN instead of GSTIN in SB has also been clarified.

No fees for amendment in Export Manifest for specified period - Levy of Fees (Customs Documents) Regulations amended: CBIC has amended the Levy of Fees (Customs Documents) Regulation, 1970 by inserting Regulation 5. According to the new regulation, no fees shall be levied in respect of export manifest when it is amended or supplemented with the entries relating to the Shipping bills filed from 1st July, 2017 to 30th June, 2018 in Inland Container Depots. Notification No. 64/2018-Cus. (N.T.) 27-7-2018 has been issued for this purpose.

SCOMET - Amendments in Appendix 3, procedural relaxations and export authorisations: The Central Government has made a total of 139 amendments in Appendix 3 to Schedule-2 of ITC (HS) Classifications of Export and Import Items, 2018. These amendments have been made to align India's SCOMET list with the amendments made to Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies in December 2017 to which India is a signatory. Notification No. 17/2015-2020, dated 3-7-2018 has been issued for the purpose.

Procedural relaxation for issue of authorizations for repeat orders: By Public Notice 20/2015-20, dated 12-7-2018, DGFT has

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relaxed the procedure for issue of authorisations for repeat orders of SCOMET items. Now the applications for grant of authorization for repeat orders to the applicant exporter for export of same SCOMET items to the same country/entities shall be approved by Chairman IMWG, without any consultation with IMWG members. However, in cases of repeat orders for export of same SCOMET items to different country/entities, approval shall be granted only after verification of the credentials of foreign buyer/consignee/end user. The public notice also specifies criteria subject to which the approval will be granted for repeat orders.

Issuance of export authorisation/license by DGFT (Hqrs): DGFT has decided that export authorisations for SCOMET items would be issued by the SCOMET Cell, DGFT (Hqrs). Issues relating to revalidation of SCOMET authorisations after expiry, penal action in terms of FTDR Act, grant of MEIS and other benefit, etc. would continue to be handled by the concerned jurisdictional Regional Authority, in terms of the existing provision in FTP/HBP. The Trade Notice also clarifies that where the permission has been granted by DGFT (Hqrs) before issuance of this Trade Notice, jurisdictional RAs would immediately issue export authorisations in respect of such SCOMET cases. Trade Notice 20/2018-19, dated 6-7-2018 has been issued for this purpose.

Ratio decidendi

Tax exemption notifications to be interpreted strictly favouring Revenue: 5 Judge Constitution Bench of the Supreme Court has held that exemption notification should be interpreted strictly and when there is any ambiguity in such notification, the benefit cannot be claimed by assessee rather it must be interpreted favouring Revenue department. Overruling its decision in *Sun Export*, the Apex Court also overruled all decisions in which similar views were taken. Further, it also observed that in case of ambiguity in a charging provision, benefit must go in favour of assessee, but that the same is not true for an exemption notification. The Court was also of the view that every taxing statute including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. [*Commissioner* v. *Dilip Kumar and Co.* – Judgement dated 30-7-2018 in Civil Appeal No. 3327 of 2007, Supreme Court]

Redemption of goods on payment of fine – Additional condition of re-export not correct: In a case where importer did not want to re-export, CESTAT Hyderabad has set aside the order imposing additional condition of re-export along with imposition of redemption fine. Imported goods were earlier confiscated as they did not meet mandatory BIS requirements. The Tribunal in this regard held that the authority may allow redemption of prohibited goods on payment of fine, but cannot ask for a conditional redemption. It was held that Section 125 of the Customs Act, 1962 does not confer upon the authority the power to impose any conditions while allowing redemption of goods. [*HBL Power System Ltd.* v. *Commissioner* - Final Order No. A/30684/2018, dated 5-7-2018, CESTAT Hyderabad]

SEZ Act does not override FT (D&R) Act if it remains consistent with former: Delhi High Court has held that Development Commissioner appointed under SEZ Act has jurisdiction to adjudicate and impose penalty under Section 11(2) of Foreign Trade (Development & Regulation) Act. The Court in this regard observed that there is no conflict between the Foreign Trade (D&R) Act and the SEZ Act as violations under former are designated as notified offences under latter, and also Section 58 of the SEZ Act shields and insulates sections and

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notifications under the Foreign Trade (D&R) Act to the extent they are consistent with the SEZ Act. It was noted that Proceedings under Section 11 of the F.T. Act is not a civil suit and adjudication by the designated authority under Section 13 of the F.T. Act is not adjudication by a civil court. [*Xtraa Cleancities* v. *UOI* - Writ Petition (Civil) No. 3909/2013, decided on 30-7-2018, Delhi High Court]

Amendment of Bill of Entry on change in importer, after Customs duty rates increased: Gujarat High Court has granted permission for amendment of existing Bill of Entries (BoE) instead of filing fresh BoE while also permitting provisional clearance on basis of pre-revised rate of duty, subject to furnishing of bank guarantee considering the current duty rates. Another company had imported yellow peas which were Nil rated at relevant time but failed to clear goods due to financial difficulties. The present importer negotiated with the exporter and the original importer, but by then Customs duty rate was increased. [*Agricore Commodities* v. *UOI* - R/Special Civil Application No. 4510 of 2018, decided on 26-7-2018, Gujarat High Court]

Central Excise and Service Tax

Ratio decidendi

Vocational training - Exemption to commercial training services in aviation, hospitality, etc.: Supreme Court has dismissed the Civil Appeals filed by department on the issue of service tax liability on providing vocational training in the fields of aviation, hospitality and travel management. The Tribunal in its impugned order had agreed that assessee was eligible for exemption as Notification No. 24/2004-ST covered both ability to seek employment and to undertake self-employment. Revenue's contention that benefit was not available as courses offered did not impart skills to engage participants in self-employment, was thus rejected. The Supreme Court in this regard stated that they did not find any merit in the appeals. [*Commissioner* v. *Frankfinn Aviation Services* - Diary No. 21341/2018, decided on 23-7-2018, Supreme Court]

No Cenvat credit of service attributable to trading even prior to 2011: Delhi High Court has held that assessee has to segregate quantum of input service attributable to trading activity and exclude it from records maintained for availing credit on proportionate basis. It observed that activity of trading was not service or manufacture (period involved prior to 2011) and it went beyond the purview of Central Excise Act and Finance Act, 1994. The assessee was involved in sale of automobiles and also in providing Business Support Services. Assessee's argument of absence of mechanism for reversal of credit was also rejected. [*Lally Automobiles* v. *Commissioner* - SERTA 7/2018, decided on 25-7-2018, Delhi High Court]

Agreement for supply of water on agreed tariff not covered under BSS: Supreme Court has dismissed Civil Appeal filed by department in respect of supply of water by assessee to Chhattisgarh State Industrial Development Corporation (CSIDC). The assessee had entered into an agreement with CSIDC to maintain water supply as per agreed tariff. Department's contention that such activity fell under Support Services of Business was earlier rejected by the CESTAT as outsourcing activity was absent. The Apex Court in this regard upheld the order which

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concluded that such activities fell under scope of agreement for consideration on sale of water. The Civil Appeal was dismissed observing absence of any legal and valid ground for interference. [*Commissioner* v. *Radius Waters* – Civil Appeal No. 19415 of 2017, decided on 13-7-2018, Supreme Court]

Cenvat credit available on courier service used for sending free samples: CESTAT Chennai has allowed Cenvat credit on courier service used for sending free samples to prospective buyers in foreign countries. Revenue department's plea that the service was akin to outward transportation of finished goods and hence not eligible for credit, was thus rejected. The Tribunal in this regard found force in the argument that samples were sent to prospective foreign buyers as sales promotion/ marketing/advertisement for trading, and that the same was not removal of finished goods involving sale. [*Raj Petro Specialities* v. *Commissioner* – Final Order Nos. 42032-42034/2018, dated 18-7-2018, CESTAT Chennai]

Reimbursements towards senior counsel fee not liable to service tax: Delhi High Court has held that payments received as reimbursements towards senior counsel fee, were not includible in the value of services rendered by a law firm. Apex Court's decision in *UOI v. Intercontinental Consultants* was relied on for this purpose. The Court in this regard observed that the department wrongly relied on Rule 5 of Service Tax (Determination of Value) Rules, 2006 for subjecting to service tax payment made by the law firm to the senior counsel for services rendered to third party in the form of representation in Courts, etc. [*Duttmenon Dunmorrsett* v. *UOI* - W.P. (C) 4740/2017, decided on 16-7-2018, Delhi High Court]

Cenvat Credit on CVD not deniable even if document for other inputs not enough: Delhi High Court has allowed benefit of Cenvat Credit of CVD paid by assessee which was denied by authorities on basis of lack of documents pertaining to payment of duty on other inputs, clandestine removal and due to absence of registration under Central Excise Act. The Court in this regard noted that assessee was given benefit of SSI status and its consequential entitlement cannot be denied when record establishes the same. The Court also observed that assessee imported PVC resin for which CVD was paid which can be legitimately claimed as input credit. [*Icon Industries* v. *Commissioner* - CEAC 30/2017, decided on 17-7-2018, Delhi High Court]

Construction of residential complex for personal use, via sub-contractor: Karnataka High Court has held that principal contractor was not liable to pay service tax on construction of residential complex undertaken through sub-contractor. It noted that sub-contractor had paid tax for construction activity and tax cannot be demanded from the one not undertaking construction. The High Court for this purpose observed that activity of assessee was covered by CBEC Circular dated 24-5-2010, as after construction, it will be handed over to the ultimate owner for personal use.. [*Commissioner* v. *Nitesh Estates* – CEA No. 5/2016, decided on 4-7-2018, Karnataka High Court]

Credit card services – Bank issuing credit card when not liable: CESTAT Delhi has held that bank issuing credit card and receiving certain commission from the acquiring bank (bank paying to the merchant and charging certain amount from them) was not liable to pay service tax on that amount under the category of 'Credit Cards Services' under Section 65(33A) read with Section 65 (105)(zzzuu) of Finance Act, 1994. The Tribunal in this regard held that the

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issuing bank was not engaged in any activity of settlement of the amount, and hence would not be covered under Credit Cards services. Relying on Allahabad High Court's decision in the case of *Chotey Lal Radhey Shyam*, it was also held that assessee-issuing bank was not liable since acquiring bank was discharging their service tax liability on the amount in question. [*ABN Amro Bank NV* v. *Commissioner* - Final Order No. 71601/2018, dated 23-7-2018, CESTAT Delhi]

Food supplied to airlines and not served to passengers on board is not outdoor catering service: In a case where the assessee was simply supplying the food and not serving the same to the passengers on board the airlines, CESTAT Delhi has set aside the demand of service tax on the value of food. The Tribunal in this regard observed that invoice showed sale of food separately from the charges of other services rendered in addition to supply food, and that the property in food got transferred the moment it was loaded on the aircraft trolley. Discharge of VAT liability on food was also considered by the Tribunal while allowing assessee's appeal. The department had relied upon Supreme Court's decision in the case of Tamil Nadu Kalyana Mandapam Association. [*EIHA (Unit of Oberoi Flight Services)* v. *Commissioner* - Final Order No. 52308/2018, dated 26-6-2018, CESTAT Delhi]

Steel doors cleared to research institute not eligible for Notification No. 10/97-CE: Observing that there was nothing on record to satisfy the Tribunal that the steel doors with frames in question supplied to the research institute were related to research except a letter by the research institute, CESTAT Hyderabad has rejected the plea of exemption under Notification No. 10/97-CE. However, penalty was set aside on the ground of bona fide belief that subject goods were eligible for exemption. The eligible goods under this notification included scientific and technical instruments, apparatus, equipment (including computers), accessories, parts and consumables. [*Shakti Met Dor Ltd.* v. *Commissioner* – 2018 TIOL 2496 CESTAT HYD]

Manufacture – Cutting and embossing of jumbo paper rolls when amount to manufacture: Applying the fourth test as stated by the Supreme Court in its decision in the case of *Servo-Med Industries Pvt. Ltd.*, CESTAT Delhi has held that activity wherein the jumbo roll of paper was attached to the paper napkin machine, set in the required size and then embossing of design, cutting, slitting, and folding were undertaken using the machine, would amount to 'manufacture' under provisions of Central Excise Act, 1944. The Tribunal in this regard observed that even though both the jumbo rolls and final products such as napkins were made of the same tissue paper, the transformation of jumbo rolls into either toilet rolls or kitchen rolls or in the form of paper napkins brought out a distinctive and different use in the article and the products were perceived differently in the market. [*S R Protus Hygiene Pvt Ltd.* v. *Commissioner* – 2018 TIOL 2486 CESTAT DEL]

Cenvat credit on rail and rail sleeper for transporting material: CESTAT Kolkata has allowed Cenvat credit on rails and railway sleepers for laying railway track from railway siding to the unloading point inside the factory for inward transportation of raw materials and also for outward transportation of finished goods. Reliance in this regard was placed on the Rajasthan High Court's decision in the case of *Aditya Cement* [2008 (221) ELT 362 (Raj.)] and CESTAT Order in the case of *Tata Steel Ltd.* [2016 TIOL 881 CESTAT KOL] which in turn had relied on Supreme Court decision in the case of *Jayaswal Neco Ltd.* [2006 (199) ELT 145 (SC)]. It was held that the impugned goods had nexus with the manufacture of final goods and were covered under definition of inputs as per Cenvat Credit Rules, 2004. [*Adhunik Alloys and Power Ltd.* v. *Commissioner* – 2018 TIOL 2476 CESTAT KOL]

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