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An e-newsletter from
Lakshmikumaran & Sridharan, India

December 2018 / Issue – 90

Contents

December
2018

Articles

Liaison office in India – The GST connection

By **Nirali Akhani**

A foreign company/ investor intending to expand business in India can do so by opening a branch office, project office, etc., or by establishing a liaison office in India among various other options. However, if the foreign company/investor is entering the Indian market for the first time, they would want an establishment that is not only economically viable and tax efficient but also a safe option considering the nitty gritty of Indian laws and the risks involved.

Liaison office as per FEMA

A liaison office, commonly speaking acts as a communication channel between the foreign company/investor and prospective buyers/ customers or prospective vendor in India without undertaking business in India as such. Reserve Bank of India regulates such establishments through Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016 dated March 31, 2016 (for short FEMA regulations). As per the FEMA regulations, liaison office means a place of business to act as a channel of communication between the principal place of business or head office or by whatever name called and entities in India, but which does not undertake any commercial /trading/ industrial activity, directly or indirectly, and maintains itself out of inward remittances received from abroad through normal banking channel.

GST implications

The activities undertaken by a liaison office in India of a person resident outside India may amount to supply of service for a consideration in the form of inward remittance from head office. It can argued that remittance from head office is not a consideration but only funds for payment of salary etc. or a reimbursement of expenses like rent, etc. Section 7(1)(c) of the CGST Act states that the activities specified in Schedule I to the CGST Act, shall be treated a supply of goods or services, even if made without consideration.

To understand if the activities undertaken by liaison office for its head office falls in either of the two entries in Schedule I or not, we need to first examine if the liaison office and head office are related persons or distinct persons. Related person has been defined in Explanation to Section 15 of the CGST Act and it states that persons shall be deemed to be related if one of them directly or indirectly controls the other. Employer and employee, legally recognized partners and members of same family are some of the other persons deemed to be related. Liaison office and head office do not fit under the list of persons deemed to be related as per the explanation to Section 15 of CGST Act.

Explanation 1 to Section 8 of Integrated Goods and Services Tax Act, 2017 ('the IGST Act') lays down that where a person has an establishment in India and any other establishment outside India, then such establishments shall be treated as establishments of distinct persons. Explanation 2

to Section 8 of IGST Act states that a person carrying on a business through a branch or an agency or a representational office in any territory shall be treated as having an establishment in that territory. In other words, the person, through a branch or an agency or a representational office, should carry on business in India. However, as per the FEMA regulation, liaison office shall not undertake any commercial /trading/ industrial activity, directly or indirectly.

The term 'business' has been defined in a wide manner in CGST Act. To answer the question as to whether liaison office is carrying on or conducting business in India, the activities of such liaison office needs to be observed on individual fact to fact basis. Where liaison office is simply acting as communication channel or engaged in the activities of market research, promotion, which are not the core business operations of the head office and are merely ancillary in nature, in such a case it may be argued that head office is not carrying on business in India. In such cases, liaison office would not be treated as an establishment in India.

Notification No.15/2018-Integrated Tax (Rate) dated 26.07.2018 (in short Notification No.15/2018) provides exemption for services supplied by an establishment of a person in India to any establishment of that person outside India, which are treated as establishments of distinct persons in accordance with Explanation 1 in Section 8 of IGST Act. This is subject to the condition that the place of supply of the service is outside India. Thus, even if liaison office and head office are establishments of distinct persons, exemption from GST is available if the conditions of this notification are satisfied. It may be noted that this kind of exemption is made available only from 27.07.2018 and so for the period from implementation of GST i.e. from 01.07.2017 till 26.07.2018, no such exemption is available to such establishment of distinct persons.

Assuming the liaison office carries out other activities, not permissible under FEMA regulations, the question may arise as to whether the liaison office is still not required to discharge its GST liability? Is the liaison office an intermediary for its head office? The term 'intermediary' is defined under Section 2(13) of IGST Act to mean a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services on his own account. The liaison office, who undertakes activities which involves arranging or facilitating supply of goods or services with the head office may get covered in the aforesaid definition.

If the liaison office is providing intermediary service to its head office, let us test if the exemption provided to establishment of distinct persons as per Notification No.15/2018 discussed above is available to such liaison office. As per Section 13(8) or IGST Act, place of supply in case of intermediary service is location of supplier of service i.e. location of intermediary, which in this case would be the liaison office situated in India. As the condition of place of supply being outside India as per Notification No. 15/2018 is not fulfilled, the liaison office working as an intermediary of head office will not be in a position of claim exemption form payment of GST. However, depending on the nature of activities undertaken by the liaison office, such exemption may require to be examined on case to case basis.

The Rajasthan Authority for Advance Ruling [In Re: M/s. *Habufa Meubelen B. V.* (Indian Liaison Office) dated 16.06.2018] held that "*when the liaison office is working as per the terms and conditions as mentioned in FEMA regulations,*

the reimbursement of expenses and salary paid by head office to the liaison office, is not liable to GST, as no consideration for any services is being charged by the liaison office.." Further, the ruling by Tamil Nadu Authority for Advance Ruling [In Re: *Takko Holding GmbH* dated 27.09.2018] considers that liaison office works as employees of foreign office and none of the activities of liaison office is covered under the definition of service and therefore not liable to GST.

Conclusion

To sum up, one school of thought is that the liaison office and head office are not establishments of distinct person. As they are one and the same person, the question of providing service to self does not arise and therefore, no GST liability arises on liaison office undertaking activities as permitted by FEMA regulations. However, the other school of thought can be that the liaison office and head office are establishments of distinct person when activities beyond FEMA regulations are undertaken. In such a case, depending on the nature of activities undertaken by the liaison office for its head office, applicability of Notification No.15/2018 would require examination on case to case basis to ascertain if exemption from payment of GST is available to the liaison office. Companies will have to be mindful of the activities that the liaison office in India will be required to undertake for its head office abroad in order to be tax efficient in India.

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Denial of ITC for non-possession of e-way bill - An unfounded proposition

By **Nirav S. Karia** & **Nivedita Agarwal**

The Goods and Services Tax, the government's most ambitious project and tax reform, is largely dependent on deployment of right technology and infrastructure for successful implementation. The introduction of the e-way bill system is a major gamechanger in this aspect. It is aimed at aiding seamless movement of goods across states, reduction in transportation costs and lead time by replacing physical check posts by mobile squads and giving a major boost to India's logistic ecosystem resulting in lesser traffic on major transportation routes.

After a few months of implementation, we find in a number of cases that the e-way bill is being used as tool for harassment where goods are seized, vehicles impounded, and penalty imposed by the field officers for minor procedural infractions in the e-way bill although there are no major lapses and taxes have also been paid. Recently, the departmental officers have devised another mechanism to penalise honest taxpayers by denying input tax credit (ITC) for non-possession of the physical copy of an e-way bill. Let us look at the nitty-gritty of such cases.

The CGST Act requires accompaniment of an e-way bill with the goods when being transported from the supplier's premises to the recipient's premises. Further, in certain special circumstances such as the bill-to-ship-to transactions, the supply is billed to the buyer but the actual delivery of goods are made to a third person on the direction of the buyer. Keeping in mind the mandate of the statute, the physical copy of the e-way bill is received by the third party as the goods are delivered to the third party.

Section 16(2)(b) of the CGST Act, 2017 provides every registered person who has received the goods/services shall be allowed to claim credit of input tax provided he has complied with the other conditions of Section 16. Following is the relevant excerpt from the abovementioned provision:

"(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless, —

(a)….

(b) he has received the goods or services or both.

Explanation.—For the purposes of this clause, it shall be deemed that the registered person has received the goods where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way."

On an analysis of clause (2)(b) of Section 16 read with the Explanation appended thereto, it is evident that the CGST Act provides for actual as well as constructive possession in cases when the goods have been delivered to a third person on the instruction of the buyer. Constructive possession is when the title in goods is transferred (through tax invoice or delivery challan) but the person is not in physical possession of the goods. In all such transactions, the buyer is considered to have received the goods as provided by the above provision even though he has not received the physical possession of such goods.

The departmental officer while examining the eligibility of ITC to a registered person checks if the taxpayer has ***actually received*** the goods to be eligible for the credit as per the condition laid down in Section 16(2)(b). The easiest way for the officer to verify the receipt is to check the e-way bill against the invoices issued as the e-way bill is generated for the movement for the goods from the premises of the supplier to the premises of the recipient. The department seeks to restrict ITC in cases where the taxpayer is unable to provide the officer with the physical copy of the e-way bill including in cases such as bill-to-ship-to transactions. The deeming provision has been created in the Act by way of insertion of explanation to Section 16(2)(b) wherein the receipt of goods by ship-to party will also be considered as receipt of goods by bill-to party hence making them eligible for credit. But this provision is not considered by the department.

At this juncture, it is also pertinent to note that Section 16(2)(a) of the CGST Act read with Rule 36 of the CGST Rules provides the documents to be possessed by a taxpayer for availment of credit. The said provisions do not include an e-way bill as a document on the basis of which ITC can be availed. ***Thus, eligibility to avail ITC is not dependent on e-way bill (which is only a document to track movement of goods).*** Therefore, even Section 16(2)(1) cannot be invoked for denial of ITC to a taxpayer who does not have physical possession of the e-way bill.

While the intention of the government is to ensure seamless flow of credit across the supply chain, the department, it appears, is placing undue restrictions which do not have statutory backing. Such departmental action is against the very spirit of GST. It is the need of the hour that the field formations are instructed by the CBIC to protect the assessees from unsustainable demands when the government revenue is not impacted.

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Goods and Services Tax (GST)

Notifications and Circulars

GST Annual Returns to be filed by 31st of March 2019: Due date for filing FORM GSTR-9, FORM GSTR-9A and FORM GSTR-9C has been extended till 31st of March 2019. Press Release of the Ministry of Finance issued on 7th of December 2018 states that the requisite forms shall be made available on the GST common portal shortly. These forms were notified by the CBIC in September 2018 and are to be filed annually by every registered taxpayers barring few exceptions. As per Section 44 of the CGST Act, these forms were to be filed by 31st of December 2018.

TDS – Form GSTR-7 for October to December 2018 can be filed by 31-1-2019: CBIC has extended the time limit for furnishing the Form GSTR-7 return by a registered person required to deduct tax at source under Section 51 of the CGST Act, 2017 for the months of October to December, 2018. The Return for these months can now be filed till the 31st day of January, 2019. Notification No. 66/2018-Central Tax, has been issued for this purpose on 29-11-2018.

Ratio decidendi

No profiteering when MRP unchanged despite increase in post-GST tax rate: A complaint was filed against the respondent for alleged profiteering on supply of the products 'Bathing Bar' and 'Instant Drink Powder 50 grams'. The complainant stated that the tax rate on these products was reduced to 18% in GST regime as against 12.5% excise duty and 14.5% VAT earlier. The respondent submitted that he was procuring these goods on payment of 14.5% VAT which has increased to 18% under GST and hence, he was suffering loss of margin on supply of both the products post GST implementation. Accordingly, there was no benefit to pass on.

The DGAP noted that the respondent was procuring the impugned goods from manufacturers who were claiming the benefit of excise exemption/ concession and therefore, the effective tax rate on the said products in the pre-GST regime was 14.5%/ 16.5% and not 27% as claimed by the applicant. The DGAP noted that the respondent has supplied the impugned product at the same MRP even though the tax rates had increased, thereby suffering a loss from his own margins and hence there was no profiteering. The DGAP also observed that the supplier to the respondent had increased the transaction value for supply of bathing bar to the respondent, however the respondent still maintained the same MRP and effectively reduced his base price. The National Anti-profiteering Authority (NAA) held that the effective tax rates for the impugned product has increased post GST and the respondent has still maintained the same MRP and the reduction in base price was more than the increase in ITC and hence, there was no profiteering by the respondent. [*Mandalika Sakunthala* v. *Fabindia Overseas*, Case No. 13/2018, Order dated 16-11-2018]

Profiteering when increase in base price from same date as rate reduction is more than ITC denied: A complaint was filed against the respondent for alleged profiteering by keeping the price including taxes unchanged for supplies after the GST rate reduction on restaurant services from 18% to 5% from 15.11.2017. Observing that the assessee had increased base price overnight with effect from the date when tax rate was reduced along with denial of ITC,

National Anti-Profiteering Authority (NAA) has held that mere charging of less tax from a specified date did not amount to passing the benefit. The NAA also held that factors like rising/ falling input costs, demand/ supply conditions are not relevant for determining profiteering under Section 171. It observed that DGAP has mandate only to examine whether benefit of reduced tax or ITC has been passed or not.

The NAA rejected the contention of the respondent that Section 171 was applicable only for contracts entered into for supply before GST rate change or availability of ITC and both parties agree to such change. It did not accept the contention of the respondent that the provisions of Section 171 cannot be enforced in the absence of machinery provisions by stating that a comprehensive machinery comprising of Screening Committee, Standing Committee, DGAP, etc., have already been constituted to enforce these provisions. It was further held that depositing of extra GST collected from customers with the government did not absolve the respondent of profiteering as he had compelled the recipient to pay a price higher than what was payable. Accordingly, the respondent was held guilty of profiteering and was asked to deposit the amount of profiteering along with interest. Penalty was also proposed to be imposed under Section 122(1)(i) of the CGST Act for issuing an incorrect invoice. [*Ravi Charaya v. Hardcastle Restaurants* – Case No. 14/2018, decided on 16-11-2018, National Anti-Profiteering Authority].

Non-reduction of base price when CVD subsumed in IGST on imported goods, is profiteering: Observing that opposite party wrongly charged higher price on supply of machine as the base price was not reduced to the extent of CVD that was not paid after implementation of GST, National Anti-Profiteering Authority has upheld liability to penalty. NAA in this regard held that there was profiteering and thus violation of provisions of Section 171 of the CGST Act. It was held that price offered prior to implementation of GST was to be reduced by the amount of CVD. DGAP was directed to initiate investigation of other supplies. The Respondent was directed to reduce the sale price of the items immediately commensurate to the reduction in the price due to ITC of erstwhile chargeable CVD which is now available in the form of IGST and pass on this benefit to his customers. [*Crown Express Dental Lab* v. *Theco India Pvt Ltd.* - 2018-VIL-12-NAA]

GST on transfer of right to use buses for passenger transportation: GST AAR Maharashtra has held that the services rendered by applicant to Nagpur Municipal Corporation (NMC) by giving buses on rent are covered under Sr. No. 10, sub-clause (ii) of Notification No. 11/2017-Central Tax (Rate), liable to GST @ 18%. The service was held to be classifiable under Heading No. 9966. Applicant's activity was held as supply of service as per clause 5(f) of Schedule II to the CGST Act. The Authority in this regard observed that exemption under Notification No. 12/2017-CT (Rate) to stage carriage is applicable to NMC for further services provided to passengers by way of transportation. [In RE: *SST Sustainable Transport Solutions India Pvt. Ltd.* – Order No. GST-ARA-68/2018-19/B-129, dated 15-10-2018, AAR Maharashtra]

Transfer of ownership without physical imports – IGST not payable: Maharashtra AAR has ruled that goods sold from and to a non-taxable territory, by a supplier in India, though clearly in the nature of an inter-state supply, it would come in the category of exempt supply as no duty is leviable on them except under Section 5(1) of the IGST Act. The Authority in this regard held that for goods supplied on an out and out basis there is no levy till the time of their customs clearance in compliance with Section 12 of the Customs Act and Section 3 of the Customs Tariff

Act. The transaction involved in this case related to transfer of ownership in tools without physically moving them from Germany. [In RE: *INA Bearings India Pvt. Ltd.* - 2018-VIL-290-AAR]

Provision for subscription by a club when included under 'Business': Observing that annual membership subscription facilitated the members to further objectives of the organisation, GST AAR West Bengal has held that any consideration for facilities to members is 'business' under Section 2(17)(e) of the CGST Act. The AAR ruled that the activities by the applicant, a women service organisation, do not conform to the definition of charitable activity under clause 2(r) of Notification No. 12/2017-CT (Rate). It noted that funds collected are spent on organising meetings providing facilities to members. Services provided against subscription/membership fee was held classifiable under SAC Heading 99959. [In RE: *Inner Wheel Club* – Order No. 23/WBAAR/2018-19, dated 26-11-2018, AAR West Bengal]

Separate contracts for supply of goods and transportation when a 'composite supply': In a case involving dual contracts, one for supply of goods ex-factory and another for transportation and installation, etc., where title of goods was not transferred at the factory gate, GST AAR West Bengal has held that first contract does not amount to a contract for supply of goods unless it is tied up with the second contract. It noted that although the supplies of good and services were made under two separate contracts, they are not executable separately. Considering the service as composite supply, i.e. works contract service, the Authority denied exemption under Sl. No. 18 of the Notification No. 12/2017-CT (Rate) to the applicant engaged in manufacturing and installation of transmission towers. [In RE: *Skipper Ltd.* – Order No. 22/WBAAR/2018-19, dated 26-11-2018, AAR West Bengal]

Services from sweet shop cum restaurant is a 'composite supply': Supply of food items such as sweetmeats, namkeens, etc., from a sweet shop which also runs a restaurant, is supply of restaurant services. GST AAR Uttarakhand has held that in such case, it is a composite supply with services from restaurant, providing a bundled supply of preparation and sale of food and serving the same, being the principal supply. The Authority was of the view that sweet shop shall be an extension of the restaurant. The activity of the applicant was held classifiable under restaurant services under Heading 9963 and held liable to GST @ 5% under Notification No. 11/2017-Central Tax (Rate), without ITC. [In RE: *Kundan Misthan Bhandar* – Order No. 08/2018-19/Advance Ruling/DDN/5459, dated 22-10-2018, AAR Uttarakhand]

Supplies when classifiable as mixed and not composite supply: GST AAR Rajasthan has held that services under comprehensive maintenance services agreement including supply of spares is a composite supply with supply of goods being ancillary. Contract for supply of parts and services was held to be covered as mixed supply. Applicant's plea that service is a composite supply in both the situations, was rejected observing that where supply of parts and services are known and can be supplied individually or in any combination to customers, supplies would be covered as mixed supplies. [In RE: *Sandvik Asia Pvt. Ltd*. – Ruling No. RAJ/AAR/2018-19/21, dated 12-10-2018, AAR Rajasthan]

Ancillary services linked to lease of industrial plots not exempt: Considering that there is no exemption to all services related to plots, GST AAR Chandigarh has held that additional/ancillary services (Transfer fees, Extension fees, Conversion fees, Processing fees, bifurcation fees and tower installation

charges) provided in respect of industrial plots, are liable to GST. Rejecting applicant's plea that ancillary services are inter-linked with lease of industrial plots, AAR held that said services are covered under "Other Miscellaneous services"- Group 99979 and taxable at 18%. [In RE: *Punjab Small Industries & Export Ltd*. – Ruling No. CT/01/A.R./CHD/2018/8042, dated 8-11-2018, AAR Chandigarh]

GST payable on penal interest collected for tolerating delayed EMI: GST AAR Maharashtra has held that penal interest collected by the applicant in pursuance of tolerating the act of delayed payment of EMI by the customers, would constitute a supply under Section 7(1)(d) of the CGST Act read with Clause 5(e) of Schedule II thereof. Further, observing that the penal interest was collected by the applicant only because there is a delay in payment of EMI, it was held that such interest cannot be said to form part of interest on 'loan', 'deposit' or 'advance'. Accordingly, the exemption contained at Sl. No. 27 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 would not apply to penal interest. Assumption of the applicant that the delayed EMI is nothing but a new loan amount advanced was held to be fallacious. [In RE: *Bajaj Finance Ltd*. - 2018-VIL-275-AAR]

DFIA is not a duty credit scrip – GST payable: After analyzing various provisions of Chapters 3 and 4 of the FTP 2015-2020, AAR Maharashtra has held that DFIA and duty credit scrips are not same. The AAR observed that duty credit scrips are issued under MEIS and SEIS scheme and DFIA is not covered under the said schemes. Further, DFIA license is quantity based whereas duty credit scrips are value based. It was also observed that duty credit scrips can be used for payment of specified duties of customs on the imported goods and in DFIA, inputs are imported on duty free basis for use in manufacture of goods to be exported. In view of these observations, it was held by AAR that DFIA is not a duty credit scrip and hence, sale of DFIA is not exempted from GST. [In RE: *Spaceage Syntex Pvt. Ltd.* - 2018-VIL-272-AAR]

UK VAT - Sub-contractor's supply – Unjust enrichment and fiscal neutrality: UK's Upper Tribunal Tax and Chancery Chamber has dismissed sub-contractor's appeal against HMRC charging VAT for services to principal supplier providing zero-rated service. The appellant had claimed that it could not recover VAT due to insolvency of principal. The Tribunal stated that HMRC should collect output tax due from assessee as there are no grounds of unjust enrichment of HMRC. It noted that tax authorities are not required to insulate assessee from consequences of insolvency of its counterparty where it has made a mistake in applying VAT. [*J & B Hopkins* v. *HMRC* - Appeal number: UT/2017/0099, decided on 23-11-2018, UK Tax Tribunal]

Department not to go against own directives unless public interest involved: UK's Upper Tribunal Tax and Chancery Chamber has held that Her Majesty's Revenue and Customs (HMRC) cannot override legitimate expectation under its own directives unless there is sufficient public interest to it. It held that it would be unfair on the part of HMRC to seek to resile from its own guidelines. The Tribunal quashed the decision made by HMRC, applying VAT to card handling services of an online travel agency and doing away with its own Business Brief 18/06 which exempted said services from VAT. [*Vacation Rentals (UK) Ltd.* v. *HMRC* – Case No. UTJR/2012/002, decided on 22-11-2018, UK Tax Tribunal]

Customs

Notifications, and Circulars

Expeditious disposal of unclaimed cargo via auction – New procedure: CBIC has prescribed a new procedure for expeditious disposal of unclaimed/uncleared cargo lying with the custodians. This procedure will apply to unclaimed/uncleared cargo, unloaded at Customs Station after being brought from outside India from 1-4-2018. It will also apply to such goods brought before such date if auction process has not started. According to Circular No. 49/2018-Cus., dated 3-12-2018, in case entire process of auction is not concluded within 180 days of commencement of auction, custodian shall inform the bidder about extended time.

SEZ – Time period for bringing back jewellery after processing, revised: Time-period for bringing back studded gold jewellery, silver jewellery and imitation jewellery, sent outside the SEZ for sub-contracting, has been revised to 45 days. The 2nd proviso inserted in Rule 41, sub-rule (1), clause (a), with effect from 27-11-2018 by Notification dated 9-11-2018 is applicable to gems and jewellery units taking out of SEZ finished goods requiring further processing or semi-finished goods. According to first proviso, inserted in June 2017, precious metals taken out of SEZ by such units are to be brought back within 28 days.

EOUs - Customs and Central Excise notifications amended to align with FTP: Both Customs and Central Excise notifications governing provisions for EOU scheme have been amended to align them with the present FTP provisions. B-17 Bond (General Surety/Security) being submitted by EOUs has also been updated. The amendment also provides for re-import of specified goods by EOUs within 7 years of export, for repair and reconditioning. Further, as per Circular No. 50/2018-Cus., dated 6-12-2018, the new B-17 bond will be applicable to the new EOUs, and the existing EOUs shall continue with the earlier one already executed by them.

AEO – Online filing and processing of AEO T1 application: CBIC has launched a website for online filing of AEO T1 applications by the applicants and for Customs officials to process and deliver digitized AEO certificate online. The manual filing and processing of such application will however continue till 31-3-2019 in order to ensure seamless transition to the online web application. Circular No. 51/2018-Cus., dated 7-12-2019 also amends Master Circular No. 33/2016-Cus., to revise the time period for review and OSPCA of AEO T1 certified entities. Now, both review and audit of such entities would be done once in three years. This will synchronise the time period with that of validity of the certificate.

SCOMET - Amendment to allow re-transfer/ re-export of SCOMET items on post reporting basis – Para 2.79A of the HBP 2015-20 has been amended to allow re-transfer/ re-export of SCOMET items within the country of the Stockist and to the end users in other specified countries as approved by IMWG on post reporting basis, i.e. within 3 months of every such transfer. Further, *vide* Public Notice No. 46/2015-20, dated 15-11-2018, Para 2.79B of the HBP has been amended to clarify that application for export authorisation of spare parts shall be considered on the same conditions, as applicable for the main item/ component.

Gold religious idols exported by DTA units eligible for Advance authorisation for precious metals and Replenishment schemes: Ministry of Commerce and Industry has amended Para 4.32(i) of the Foreign Trade Policy to extend the benefit of schemes mentioned under Para 4.33 of the FTP to gold religious idols (only gods and goddesses) of 8 carats and above, exported by DTA units. The DTA units can avail the benefit of the (i) Advance Procurement / Replenishment of Precious Metals from Nominated Agencies; (ii) Replenishment Authorisation for Gems; (iii) Replenishment Authorisation for Consumables, and; (iv) Advance Authorisation for Precious Metals, provided the exports are made by actual manufacturer of such idols and realisation of foreign remittance within a period of 3 months from the date of export. Notification No. 44/2015-20 dated 30-11-2018 has been issued for this purpose.

Gold religious idols - Wastage and value addition norms prescribed: Director General of Foreign Trade has prescribed wastage and value addition norms in respect of gold religious idols (only gods and goddess) – plain and studded, of 8 carats or above. Para 4.60 and 4.61 of the Handbook of Procedures 2015-20 has been amended in this regard by Public Notice No. 51/2015-20 dated 30-11-2018. The waste percentage has been prescribed at 2.5% for plain gold idols and 5% in case of studded gold idols. The value addition has been prescribed at 10% in case of plain gold idols, 14% in case of gold idols studded with coloured gemstones and 15% in case of gold idols studded with diamonds.

Exemption to gold, silver and platinum imported as replenishment, restricted: Notification No. 57/2000-Cus. grants exemption to gold, silver and platinum imported as replenishment under the scheme for export through exhibitions/export promotion tours/export of branded jewellery or under the scheme for export against supply for nominated agencies. A third proviso has now been added to this notification by Notification No. 78/2018-Cus., dated 29-11-2019, according to which no replenishment of gold or silver shall be available where, at the time of export, the exporter had availed Cenvat credit on inputs under the Central Excise Act, 1944; or input tax credit on inputs or services or both under the CGST Act; or refund of input tax credit or refund of integrated tax under Section 54 of the CGST Act.

Non-basmati rice made eligible for MEIS benefits: Director General of Foreign Trade has amended Appendix 3B of Merchandise Exports from India Scheme (MEIS) to provide MEIS benefits to husked (brown) rice, parboiled rice, broken rice and other rice covered under HS code 1006. The benefit would be available at the rate of 5% of exports made with effect from 26-11-2018 up to 25-3-2019. Public Notice No. 49/2015-20, dated 22-11-2018 has been issued for this purpose.

Ratio decidendi

DFIA exports – Specifications of imported inputs to be declared on Shipping Bill: Delhi High Court has allowed Revenue department's appeal in a case involving DFIA exports. Department's plea that the exporter was required to make declaration of technical characteristics, quality and specification on the shipping bills, of its inputs, and not the export products, as listed in Para 4.55.3 of FTP Handbook of Procedures, was upheld. The Court in this regard observed that condition in paragraph (i) of Notification No. 40/2006-Cus. must be read harmoniously with the provision of the FTP-Handbook of Procedures to which it expressly refers. Assessee's contention that the declaration requirement of the exemption notification is applicable only if the exported goods are

included in the list of items enumerated in Paragraph 4.55.3, was rejected. [*Commissioner* v. *Kothari Foods & Fragrance* - CUSAA 147/2018, dated 26-11-2018, Delhi High Court]

Anti-dumping - Classification of parts of imported articles: CJEU has reiterated that a general part presented separately with an imported article does not constitute that article and hence is to be classified under appropriate heading under the EU's Combined Nomenclature. The court observed that an article which allows the child safety gate to be mounted on wall does not constitute part of gate and must be classified under Heading 7318 as screws, bolts & nuts. The goods were held liable to anti-dumping duty imposed on imports of iron and steel fasteners from China. [*Skatteministeriet* v. *Baby Dan A/S* – Order dated 15-11-2018 in Case C-592/17, CJEU]

Central Excise and Service Tax

Ratio decidendi

Electricity generated from bagasse and sold out – Cenvat Rule 6 not applicable: Mumbai Bench of CESTAT has set aside demand of 6% under Rule 6 of the Cenvat Credit Rules, 2004 on the sale of surplus electricity produced using bagasse (waste product) in sugar factory, when no other input is used. The Tribunal relied on Allahabad High Court Judgement in *Gularia Chini Mills,* Supreme Court Judgement in *DSCL Sugar Mills* and CESTAT Order in case of *Jakarya Sugars Ltd.* It observed that electricity generated from bagasse, like that generated through solar power, hydro power, wind power etc., is not covered under Chapter 27 of the Central Excise Tariff. [*Shivratna Udyog Ltd.* v. *Commissioner* - Order No. A/87964/2018, dated 20-11-2018, CESTAT Mumbai]

Service Tax liability of courier agent in case of international courier: CESTAT Mumbai has upheld service tax liability on a courier service provider in respect of international couriers. It held that the assessee, a courier company, would be liable in respect of both freight services – one it performs in India (for import of freight paid courier), and second, under reverse charge mechanism, in case where services originated in India and carried abroad by its partner (export of freight collect courier). The Tribunal observed that despite payment in foreign exchange said services cannot be treated as export of service. It noted that the appellant was performing entire services within India and no part of the service was provided outside India. [*UPS Jetair Express* v. *Commissioner* - Order No. A/87929/2018, dated 16-11-2018, CESTAT Mumbai]

Cenvat credit available on manpower supply for OHC at hazardous unit: CESTAT Mumbai has allowed Cenvat credit on manpower supply for Occupational Health Centre (OHC) to a unit manufacturing insecticides and pesticides. It noted that there was statutory requirement to maintain an OHC by such unit. The Tribunal observed that denial on ground of failing to keep separate records of emergency treatment was not fatal, as OHC was to meet emergency situations. Exclusion for health services, in Cenvat Credit Rules, in 2012, was held as not material. Period involved was from October, 2012 till March, 2016. [*Rallis India Ltd.* v. *Commissioner* - Order No. A/88008/2018, dated 26-11-2018, CESTAT Mumbai]

No Real Estate Agent service even if land sold not owned: In a case involving alleged real estate agent service, CESTAT Delhi has rejected department's plea that since the land sold was not in the name of assessee, it was not a transaction for sale or purchase of land. It held that for a principal to principal transaction for purchase and sale of land, it is immaterial whether the property sold is in the name of the seller or in the name of some 3rd party. Observing that assessee did not act as agent and was into buying/selling on a principal to principal basis, the Tribunal held that assessee was not engaged in real estate agent service. It also held that in the absence of any defined consideration for alleged services there was no contract of service at all and hence no liability. [*Premium Real Estate Developers* v. *Commissioner* - Final Order No. 53322-53323/2018, dated 27-11-2018, CESTAT Delhi]

Area-based exemption – Commencement of production - Effect of absence of particular plant: CESTAT Delhi has held that non-existence of DM/RO plant will not prove that cosmetics were not manufactured in a unit claiming area-based exemption. Further, fact that goods were produced before grant of drug licence, was found not material. The Tribunal for this purpose, based on documents of transport and affidavits from buyers of manufactured goods, questioned department over its stand that manufacturing did not take place. Relying on earlier decision in *Vega Auto Accessories* it stated that department did not conduct proper investigation. [*Proveda Herbals* v. *Commissioner* - Final Order No. 53292/2018, dated 16-11-2018, CESTAT Delhi]

Export of services – Person requesting and paying for service is recipient: CESTAT Delhi has observed that it is the person who requests for the service and is liable to make the payment for the same, must be treated as recipient of service and not the person affected by the performance of the service. It noted that destination must be decided based on place of consumption and not the place of performance of service. The Tribunal was of the view that the service provided to a company outside India but performed on the customers in India, was export of services. [*Pitney Bowes India P. Ltd.* v. *Commissioner* - Final Order No. 53289/2018, dated 15-11-2018, CESTAT Delhi]

Central Excise duty on matches – Liability under Notification No. 12/2012-CE: In a case where assessee-petitioner purchased machine made match splints, undertook other jobs (like, box filling, fixing of labels and packaging) through third party job workers and then sold it, Madras High Court has held that petitioners being principal and not job worker, benefit of Notification No. 36/2001-C.E. (N.T.) was not applicable. The goods were held liable to central excise duty under Sl. No.142 of Notification No. 12/2012-C.E. The High Court observed that the assessee always held principal interest on goods processed and sold. Argument that matches in bundles were not classifiable under Chapter 36 was also rejected. [*Jeyam Traders* v. *Union of India* - W.P (MD) Nos. 7164 of 2012 and Ors., decided on 29-10-2018, Madras High Court]

Retrospective exemption when department failed to acknowledge merger before: CESTAT Mumbai has allowed retrospective exemption for captive consumption under Notification No. 67/95-C.E., for clearance between two units. It noted that there was failure was on the part of the department to ascertain the merger which was sought earlier. It observed that the units were

operating under separate registrations, and it was only after intervention of the Bombay High Court, the single registration was granted. It held that certificate of single registration, though issued later, should be deemed to have been issued from the date of entitlement. [*Vidyut Mettalics Pvt Ltd* v. *Commissioner* - Order No. A/87857/2018, dated 6-11-2018, CESTAT Mumbai]

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