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GST and amortization – An unceasing connection

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In our previous article published in the 82nd issue of Tax Amicus in April 2018 (*https://www.lakshmisri.com/News-and-Publications/Publications/Articles/Tax/relevance-of-amortization-for-valuation-under-gst-law*), we highlighted the inconsistency arising out of a joint reading of Section 15(1) of the CGST Act and Circular No. 38/12/2018, dated 26-3-2018, regarding inclusion of amortized value of mould in job work charges for payment of GST by the job worker. Various representations were made by trade and industry in this regard and it was expected that CBIC would clarify the position to end the anomaly.

CBIC has been proactive in clarifying various issues under GST law. It has recently clarified certain issues by way of Circular No. 47/21/2018-GST, dated 8-6-2018. One of the issues addressed in this circular pertains to tax implications on free of cost (FOC) supplies and the need for reversal of input tax credit (ITC) in such cases. In addition to providing clarification on the above issues, this circular also tries to throw some light (or rather add to the anomaly) on the un-posed query on valuation and amortization.

The transaction addressed in the latest circular is very common in the automobile industry, wherein Original Equipment Manufacturers (OEM) place order on Component Manufacturers (CM) for manufacture and supply of components, and the mould and dies owned by the OEM are given to CM for free.

As the transaction under consideration contemplates payment of tax and reversal of ITC in certain circumstances, it would be relevant to keep in mind a recent amendment by way of insertion of second proviso to Rule 37(1) of the CGST Rules by Notification No. 26/2018-Central Tax dated 13-6-2018. The amendment allows the recipient to retain the ITC on the amount added in terms of Section 15(2)(b) of the CGST Act, even when the payment towards the value of supply and tax thereon is not made to the supplier within 180 days from the date of his invoice.

We would now proceed to analyze the circular dated 8-6-2018 under two broad scenarios. As per para 1.1 of the circular, the mould owned by the OEM, **provided** to the CM, does not constitute a supply as there is no consideration involved (say, *Scenario 1*). On the other hand, as per para 1.3 of the circular, the mould which was required to be procured by the CM, but **supplied** by OEM on FOC basis, is required to be added to the value of components by way of amortization (say, *Scenario 2*). The circular seems to take two different positions on the liability to pay tax by the OEM based on his terms of contract with the CM.

In our understanding, the transaction between unrelated persons is generally regulated by market forces. If the contract specifically requires CM to procure mould and the same is given to him by OEM for free, then the CM would readily agree for OEM to deduct payment

towards the value of the mould from his invoice. The question of amortizing the value of mould in the value of component arises only if the price of the component is suppressed, resulting in short payment of tax by CM, taking into account the entire contract.

In so far as the eligibility of ITC of GST on the mould is concerned, the recent circular clarifies that the OEM can take such ITC under Scenario 1 as the same is provided in the course or furtherance of his business. It is also clarified that under Scenario 2, the ITC is not eligible in the hands of OEM as the mould is not considered to be provided to CM in the course or furtherance of OEM's business. This contention in the circular may have to be agitated as it intends to narrow down the scope of ITC under GST law.

It is interesting to note that the OEM has procured the mould by himself in both the scenarios; however, he is allowed to take ITC only under Scenario 1. As per the circular, the mould is not used in the course or furtherance of business of OEM under Scenario 2. It therefore follows that the mould is used in the course or furtherance of CM's business and hence he should be eligible to take ITC of GST paid on such mould, subject to the satisfaction of other conditions under Section 16(2) of the CGST Act.

One primary condition for taking ITC relating receipt of goods is already met by the CM. Another important condition, for retaining the ITC, as prescribed under the second proviso to Section 16(2) is that the amount towards the value of supply along with tax should be paid to the supplier within 180 days from the date of his invoice. As per the circular, the mould is "supplied" by OEM to CM on FOC basis, so no payment of consideration can be expected for such transaction. However, insertion of second proviso to Rule 37(1) of the CGST Rules would allow the CM to take ITC even when the payment towards the value of supply and tax thereon on account of the amount being added in terms of Section 15(2)(b) of the CGST Act, i.e., the value of the mould, is not paid to the OEM within 180 days from the date of his invoice.

The Departmental Authorities may however contend that the amendment to Rule 37(1) is only meant to allow ITC of GST on the amortized value of mould in the component, in the hands of the OEM and not to allow the CM to take ITC of GST on the mould. Also, unlike the amendment to Rule 96(10) of the CGST Rules, relating to restriction in claiming refund of GST paid on export of goods right from 1-7-2017, the amendment to Rule 37(1) seems to be prospective. Therefore, retaining ITC on the amount added in terms of Section 15(2)(b) of the CGST Act, even when payment for such amount is not made within 180 days from the date of invoice, for the period prior to 13-6-2018 may act as a hanging sword of 'tax liability' along with continuously ticking 'interest' meter.

In our view, the artificial restriction of barring ITC under Scenario 2 is contrary to the general principles under which the GST operates and the same needs to be deliberated further by the authorities. If a particular contract requires CM to procure the mould, but the same has been "supplied" by the OEM, then one way to overcome the ITC restriction as per the circular would be for the OEM to generate a tax invoice for supply of mould to CM. This would be equivalent to reversal of ITC by OEM as contemplated in the circular.

As per the Westminster Principle, based upon the observations of Lord Tomlin in the case of **Inland Revenue Commissioners v. Duke of Westminster [(1936) AC 1]**, tax planning may be legitimate provided it is within the framework of

law. Payment of tax will satisfy the requirement of ITC reversal as contemplated in the circular and the CM can in-turn take ITC of GST on the mould and utilize such ITC towards payment of GST on supply of component, including the amortized value of the mould in the transaction value, in terms of Section 15(2)(b) of the CGST Act. This would ensure effective utilization of the ITC rather than it being lost in the process of reversal.

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Goods and Services Tax (GST)

Notifications and Circulars

Refund of ITC in case of inverted tax structure and refund to UIN agencies – Amendments in CGST Rules made retrospective: CBIC has revised the date of effect of certain amendments made earlier in the Central Goods and Services Tax Rules, 2017. According to the CGST 5th Amendment Rules 2018 issued under Notification No. 26/2018-Central Tax, dated 13-6-2018, amendment earlier made in Rule 89(5) of the CGST Rules on 18-4-2018, relating to refund of ITC in case of inverted duty/tax structure, has been made applicable retrospectively from 1-7-2017. Similarly amendment in Rule 95(3)(a), relating to refund to UIN agencies, which was made on 29-12-2017, is now applicable from 1-7-2017.

Unique Common Enrolment Number for transporters – 6th amendment of CGST Rules: Central Goods and Services Tax Rules, 2017 have been amended to provide a unique common enrolment number to a transporter who is registered in more than one State or Union Territory having the same PAN. According to the amendment in Rule 58 of the CGST Rules, a transporter who has obtained a unique common enrolment number, shall not be eligible to use any of his GSTIN for the purposes of the said Chapter XVI of the Rules providing for E-way Bill Rules.

Time limit to furnish return in Form GSTR-6 by ISDs extended till 31-7-2018: Ministry of Finance, by Notification No. 25/2018-Central Tax dated 31-5-2018, has extended the time limit for furnishing the return by an Input Service Distributor (ISD) in Form GSTR-6 for the months of July, 2017 to June 2018, till 31-7-2018. Previously, the last date to furnish the said return was 31-5-2018, for the period July 2017 to April 2018.

SEZs – Nature of supply of services thereto: Services of short-term accommodation, conferencing, banqueting, etc., provided to a SEZ developer or a unit are to be treated as inter-State supply. CBIC Circular No. 48/22/2018-GST, dated 14-6-2018 observes that Section 7(5)(b) of the IGST Act, 2017, being a specific provision relating to supplies to SEZ, will prevail over general Section 12(3)(c) of the said Act. It has also been clarified that benefit of zero rated supply is available if event management services, hotel accommodation services, consumables, etc., are received by SEZ developer/unit for authorised operations, subject to provisions of Section 17(5) of the CGST Act.

Refund on exports – Restrictions under Rule 96(10) clarified: Restriction under Rule 96(10) of the Central GST Rules, 2017 is not applicable to an exporter procuring goods from suppliers who have, in turn, received goods from registered

persons availing benefits of notifications listed under said Rule. According to CBIC Circular No. 45/19/2018-GST, dated 30-5-2018 the restriction is not applicable since the exporter did not directly procure these goods without payment of tax or at reduced rate of tax. It has been further clarified that restriction under said rule will also not apply in case of specified inward supplies of the exporter.

Refund in case of exports clarified: In case of export of services or supplies to SEZ, where taxpayer showed supplies in column 3.1(a) instead of in column 3.1(b) of Form GSTR-3B, refund can be filed for periods from 1-7-2017 to 31-3-2018, on common portal, if amount is not more than aggregate of tax/cess stated in columns 3.1(a), 3.1(b) and 3.1(c) of GSTR-3B. Circular No. 45/19/2018-GST, dated 30-5-2018 clarifying number of other issues relating to refund also clarifies that while exporters making zero-rated supplies under LUT / bond can claim refund of unutilised compensation cess, such refund of compensation cess in case of zero-rated supply on payment of IGST is not available. Refund of unutilised credit is also available on export of non-GST or exempted goods.

Refund of unutilised ITC to job workers in textile sector: Refund of unutilized input tax credit on account of inverted duty structure under Section 54(3) of the CGST Act, 2017 is available to the fabric processor, i.e. the job worker, even if the goods (fabrics) supplied are covered under Notification No. 5/2017-Central Tax (Rate). Circular No. 48/22/2018-GST, dated 14-6-2018 clarifies that in case of fabric processors, the output supply is the supply of job work service and not of goods (fabrics).

Inspection of goods in movement – Proof of inspection and time period for conclusion of proceedings: Rule 138C (2) of the CGST Rules, 2017 provides that where physical verification of goods being transported on any conveyance has been done during transit at one place no further physical verification of the said conveyance is to be carried out again, unless specific information relating to evasion of tax is made available subsequently. Since the forms are not available on the common portal at present, any action by one officer is not being intimated to the other. Therefore, CBIC has clarified that hard copies of the notices/orders issued in the specified forms may be shown by the transporter/registered person as proof of initiation of action by a tax authority to another tax authority. Circular No. 49/23/2018-GST, dated 21-6-2018 also amends earlier Circular No. 41/15/2018-GST regarding the number of days for completion of inspection proceedings. The proper officer has to now conclude the proceedings within 3 days and not 3 working days as stated in the earlier circular.

Moulds and dies provided free to unrelated component manufacturer is not 'supply': CBIC has clarified that moulds/dies owned by original equipment manufacturer and provided to component manufacturer (when the OEM and the component manufacturer are not related/distinct persons) on free of cost basis is not 'supply', and hence there is no requirement for reversal of input tax credit by OEM. Circular No. 47/21/2018-GST, dated 8-6-2018 also states that cost of such moulds is not includible in the value of supply by the component manufacturer. It however notes that if contract is for goods made by using moulds/dies belonging to component manufacturer, but same are supplied free by the OEM, amortised cost of such moulds and dies is includible.

PSLCs and RECs classifiable under Heading 4907 and taxable @ 12%: Priority Sector Lending Certificates (PSLCs) and Renewable Energy Certificates (RECs) and other similar documents are classifiable under Heading 4907. CBIC Circular No. 46/20/2018-GST, dated 6-6-2018, while modifying earlier Circular No.

34/8/2018-GST, clarifies that such certificates are liable to GST @ 12%. It also reiterates that duty credit scrips, however, attract Nil GST under S. No. 122A of Notification No. 2/2017-Central Tax (Rate).

Future contracts when liable to GST: CBIC has clarified that future contracts are in nature of derivatives and qualify as 'securities' as defined in Section 2(101) of CGST Act, and hence are not chargeable to GST. The FAQ answering 91 questions, however also states that future contracts having delivery option of underlying commodity/currency would be liable to GST as normal supply of goods. It is also clarified that if some service charges/fees or broking charges, etc., are charged, it would be a consideration for supply of service, chargeable to GST.

Farmers not liable to GST on leasing out their land: Ministry of Finance has clarified that support services to agriculture, forestry, fishing or animal husbandry are exempt from GST. The Press Release dated 28-5-2018 in this regard states that exempted support services include renting or leasing of vacant land with/without a structure incidental to its use. It clarifies that agriculturists are exempt from GST registration and that news reported in certain section of press that according to certain amendments coming into force from 1-6-2018, farmers would be required to pay GST on leasing out their land, is factually incorrect.

Ratio decidendi

Order for seizure of vehicle appealable and not covered under CGST Section 121: In a case involving seizure of vehicle, Calcutta High Court has held that order of seizure of vehicle is appealable under Section 107 of the CGST Act, 2017, and is not covered under exceptions provided under Section 121. The petitioner had relied on Section 121(b) which states that an order pertaining to the seizure or retention of books of accounts, register and other documents is not appealable. Observing that the petitioner has statutory alternative remedy available, the Court directed them to prefer an appeal before the designated appellate authority, either electronically or otherwise. [*Gati-Kintetsu Express Private Limited* v. *Assistant Commissioner* - 2018-VIL-260-CAL]

Valuation of goods supplied to branches – Option of both provisos of Rule 28 available: GST AAR, West Bengal has held that the applicant, an importer of sunglasses, etc., when supplies goods to its branches in States other than West Bengal, has the option to value its goods either in terms of first proviso (90% of price charged by recipient to unrelated customer) or the second proviso (value declared deemed as open market value) to Rule 28 of CGST Rules. Further, observing that second proviso to Rule 28 is applicable to both goods used in and for the course of business (non-trading stock), it was held that recipient is eligible to take ITC of amount of tax paid by supplier as mentioned in respective invoices or any other valid document. [*GKB Lens* – Order No. 07/WBAAR/2018-19, dated 30-5-2018, AAR West Bengal]

Works contract – Effect when supply and service contracts have cross-fall breach clause: GST AAR, West Bengal has held that the primary contract for ex-works supply of equipment and materials and the secondary contract for transportation, in-transit insurance, loading/unloading, delivery, etc. are linked by a 'cross fall breach clause'. The Authority in this regard noted that first contract cannot be executed independent of the second contract, and hence the price components of both are to be clubbed together to arrive at value of composite supply of works contract to be taxed at 18% GST. The applicant had contended that they are not Goods Transport Agency (GTA) and that transportation services provided by them are

exempt under Notification No. 9/2017-IT (Rate). [*EMC Ltd.* – Order dated 11-5-2018, AAR West Bengal]

Agreements from single tender notification not separate contracts: GST AAR, Karnataka has held that a single composite contract with 3 connected agreements for supply of materials, erection and civil works is indivisible and falls under Works Contract. Noting that the agreements were awarded in response to a single tender, it held that agreements were not separate contracts for supply of goods and services. AAR also held that applicant is not entitled to concessional rate of GST for providing services to State Government, as entity which awarded contract is registered under Companies Act and is a separate entity. It was noted that a statutory body, corporation or an authority created by the Parliament or a State Legislature is neither 'Government' nor a 'local authority'. [*Skilltech Engineers* – Advance Ruling No. KAR ADRG 3/2018, dated 21-3-2018, AAR Karnataka]

Transfer of entire business of one unit is supply of service and covered by exemption: GST AAR, Karnataka has held that sale of independent manufacturing unit as a whole along with the transfer of all assets and liabilities to buyer is in the nature of transfer of going concern which constitutes supply of service. It noted that said transaction is covered under Sl. No. 2 of Notification No. 12/2017-CT (Rate) attracting NIL GST. The findings were based on admission of applicant as no documentary evidences were produced and the applicant asserted that business will continue in new hands with regularity and permanency. [*Rajashri Foods Pvt. Ltd.* – Order dated 23-4-2018, AAR Karnataka]

Renting of space different from providing warehousing service: GST AAR, Gujarat has held that mere renting of space cannot be said to be in the nature of service provided for storage or warehousing of goods. Taking note of the fact that invoice issued by the applicant was for 'godown rent', the service was held to be covered under 'rental or leasing services involving own or leased non-residential property' (SAC 997212), taxable @ 18%. The applicant was taking warehouse/godown space from government/private parties and providing service of warehouse/space on rent to their customers for storing imported agricultural commodities. [*Rishi Shipping* - 2018-VIL-65-AAR]

Printing of content on customer's request is supply of service: Activity of printing of contents from media on customer's requirement is supply of service and not goods, and classifiable under SAC 9989. Relying on Supreme Court's judgement in *Rainbow Colour Lab,* GST AAR West Bengal has held that such supply is taxable at 6% CGST (12% GST) under Sl. No. 27(i) of Notification No. 11/2017-Central Tax (Rate). The Authority in this regard noted that printed material had no value as independent goods, the matter was not pre-printed, and that there was no transfer of ownership which is an essential condition for supply of goods. [*Photo Products Co.* – Order No. 06/WBAAR/2018-19, dated 30-5-2018, AAR West Bengal]

GST leviable on 'Abhivahan Shulk' and exempted on 'Marg Sudharan Shulk': GST AAR, Uttarakhand has held that no GST is leviable on *Marg Sudharan Shulk* charged by the applicant, Divisional Forest Officer, Dehradun for using forest road and used for road construction and maintenance. It noted that said charges are nothing but toll charges which are included in the list of exempted services. On the other hand *Abhivahan Shulk* was held to be charged as a consideration for carrying forest produce through road or water. The said service was held to be classifiable under SAC 9997 as 'other services' and taxable at 18% GST. [*Divisional Forest Officer, Dehradun* - 2018-VIL-42-AAR]

Implants for joint replacements taxable @ 5%: GST AAR, Kerala has held that implants for joint

replacements fall under HSN Code 9021 31 00 and are covered under S. No. E(9) of List 3 of Entry 257 of Schedule-I of Notification No. 1/2017-CT (Rate) attracting GST @ 5%. Rule 3 of General Rules of Interpretation of First Schedule to the Customs Tariff was relied on to reject coverage under S. No. 221 of Schedule-II to the notification which is a general entry covering artificial parts of body. The applicant had also contended that Sl. No. 578 in Customs Notification No. 50/2017-Cus. has similar entry providing for nil BCD. [*Veena Chemicals* – Order No. CT/4683/2018-C3, dated 29-5-2018, AAR Kerala]

Roof ventilators powered by wind and used for ventilation attract 18% tax: GST AAR, Telangana has held that Roof Ventilators, used for ventilation in industries, warehouses, etc. fall under Schedule-III of Notification No. 1/2017-CT (Rate) and attract GST @ 18% (CGST 9% + SGST 9%). The Authority in this regard noted that primary use of said goods is to provide ventilation by continuous extraction of air from the building. Relying on trade parlance and General Rules for Interpretation, AAR rejected the contention of the applicant that goods are classifiable as windmills as they are powered and function with the flow of wind. [*Sammarth Overseas & Credits* - 2018-VIL-46-AAR]

UK VAT – Negotiation of discount is supply of service: In a case where appellant negotiated and received discounts from manufacturers on goods supplied to X, and paid the latter a proportion of the amount received from the manufacturer, UK Upper Tribunal (Tax and Chancery Chamber) has held the same to be supply of service. It was held that the consideration in the transaction was the amount retained by the assessee when paying to X, part of the amount received from the manufacturer. The Tribunal in this regard rejected the plea that X made supplies to assessee inasmuch as it agreed to transfer its right to claim a discount in exchange for payments made to them. The assessee in the case was in the business of managing hotels, etc., and negotiated discounts with the manufacturers in respect of certain goods for own consumption and for other persons (X). [*Redwood Birkhill Ltd.* v. *Commissioner, HMRC* - Appeal No. UT/2017/0090, decided on 11-6-2018, UK Upper Tribunal (Tax and Chancery Chamber)]

UK VAT – Right to deduct input tax in case of incorrect invoice: Relying upon CJEU Judgement in case of *Mahageben*, UK's First-Tier Tribunal (Tax Chamber) has held that absence of actual or constructive knowledge of fraud on taxpayer's part is sufficient to give rise to right to deduct input tax shown on the invoice even if information in relevant invoice is incorrect. The Tribunal was of the view that the fact that the invoice did not correctly describe the goods or services supplied (because there was no actual supply) cannot be a bar to the taxpayer's deducting input tax. [*Infinity Distribution* v. *Commissioner, HMRC* – Appeal No. MAN/2006/0642, decided on 1-5-2018, UK First-Tier Tribunal Tax Chamber]

EU VAT – Exemption to be opted at the time of commencement of activity: CJEU has upheld denial of exemption to a small enterprise who did not exercise its right to opt for application of exemption scheme at the time when it declared commencement of economic activities. The Hungarian law was hence held as not contrary to the EU law. The Court of Justice in this regard relied on principles of legal certainty and fiscal neutrality. It observed that if a taxable person is allowed to opt for an exemption scheme after the time limit, it would confer on them undue competitive advantage. [*Dávid Vámos* v. *Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* – Order dated 17-5-2018 in Case C-566/16, CJEU]

Customs

Notifications, and Circulars

India set to increase import duty on certain goods from USA: Ministry of Finance by Notification Nos. 48 and 49/2018-Customs dated 20-6-2018 has amended First Schedule to Customs Tariff Act and revised the jumbo exemption notification, on being satisfied that import duty leviable on goods under Chapter 7, 8, 28, 38, 72 and 73 should be increased immediately on imports from USA. Effective from 4-8-2018 this increased rate of duty will be levied on commodities such as almonds fresh and dried, shelled almonds, apples fresh and other diagnostic reagents. The increase in BCD has been made in response to additional duty being imposed by USA on aluminium and steel articles from India and other countries. Earlier, India, on 13th of June had notified to the WTO its revised communication relating to its decision to suspend concessions and other obligations in connection with the safeguard measures taken by USA with effect from 23-3-2018.

Customs Regulations for audit at premises of importer/exporter replaced: Ministry of Finance by Notification No. 45/2018-Customs (N.T.) dated 24-5-2018 has replaced the On-site Post Clearance Audit at the Premises of Importers and Exporters Regulations, 2011 with the Customs Audit Regulations, 2018. Defining the term 'auditee', the new regulation substantially expands scope of person who can be audited. While the proper officer has to mandatorily inform outcome of audit to auditee, audit at premises of auditee is to be completed within 30 days, extendable for 30 days by Commissioner. Audit Officers from the Department can also take assistance of professionals.

Postal export of goods through e-commerce – New procedure prescribed: All exporters holding a valid IE Code have been permitted to export goods (through E-Commerce) through Foreign Post Offices, by filing a Postal Bill of Export (PBE) under new Export by Post Regulations 2018. CBIC Circular No. 14/2018-Cus., dated 4-6-2018 prescribing elaborate procedure for filing manual PBE by firms and companies (other than natural persons), observes that such exporters are eligible for zero rating of exports. Further, according to Circular No. 18/2018-Cus., dated 13-6-2018, CBIC has permitted use of PBE-II in case of multiple shipments addressed to multiple consignees. The new Regulations have come into effect from 21-6-2018.

E-sealing mandatory from 1-8-2018 for movement of goods to/from warehouses: RFID sealing is mandatory for transport of goods for deposit in warehouse as well as in case of removal therefrom, from 1-8-2018. According to CBIC Circular No. 19/2018-Cus., dated 18-6-2018, RFID one-time bolt seal or RFID wire cable seal has to be used depending upon the vehicle. This circular also prescribes procedure and data elements to be captured for removal from customs station to bonded warehouse, for export, or for removal to another warehouse. It may be noted that CBIC has already prescribed mandatory RFID self-sealing of containerised export cargo.

EOU – DTA clearance of specified services covered as 'goods': Sale in DTA by EOU in respect of services classified under Heading 9988 and 9989 under GST are covered under Para 6.08(a) of Foreign Trade Policy. According

to amendment by Notification No. 10/2015-20, dated 7-6-2018, such services covered in LOP/Para 9.31 of FTP as manufacturing of goods, will continue to be covered under Para 6.08(a) dealing with goods other than by gems and jewellery units. Amendment in Para 6.08(b) in this regard also states that at the time of DTA clearance, applicable GST and compensation cess would apply.

SFIS/SEIS benefit available to actual service provider and not aggregators: DGFT has clarified that benefit under Served from India Scheme (SFIS) or Service Exports from India Scheme (SEIS) is available to actual exporters providing port related services and not to ports who are aggregators of services. Policy Circular No. 6/2018, dated 22-5-2018 states that ports would be eligible to the benefit for services exclusively rendered by them and cannot claim benefit in respect of foreign exchange earnings simply routed through them. Regional authorities have been directed to ensure that there is no double claim.

Further, referring the said circular, DGFT has also clarified that service providers like steamer agents are also entitled to the benefit of SEIS for services exclusively rendered by them and for which foreign exchange earnings are received and retained by them. Policy Circular No. 8, dated 21-6-2018 has been issued in this regard.

Digital Signature not required for online/digital payment through e-MPS: To provide ease to exporters/importers, DGFT has removed the requirement of Digital Signature Certificate for making payments for miscellaneous applications through e-MPS. E-MPS was launched in March this year to ease and promote online payments for miscellaneous applications, however, exporters were required to use DSC (IEC embedded) to make payments. Now by using PAN details, exporters or importers can login in e-MPS for making online/digital payment, and there is no requirement of having digital signature.

MEIS application for project exports – DGFT notifies procedure: DGFT has issued elaborate guidelines to solve the problem faced by project exporters in filling of shipping bills under Chapter 98 for the purpose of claiming MEIS benefit. At present, higher incentive is available to project exports but exporters are only able to use specific HS codes. As per the guidelines NIC will create an 'identification tag' and exporter will submit online application and submit few documents to DGFT HQs. NIC will revise the application on instructions from DGFT and RA will issue duty credit scrip after change is communicated by NIC.

DFIA exports – Single application required for exports from any EDI port: Exporters have been allowed to file single DFIA application for exports made from any EDI port. However separate applications are required to be filed for exports made from each non-EDI port. According to Notification No. 13/2015-20, dated 20-6-2018 amending Para 4.29(vi) and (vii) of the Foreign Trade Policy 2015-20, separate application is to be made for EDI and non-EDI ports. It may be noted that hitherto, exports under DFIA were required to be made from a single port as mentioned in Para 4.37 of Handbook of Procedures.

IGST refund on exports – Correction facility and officer interface: For refund of IGST on exports, CBIC has extended the facility of officer interface to shipping bills filed up to 30-4-2018. This interface, in order to resolve invoice mismatches, was earlier available for shipping bills filed till 28-2-2018. Further, a correction facility is now available for cases involving mismatch between GSTIN of entity mentioned in shipping bill and the one filing GSTR-1/GSTR-3B. As per Circular No. 15/2018-Cus., dated 6-6-2017, this facility would be available where GSTIN of both entities are different but PAN is same.

Duty free import of certain inputs in specified sectors, restored: Entitlement for duty free import of certain sector specific inputs, which was available in Chapter 1B of Foreign Trade Policy 2009-14, has been re-inserted in Chapter 1 of FTP 2015-20 with effect from 1-4-2015. Notification No. 9/2015-20, dated 28-5-2018 inserting Para 1.41 however states that term 'Duty' shall mean Basic Customs Duty with effect from 1-7-2017. These special focus initiatives for handlooms, handicraft, leather, marine, sports goods and toys sectors will be provided according to specified percentage of exports made in preceding financial year.

FTP Appendix 3A – Scope of word 'Duty' clarified: DGFT has clarified that the word 'Duty' appearing in Sl. No. 3 of Appendix 3A of Foreign Trade Policy 2015-20 has to be read as Basic Customs Duty (BCD) and not all customs duties (BCD + IGST). Appendix 3A of FTP 2015-20 provides list of items which are not allowed for import under Export From India Schemes (MEIS and SEIS) under Chapter 3 of the FTP, unless otherwise specified. Sl. No. 3 of said Appendix covers all spices with a 'duty' of more than 30% under Chapter 09 of ITC (HS) Classification (except cloves). Policy Circular No. 7/2015-20, dated 23-5-2018 has been issued for this purpose.

Ratio decidendi

FTP benefit available even if Customs department delays exemption notification: Relying on Supreme Court judgement in *State of Punjab v. Nestle India*, CESTAT Mumbai has held that failure of Customs authorities to issue notification on time cannot be held against assessee when Foreign Trade Policy was already amended. It noted that importer was issued EPCG authorization prescribing 3% rate of duty, though Customs Department delayed issuance of corresponding notification revising duty from 5% to 3%. Tribunal also observed that Ministry of Finance was required to act in tandem with DGFT and Ministry of Commerce. [*Commissioner* v. *Chiripal Industries* – Order No. A/86379 / 2018, dated 16-5-2018, CESTAT Mumbai]

Job work imports – Benefit not deniable to imports made not free of cost: In a case where the assessee had imported human hair for processing and re-export on payment of security as agreed in MoU, CESTAT Chennai has allowed the benefit of Notification No. 32/97-Cus. The department had denied the benefit alleging that the goods were not supplied free of cost by foreign supplier. The Tribunal however was convinced that the intended purpose of the notification, including prescribed value addition, was complied with and there was no allegation of any diversion of imported goods. It was held that the larger substantive benefits of said notification should not be denied for procedural formalities. [*Hritik Exim* v. *Commissioner* - Final Order No. 41658 / 2018, dated 24-5-2018, CESTAT Chennai]

Project imports – Registration by importer not direct party to contract and classification under water supply project: In a dispute involving classification of imports under water supply project or irrigation project, CESTAT Mumbai has allowed benefit of Notification No. 14/2004-Cus. The imports were held to be covered under water supply project observing that though entire project may be of irrigation, but the disputed parts were related to movement of water from one point to another. The Tribunal rejected department's contention that goods are covered under irrigation project as are part of irrigation project. Further, observing that Project Import Regulations, 1986 do not mandate that importer should have entered into contract with the foreign supplier, the Tribunal rejected department's reliance on the Customs Manual. It

was held that the project can be registered under the regulations by the importer even if the assessee-appellants are not a direct party to import contract. [*Commissioner* v. *Hindustan Construction* - Order No. A/86528-86529/2018, dated 25-5-2018, CESTAT Mumbai]

Show cause notice by DRI – Tribunal to decide dispute and not remand matter for re-adjudication after decision by SC: Delhi High Court has set aside CESTAT Order, which in turn had set aside the Order-in-Original, with the directions to await the decision of the Supreme Court in appeal preferred in the case of *Mangali Impex.* The issue involved jurisdiction of DRI officers to issue show cause notices. The High Court observed that the Tribunal should have instead decided the case on merits to prevent causing harassment to assessee and inconvenience to department as entire adjudication proceeding has to be undergone again. [*Commissioner* v. *Arif Khichi* - CUSAA 16/2018, decided on 23-5-2018, Delhi High Court]

SAD refund not deniable even if words in invoice differ from that prescribed in Notification: Karnataka High Court has held that even if Notification No. 102/2007-Cus., prescribes words which should be included in an invoice to avail benefit of refund of SAD, the benefit cannot be denied if invoices contain other words, conveying the same intention. The High Court in this regard observed that non-declaration of SAD in commercial invoice is an affirmation that no Cenvat Credit was available, thus satisfying the condition in the notification. Allowing refund, it was also observed that the said condition in the notification was procedural. [*Commissioner* v. *Schneider Electric IT Business* – CSTA No. 8 of 2015, decided on 5-6-2018, Karnataka High Court]

Central Excise and Service Tax

Circulars

'Place of removal' in Central Excise Section 4 clarified: Considering various Supreme Court judgements on 'place of removal', CBIC has, by Circular No. 1065/4/2018-CX, dated 8-6-2018, rescinded Circular No. 988/12/2014-CX and omitted clause (c) of para 8.1 and para 8.2 of Circular No. 97/8/2007-CX. It observes that 'place of removal' is required to be determined with reference to 'point of sale' with the condition that place of removal (premises) is to be referred with reference to the premises of the manufacturer, except in case of FOR sales. Further citing Apex Court judgements in cases involving FOR sales, and Cenvat credit on GTA service, it states that any new show cause notice issued on the basis of this circular should not invoke extended period of limitation as the issue is in the nature of interpretation of law.

Monetary limit for departmental appeals before Commissioner (Appeals): CBIC has introduced monetary limit for filing appeals to Commissioner (Appeals). The new threshold limit for such departmental appeals will be Rs. 250,000/-. According to Instruction F. No. 390/Misc/116/2017-JC, dated 25-5-2018, this limit is applicable only for matters under legacy Central Excise and Service Tax laws and will also apply to cases currently pending before Commissioner (Appeals). Withdrawal process in respect of such pending cases will be according to current practice being followed in withdrawal of departmental cases from CESTAT and High Court.

Ratio decidendi

Pre-deposit under Excise Section 35F for second appeal includes deposit made for first appeal: Delhi High Court has held that for second appeal before the CESTAT, assessee is required to deposit 10% of duty/penalty as confirmed by the first appellate authority which is inclusive of 7.5% pre-deposit made for the first appeal. Quashing CESTAT Circular dated 27-4-2017 based on a Larger Bench decision, it noted that earlier deposit will not get obliterated or become inconsequential. The Tribunal was of the view that it would amount to adding words to the plain and unambiguous provision if it is stipulated that 10% pre-deposit will be over and above 7.5% pre-deposit made at the time of the first appeal. [*Santani Sales Organisation* v. *CESTAT* - Writ Petition (Civil) No. 4551/2017, decided on 31-5-2018, Delhi High Court]

Cenvat credit available to insurance firm on sum paid for repair of insured vehicle: In a case where the assessee (insurance company) had paid for repairs of the insured vehicle to the Authorized Service Stations, CESTAT Chennai has held that the insurance company would be the service recipient though the beneficiary would be the owner of the vehicle. Cenvat credit was hence allowed on such services utilised for provision of insurance service. Further, CESTAT was of the view that Cenvat credit was available even though the invoice was not in favour of the assessee (insurance company). The defect was held to be a procedural infraction further observing absence of any record to suggest that the owner of the vehicle had also made claim for Cenvat credit. [*United India Insurance* v. *Commissioner* - Final Order No. 41708/2018, dated 1-6-2018, CESTAT Chennai]

Supplementary invoice - Interest on delayed duty payment when not payable: CESTAT Delhi has set aside demand of interest on delayed payment of Central Excise duty in a case involving supplementary invoices due to subsequent price escalation. The Tribunal observed that both the parties were not aware of escalated price or possibility of escalation at the time the goods were removed. Distinguishing Apex Court judgment in *SKF India*, it was held that duty was not short-paid. The Tribunal was of the view that expression 'ought to have been paid' in Section 11AB of the Central Excise Act, 1944 would mean the time when the price is agreed by seller and buyer. [*Indo Alusys Industries* v. *Commissioner* - Final Order No. 52003/2018, dated 22-5-2018, CESTAT Delhi]

Cenvat credit – Bar of limitation when not applicable: Right available under Cenvat Rule 3(2) cannot be extinguished by making reference to Rule 4(1). Rejecting department's plea of bar of limitation in availing Cenvat credit, CESTAT Delhi has allowed credit to an assessee who was availing SSI exemption and took credit of inputs on coming out of exemption. The Tribunal observed that there was no dispute on entitlement and that right to avail credit arose only on crossing exemption limit. [*Sanwariya Tiles Pvt. Ltd.* v. *Commissioner* - Final Order Nos. 52101-52102/2018, dated 1-6-2018, CESTAT Delhi]

Cenvat Credit not deniable applying any thumb rule/formula: CESTAT New Delhi has held that restricting Cenvat Credit on the basis of thumb rule/formula (ratio of output taxable service to total expenditure incurred) as adopted by the department has no legal basis. The Tribunal was of the view that credit availed under Cenvat Rule 2(l) cannot be disallowed by taking recourse to any such formula. It noted absence of grounds on record to allege that credit availed was in respect of ineligible input services. CESTAT also held that insertion of Explanation 3 in Cenvat Rule 6(1) on 1-4-2016 was not retrospective. [*ONGC* v. *Commissioner* - Final Order No. 51950/ 2018, dated 22-5-2018, CESTAT Delhi]

Activity before giving land ownership right is self-service: In a case involving non-payment of service tax by land owner on sale of his share of flats received in lieu of transfer of land to the developer, CESTAT Delhi has set aside penalty observing absence of intention to evade. Tribunal rejected department's view that since land owner had to get the drawing/plan approved, he was liable as developer and hence non-payment amounted to suppression. It observed that any act done for getting sale consideration and the sale finalized, before parting with ownership right in land, will be a self-service. [*Subhash Chand Surana* v. *Commissioner* - Final Order No. 52002/2018, dated 22-5-2018, CESTAT Delhi]

Cenvat credit on scrap re-purchased from first stage dealer: Dealer is one who purchases goods from manufacturer, and not limited to somebody who only purchases goods 'manufactured' by the manufacturer. CESTAT Chennai while holding so has allowed Cenvat credit on scrap earlier cleared as such to first stage dealer by importer which was later resold back to assessee-importer. The department had contended that invoices issued by first stage dealers under which credit was transferred back were not valid documents as first stage dealer could not avail credit on scrap removed as such. [*Vignesh Alloys Private Ltd*. v. *Commissioner* - Final Order No. 41291/2018, dated 13-4-2018, CESTAT Chennai]

Exposure fee paid to foreign banks for availing ECBs is 'interest': CESTAT Mumbai has held that exposure fee paid to US Exim Bank is not liable to service tax as the same is not with respect to any service provided by the bank. The assessee had discharged service tax liability on fees, etc., paid to agencies outside India from whom ECBs were availed to set-up mega power project, except on exposure fee considering it to be part of interest. The Tribunal in this regard observed that exposure fee is nothing but manner of payment of interest for which rate is arrived considering various factors associated with borrowings. [*Commissioner* v. *Sasan Power* - Order No. A/86503/2018, dated 22-5-2018, CESTAT Mumbai]

Manufacture of moulds for use within factory not covered under Design service: CESTAT Kolkata has set aside the demand of service tax in a case involving preparation of moulds based on designs and mould preparation charges received from customers, where such moulds were further used in manufacture of forgings within the factory for those customers. The Tribunal held that levy of service tax under category of Design service under Section 65(105)(zzzzzd) of the Finance Act, 1994 was not justified, as the activity was of manufacture of moulds which werse liable to Central Excise duty if cleared out of factory. [*Ramkrishna Forgings Ltd.* v. *Commissioner* - Order No. FO/ST/A/75921/2018, dated 2-5-2018, CESTAT Kolkata]

Classification of vehicle designed to carry both goods and passenger: Applying common parlance test, CESTAT Hyderabad has held that vehicle 'Mahindra Camper' is classifiable under Heading 8704 and not Heading 8703 of the Central Excise Tariff. It observed that the vehicle is not principally designed for transportation of passengers but for transportation of goods. Relying on Apex Court decision in *Telco,* Tribunal noted that the load carrying capacity of the vehicle was more than its passenger capacity. It also observed that vehicle was registered as goods vehicle by the transport authorities. [*Mahindra & Mahindra* v. *Commissioner* - Final Order No. A/30430-30437/2018, dated 17-4-2018, CESTAT Hyderabad]

VAT

Ratio decidendi

Tamil Nadu VAT – ITC not to be reversed for non-payment of tax by seller: Madras High Court has rejected the contention of the Revenue department that input tax credit will not be available to the assessee (buyer) when their selling dealers had not paid the tax collected from the petitioner to the Government Treasury. Observing that this cannot be a reason for reversing the Input Tax Credit, the Court noted that there was no default committed by the buyer-petitioner. Revenue department's contention that decision in the case of *Sri Vinayaga Agencies*, was applicable only to the parties in that litigation, was also rejected by the Court holding that *ratio decidendi* of a particular judgment or order has to be taken note of. [*Elite Furniture Mart* v. *Assistant Commissioner* - 2018-VIL-255-MAD]

'Samosa' classifiable as cooked food and not as 'Namkeen': High Court of Uttarakhand has held that, *Samosa* is classifiable as cooked food, and not as *Namkeen*. The product was hence held liable to tax @ 8% for the first six months (from 1-4-2005 to 30-9-2005), and @ 4% for next six months (from 1-10-2005 to 31-3-2006), as per Section 3 of the U.P. Value Added Tax Act, 2008. The Court in this regard observed that it is unlikely that if a person asks for *namkeen* he would be offered *samosa*. It noted that *samosa* satisfied all requirements of cooked food, being consumable without any further act. [*Sarva Shri Neeraj Misthan Bhandar* v. *Commimssioner* - [2018] 67 GST 17/92 taxmann.com 162 (Uttarakhand)]

US Sales Tax – Out-of-State online retailers liable to sales tax on goods sold within State: The US Supreme Court has held that States can require out-of-State online retailers to collect and remit sales tax on goods shipped to the State, if the sellers in a given year satisfy other threshold conditions of delivery of goods or services within the State. The Apex Court by ratio of 5:4, overruled its prior decisions and observed that physical presence rule was incorrect and unfair. It was held that substantial nexus with the taxing State is enough in the current age of virtual connections. [*South Dakota* v. *Wayfair* – Decision dated 21-6-2018, US Supreme Court]

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