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Contents

Articles

Breaking the credit chain – An avenue to boost revenue? 2

Burden of unified registrations for EOUs and DTA units 4

Goods & Services Tax (GST).... 6

Customs 12

Central Excise & Service Tax . 14

Value Added Tax (VAT) 16

March
2019

Articles

Breaking the credit chain – An avenue to boost revenue?

By **Brijesh Kothary**

The Goods and Services Tax Council, in its 34th meeting held on 19-3-2019 recommended certain measures to streamline implementation of lower effective rates of GST for real estate sector. In its previous meeting, the GST Council recommended that from 1-4-2019, the effective tax rate of tax for affordable housing properties would be 1% and that 5% would be applicable on residential properties outside the affordable segment.

While the home-buyers may be pleased with an apparently lower rate of GST, the reality may be different considering the conditions put forth for availing the reduced tax rate. The conditions recommended by the GST Council for applicability of new effective tax rates are that:

- Input tax credit (ITC) shall not be available, and
- 80% of inputs and input services shall be purchased from registered persons. On shortfall of purchases from 80%, tax shall be paid by the builder @ 18% on reverse charge (RCM) basis. However, tax on cement purchased from unregistered person shall be paid @ 28% under RCM, and on capital goods under RCM at applicable rates.

The above conditions would bar suppliers from taking ITC on goods and services procured by them. When the inputs and input services do not suffer tax when procured from unregistered persons, the builder would be obliged to pay such tax under RCM effectively recouping the ITC involved in such cases. It appears that the government is targeting to make up for the revenue shortfall on account of reduction in the rate of tax on outward supplies by collecting non-creditable tax from the recipient, thereby breaking the chain of ITC.

Precedent on restricting ITC

A decision to restrict availment of ITC was taken by the GST Council in the 23rd GST Council meeting with regard to the supplies made by restaurants chargeable to GST @ 5% without the benefit of ITC. The principal reason for this decision seems to be that the benefit of ITC was not being passed on by restaurateurs to the consumers. The concerns raised by the Finance Minister on this aspect, leading to the recommendation of reducing the rate of tax by restricting the benefit of ITC, is extracted from the Minutes of the GST Council Meeting, hereunder:

"65.23. The Hon'ble Chairperson stated that the organized chains of restaurants were factoring the input tax credit and transferring its benefits to the consumers, but standalone restaurants had not transferred the benefits of input tax credit to the consumers. The anxiety and keenness shown by these restaurants to permit input tax credit was a method of profiteering by them without benefiting the consumers. He added that sectors like automobile had passed on the benefit of input tax credit but restaurants despite having an advantage of 7-8% input tax credit, had not reduced the prices and this sector had brought bad name to GST."

Considering industry's reluctance to reduce prices, the GST Council appears to have gone by a popular saying in Hindi '*जब घी सीधी उंगली से न निकले तो ऊँगली टेढ़ी करनी पड़ती है*", which implies 'we will either find a way, or make one!' While the GST Council has taken a decisive stand of regulating the price of supplies made by restaurateurs and caterers by reducing the rate of tax, the industry is still struggling to find their way out for the period where they have availed ITC.

Role of NAA

The Government had taken a proactive step by incorporating anti-profiteering measure in GST law to ensure that any reduction in rate of tax on any supply of goods or services or the benefit of ITC is passed on to the recipient by way of commensurate reduction in prices. However, lack of lucidity regarding the methodology and procedure for passing on the benefits to the recipient by way of commensurate reduction in prices, seems to have diluted the concept of anti-profiteering. In fact, some of the members in real estate and restaurant business are even held guilty of profiteering by the National Anti-Profiteering Authority. Some of the companies seem to have chosen to approach the courts seeking judicial approval to the stand taken by them to withhold price reductions.

Jurisprudence

It may be pertinent to note that the concept of restricting ITC is not new to the tax statutes in India. Several States had imposed restrictions on ITC in cases of inter-State stock transfers and inter-State sale of goods to unregistered dealers under the Value Added Tax regime. The Supreme Court in the case of *TVS Motor Company Ltd*. v. *State of Tamil Nadu* [2018-VIL-29-SC] held that the scheme of ITC is a concession and not a vested right, and that it was open to the legislature to impose such restrictions.

International perspective

The concept of breaking the chain of input tax credit is also prevalent in the tax laws of other countries. The Australian GST law has a unique concept called 'Input Taxed Supplies', where the supplier can neither charge GST, nor can he recover any of the GST incurred in relation to that supply, as credit. This concept is different from GST-free supply (i.e., exempt supply). It may not be appropriate to say that no GST is payable on input taxed supplies, as the hidden element of GST at input stage is added to the cost of supplies made. Some of the categories of input taxed supplies under Australian GST law are financial supplies, residential premises, precious metals, canteens, etc.

In UAE, Profit Margin Scheme is applicable on second hand goods, wherein the second-hand goods dealer pays VAT on the difference between sale price and the purchase price, without availing the benefit of input tax. The concept of margin scheme is also available in Indian GST law. The European Union VAT Rules are simplified in some EU countries by providing Flat-Rate Scheme, wherein the tax is calculated by multiplying the VAT flat rate on the VAT inclusive turnover, without allowing input VAT. This concept is similar to the composition scheme in Indian GST law.

Impact of recent amendments

Some of the recent changes (effective from 1-4-2019) in GST regime by way of introduction of composition scheme for suppliers of service (or mixed suppliers) as per Notification No. 2/2019-Central Tax (Rate) dated 7-3-2019 and increase in turnover limit for existing composition scheme by Notification No. 14/2019-Central Tax dated 7-3-2019, can be regarded as moves to enhance the ease of doing business, and in the process breaking the chain of ITC. Similarly, Notification No. 10/2019-Central Tax, dated 7-3-

2019 granting higher exemption threshold limit for supplier of goods is aimed at reducing the compliance burden of small taxpayers at the cost of loss of ITC for registered persons.

The overall impact of the above schemes is that the cost of supply to an ultimate consumer would be less than it would be under the normal taxation system and more to a registered person due to hidden GST component in the cost of supply which is not available as credit.

Parting remarks

Eliminating cascading effect of taxes and allowing seamless flow of ITC were the primary reasons for us to migrate to GST regime. Breaking the chain of ITC would take us back to the erstwhile regime. Blocking or restricting ITC at various stages of supply chain may help the Government meet its revenue targets as every supplier would end up foregoing ITC and pay tax on the sale price rather than on the value added by him. This practice should therefore be implemented selectively in exceptional cases and not as a general rule.

The supplier is the best judge to determine the price of his products and services. The principles of fiscal neutrality, proportionality and the protection of legitimate expectations must be interpreted in favour of the supplier to assess their eligibility to avail ITC, particularly when all the conditions prescribed under law are complied with. If the departmental statistics or data analytics reveal that the ITC is not being efficiently utilised in a particular sector, then the option must be given to the industry to choose between paying lower rate of tax without the benefit of ITC or a higher rate of tax with the benefit of ITC.

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Burden of unified registrations for EOUs and DTA units

By **Anupama Ravindran**

This article intends to highlight certain issues with regard to restrictions on refund of integrated tax paid on exports, for multiple business units having a single GST registration.

Section 54 of the CGST Act states that any person claiming refund of any tax may make an application before the expiry of two years from the relevant date. Explanation to Section 54 states that “refund” includes refund of tax paid on zero-rated supplies of goods or services or both. Further, it is clarified vide the Explanation that “relevant date” means, in case of goods exported out of India, date of loading of goods.

Rule 96 of the CGST Rules provides procedures required for claiming such refund. It enables refund of integrated tax paid on goods or services that are exported out of India. The rule states that the shipping bill filed by the exporter of goods shall be deemed to be an application for refund of integrated tax paid on export of goods. Refund is granted subject to a few conditions as prescribed under the rule.

Rule 96(10) of the CGST Rules states that persons claiming refund of integrated tax paid on export of goods or services should not have received supplies on which the benefit of Notification No. 48/2017-CT has been availed,

that is, should not have received supplies under deemed export benefit.

Further, Rule 96(10) of the CGST Rules states that person claiming refund of integrated tax paid should not have taken benefit under Notification No. 78/2017-Cus, which is exemption for imports by EOUs, or benefit under 79/2017-Cus, which is exemption for imports against advance authorization.

That is, in effect, if the registered person has received any supplies under benefit of "deemed exports" or customs notification providing exemption from integrated tax and cess to Export Oriented Units and Advance Authorization holders, then the registered person is not eligible to claim refund of integrated tax paid on exports. The intention for the above restriction may be that if the person has received deemed exports supplies or has imported under customs exemption notification for EOU/AA holders, then refund of integrated tax paid on exports by utilizing ITC should not be available as refund.

The Rule can be interpreted as provided herein:

Rule 96(10) states that the persons claiming refund of integrated tax paid on exports of goods or services should not have

(a) Received supplies on which the benefit of deemed exports benefit has been claimed
(b) Availed exemption of duties of customs for imports by EOU, or Advance authorization holders.

The rule does not carve out an exception for persons who have achieved the export obligation in respect of AAs or positive NFE in case of EOUs, as the case may be, and subsequently are claiming refund of integrated tax paid on a future export.

The rule also does not make an exception for exports of different business units under same registration.

The rule does not also carve out an exception for time elapsed after which such exemption has been claimed. That is, if the benefit of exemption is claimed today, then, according to the said rule, the person is not eligible anytime in the future to claim the refund.

Worse still, the rule does not carve an exception even if the EOU unit has exited from the EOU on payment of duties. Since the rule reads that the person claiming refund of integrated tax paid on exports of goods or services should not have received supplies under deemed export benefits or customs exemptions, even if the EOU does not exist as of today, the registered person cannot still claim refund.

Consider a scenario where a registered person has multiple units within the same state, one unit being a DTA, and another unit being EOU or an Advance Authorization holder, wherein the DTA unit brings 90% of total revenue. This arrangement could be because the local market requirement is much larger than the export market, and DTA is handling local market and EOU is handling exports.

In this case, the registered person is not eligible to claim refund under Rule 96(10) of the integrated tax paid on exports even for the DTA unit under Rule 96. The DTA unit may prefer to pay integrated tax on exports to utilize large chunk of unutilized credit. However, although the DTA unit maintains a separate book of accounts, the restriction still applies, since Rule 96(10) states that "person" claiming refund should not have "received supplies" under deemed export benefit or "availed the benefit" of customs exemptions.

It may be noted that, GST provisions allow for multiple units, including DTA and EOU, within

the same state to be registered under one GST registration. Therefore, the DTA also bears the brunt of the credit lying in the books, when actually the DTA unit has not received goods under the exemption notification.

There is scope to amend Rule 96(10) of the CGST Rules to allow these types of cases, and to read the benefits and restrictions applicable for each type of unit separately.

The alternative is rather simple and will achieve a workaround to the said rule. If the person who has claimed deemed export benefit or exemption as claimed above, and also maintains separate books of accounts, can very well split the registration to separate the DTA unit, from the unit which claims the exemption. In this case, the DTA unit is eligible to claim the refund from the separated registration.

Would this have been the intention of the restriction on refund? That multiple registrations have to be taken? That could very well have been implemented through Section 24 of the CGST Act stating that a EOU unit or a person who has sought or intends to seek advance authorization is required to be separately registered.

While GST has harmonized registration for the EOUs and DTAs, the registered person should not bear impact of restriction of the EOU on the whole registration and in turn render the Foreign Trade Policy ineffective or burdensome for them.

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Goods and Services Tax (GST)

Notifications and Circulars

34th Meeting of GST Council – New regime for residential realty sector: GST Council in the 34th meeting held on 19-3-2019 has decided on the modalities of implementation of GST rate of 1% in case of affordable houses and 5% on construction of houses other than affordable houses. According to the press release, a one-time time-bound option will be provided to promoters to continue to pay GST at the old rate in respect of on-going projects. Tax at new rate will be payable from 1-4-2019 on new projects and the same will be subject to conditions like purchase of at least 80% of inputs and input services [other than capital goods, TDR/ JDA, FSI, long term lease (premiums))] from registered persons. For ongoing projects, i.e., where both construction and booking have started before 1-4-2019, and is not completed by 31-3-2019, builders opting for new tax rates will transition input tax credit as per the method to be prescribed.

For real estate projects commencing after 1-4-2019, supply of TDR, FSI, long term lease (premium) of land by a landowner to a developer will be exempt, if constructed flats are sold before issuance of completion certificate and GST is paid on them. If sale is after completion certificate, GST will be payable (as per prescribed value) on supply of TDR, FSI and long term lease (premium) of land by the builder under reverse charge mechanism. The liability in such cases will arise on the date of issue of completion certificate. Notifications are yet to be issued to

implement these changes.

Special tax rate of 6% on intra-State supply, on annual turnover of INR 50 lakh: CBIC has notified a special tax rate of 3% CGST (+ 3% SGST) on intra-State supply of goods or services by a registered taxable person with an aggregate turnover of INR 50 lakh made on or after 1st day of April in any financial year. As per Notification No. 2/2019-Central Tax (Rate), this tax rate will apply subject to the conditions that supplier is not engaged in non-GST supplies and should not be making any supply through e-commerce. Ice-cream, pan-masala and tobacco manufacturers have been kept out of the purview of this special rate.

It may be noted that suppliers taking the benefit of this notification will be required to issue bill of supply instead of tax invoice. Central Goods and Services Tax (Third Removal of Difficulties) Order, 2019, dated 8-3-2019 has been issued for this purpose.

Registration exemption to supplier of goods if turnover does not exceed INR 40 lakh: Any person engaged in exclusive supply of goods and whose aggregate turnover in the financial year does not exceed INR 40 lakh, will not be required to register under GST. The exemption will come into effect from 1-4-2019. As per Notification No. 10/2019-Central Tax, dated 7-3-2019 issued to implement the recommendations of the GST Council, this exemption is not available to persons required to take compulsory registration, persons manufacturing ice cream, pan masala and tobacco & manufactured tobacco substitutes, persons in special category States, and persons registering voluntarily.

TCS collected by supplier not includible in value for GST: Tax Collected at Source (TCS) under the Income Tax Act is not includible in the taxable value for GST purpose as per the corrigendum dated 7-3-2019 to Serial No.5 of Circular No. 76/50/2018-GST dated 31-12-2018. It cites consultation with the CBDT which clarified that TCS is not a tax on goods but an interim levy (not having character of tax) on possible income arising from the sale of goods by buyer and is to be adjusted against the final income tax liability of the buyer.

Sales promotion schemes – GST liability and ITC availability clarified: Where free samples and gifts are offered as part of sales promotion scheme, CBIC has clarified that supply of such goods, services or both which are supplied free of cost without a consideration, will not be treated as 'supply' under GST law. It is also stated that ITC is not available on inputs, input services and capital goods to the extent they are used in relation to such supplies. As per Circular No. 92/11/2019-GST, dated 7-3-2019, schemes like 'buy one get one free' should be treated as two goods supplied for the price of one and such supply will be taxable as per Section 8 of the CGST Act, after determining whether it is a mixed or composite supply. ITC will be available to the supplier in such cases.

Valuation - Discounts when not includible in value of supply: In cases of 'Buy more, Save more offer' or staggered/volume discounts, where rate of discount is increased after volume of purchase is increased, discounts are excludible from the value of supply, subject to condition including reversal of ITC by the recipient. However, the supplier will be entitled to ITC on inputs, input services and capital goods used in relation to such supplies. CBIC by Circular No. 92/11/2019-GST, dated 7-3-2019 has clarified the above. It also clarifies that secondary discounts, which are offered after the supply is over, are not excludible, as these are not known at time of the supply and the conditions prescribed in clause (b) of Section 15(3) of CGST Act are not satisfied. It is stated that there is no

impact on availability or otherwise of ITC in the hands of the supplier.

Last dates for filing GSTR-1 and GSTR-3B for April-June 2019, notified: GSTR-1 for the months of April, May and June 2019 are to be filed till 11th day of the succeeding month by registered persons having aggregate turnover of more than INR 1.5 crore. For persons whose turnover is up to INR 1.5 crore, this return for the quarter April-June 2019 can be filed till 31-7-2019. Further, Form GSTR-3B for each of the months from April to June 2019, must be furnished by twentieth day of the succeeding month. Notifications Nos. 11 to 13/2019-Central Tax have been issued on 7-3-2019 for this purpose.

New return formats placed on GST portal: Goods and Services Tax Network (GSTN) has placed the proposed three return documents, as approved by the competent authority, on the GST Portal. The new formats, titled, normal, sahaj and sugam, is likely to simplify the compliance process for taxpayers having turnover of up to INR 5 crore. The taxpayers would have an option to file any of the three forms. It may however be noted that HSN code at least at 6-digit level shall have to be reported. As decided by the GST Council, these forms will operate on a pilot basis from 1-4-2019 and will be made mandatory only from July 2019.

National Bench of GST Appellate Tribunal notified: Ministry of Finance has notified creation of National Bench of the Goods and Services Tax Appellate Tribunal (GSTAT) at New Delhi. Notification S.O. 1359(E), dated 13-3-2019 has been issued under Section 109 of the Central Goods and Services Tax Act, 2017 for this purpose. It may be noted that the Allahabad High Court in its Order dated 28-2-2019 in *Torque Pharmaceuticals v. UOI* had directed the government to give a cut-off date to set-up the Tribunal. Union Cabinet had on 21-1-2019 approved setting-up of GSTAT.

GST incentives - Punjab to allow option: The Punjab Cabinet has on 6-3-2019 approved an amendment to the GST incentives notified under the Industrial and Business Development Policy 2017, to enable industrial units to choose either the Net GST incentive, as approved by the Cabinet in October 2018, or incentivized SGST on intra-State sale. As per official press release, option must be exercised within 90 days of the notification by units which had filed their common application form on the Invest Punjab Business First portal between October 17, 2017 and October 17, 2018 (both days inclusive).

Ratio decidendi

Provisional attachment – Section 83 not invokable against Directors: Gujarat High Court has set aside provisional attachment of bank accounts of directors of a company on the ground that provisions of Section 83 of the CGST Act can be invoked against the company, which is a taxable person, and not against the directors. The High Court also observed that when dues cannot be recovered from a company, the same can be recovered from directors under CGST Section 89 unless they prove that such non-recovery was not attributable to any gross neglect, misfeasance or breach of duty on their part. [*H.M. Industrial (P) Ltd.* v. *Commissioner* – 2019 (22) GSTL 13 (Guj.)]

Detention of goods not sustainable when dispute is *bona fide*: Relying on Kerala High Court judgement in the case of *N.V.K. Mohammed Sulthan Rawther v. UOI*, the Madras High Court has held that goods cannot be detained when the dispute is *bona fide* and that it is not open to the squad officer to detain goods

beyond the reasonable period. The High Court noted that only few hours are required to prepare relevant papers for transmission to the assessing officer. It directed the Commissioner to issue a circular to all inspecting squad officers in Tamil Nadu not to detain goods or vehicles where there is a *bona fide* dispute as regards to the exigibility of tax or rate of tax. [*Jeyyam Global Foods* v. *UOI* - 2019-TIOL-28-HC-MAD]

Anti-profiteering – Passing of benefit by retailer not dependent on manufacturer passing the benefit: National Anti-profiteering Authority has held that the registered supplier issuing tax invoices on e-commerce platform is equally responsible for passing benefits of tax reduction and by increasing base price post rate reduction, he had profiteered. It was observed that passing of benefit by distributor or retailer does not depend on passing such benefit by manufacturer or his supplier to him first. The Authority in this case agreed with the DGAP report taking cum-tax price and rejected the plea that average base price is to be used to compute profiteering. It also held that the respondent had not only increased the base price but also collected GST on such price and hence was liable to penalty. [*Rahul Sharma* v. *Cloudtail India Pvt. Ltd.* – Order dated 7-3-2019 in Case No. 16/2019, NAA]

Anti-profiteering – Comparison can be made with pre-GST tax rates: Observing that principle of *contemporanea exposito* was not applicable in interpreting Section 171 of the CGST Act, NAA has held that the respondent cannot claim that the term 'Tax' in Section 171 was not applicable to non-GST levies like Central Excise duty. It rejected the pleas that said section does not extend to reduction in rate of tax as compared with pre-GST indirect tax regime, and that only reduction of tax rate in GST regime can be considered. The Authority in this regard ruled that respondent had indulged in profiteering as tax incidence was reduced from 30.06% during pre-GST to 28% and later 18% under GST regime. [*R.K. Gupta* v. *Abbott Healthcare Pvt. Ltd.* – Order dated 5-3-2019 in Case No. 15/2019, NAA]

Profiteering to be calculated as per period owing to change in GST rates: NAA has upheld the findings of the Director General of Anti-Profiteering (DGAP) that the respondent involved in construction of flats did not pass benefit of ITC accrued post-GST to flat buyers / recipients. It was held that provisions of Section 171(1) of the CGST Act were contravened and the respondent was also liable to penalty. Observing that in construction of affordable housing, post-GST rates were also reduced, the Authority held that in cases of amendment in GST rates, profiteered amount must be broken into two parts, i.e. from 1-7-2017 to 24-1-2018 and from 25-1-2018 onwards. [*Ashok Khatri* v. *S3 Infrareality (P) Ltd.* - 2019-VIL-06-NAA]

Valuation - Cost of tools billed to customer, not includible: Appellate AAR Karnataka has held that amortized cost of the tools manufactured by the assessee and billed to the customer but retained by the assessee for manufacture of components for the customer, is not to be added to arrive at the value of the goods supplied. Overruling the AAR ruling, the AAAR observed that according to the contract between the assessee and the customer, there was no obligation on the part of the assessee to provide moulds/dies/tools. Reliance was placed on CBIC Circular No. 47/21/2018-GST, dated 8-6-2018. It was held that the value of the tools, which had already suffered tax and supplied FOC to the assessee, is not required to be added. [In RE: *Nash Industries (I) Pvt. Ltd.* - 2019-VIL-08-AAAR]

Lodging and food provided by private boarding house is a mixed supply: Services of lodging and food provided by a private boarding house exclusively to the students of a secondary school run by a charitable society is a mixed supply, and hence is taxable at the highest applicable rate. AAR West Bengal in its ruling observed that services comprised of lodging facility, food, housekeeping services and laundry services, and were not indivisible. Exemption under Notification No. 12/2017-Central Tax (Rate) was denied on the ground that the applicant was not an educational institution. [In RE: *SARJ Educational Centre* - 2019-TIOL-57-AAR-GST]

ITC on ambulance purchased prior to 1-2-2019 not available: AAR West Bengal has denied input tax credit on ambulance purchased, prior to 1-2-2019, by a manufacturer of agricultural machinery for the benefit of the employees under legal requirement of the Factories Act, 1948. It observed that the exception carved out under Section 17(5)(b)(iii)(A) of CGST Act is not applicable. The Authority in its ruling observed that the eligibility for claiming ITC under Section 16(1) is subject to the provisions of the law at the time of occurrence of the taxable event, irrespective of when the claim is made. [In RE: *Nipha Exports Pvt. Ltd.* - 2019-VIL-52-AAR]

ITC on inward supplies for construction of pre-fabricated warehouse, not available: Observing that a warehouse built with prefabricated material is constructed with the intention of use as permanent structure and associated with beneficial enjoyment of the land on which it is built, AAR West Bengal has held that the same being immovable property, input tax credit on inward supplies is not available. The Authority while holding so, also observed that the vendor is not supplying floor as prefabricated but is developing floor space by fixing prefabricated structure upon it. It also noted that the warehouse cannot be conceived without beneficial enjoyment of the civil structure embedded on earth. Definition of "immovable property" in Section 3(26) of the General Clauses Act, 1897 was referred. [In RE: *Tewari Warehousing Co. Pvt. Ltd.* - 2019-VIL-47-AAR]

ITC on services of horticulture within plant area available: Appellate AAR Odisha has held that services availed in relation to horticulture, i.e. plantation and gardening, within the plant area including mining area and the premises of other business establishments, shall qualify as input service since creation and maintenance of green area/zone inside plant/mining/office premises is a business necessity for controlling pollution as well as atmospheric temperature. The AAAR however held that expenditure incurred towards construction, reconstruction, renovation, additions or alterations or repairs of the residential colony would not be eligible for benefit of input tax credit. Further, overruling the AAR ruling to effectively disallow ITC on input and input services for maintenance of guest house transit house and trainee hostel, it was held that these are in the nature of perquisites in favour of the employees. [In RE: *National Aluminium Company Ltd.* - 2019-VIL-07-AAAR]

Liaison office not acting as distinct person – GST registration not required: AAR Tamil Nadu has held that a liaison office acting as communication channel between the parent company abroad and Indian supplier of goods and not charging any consideration for its activities in India, is not liable to register itself under GST. It observed that such office is neither

related nor a distinct person but merely an extension of its foreign company (working as employees of the foreign office) and therefore activities performed by it do not constitute supply. The Authority in its ruling held that procurement activities in India, for a foreign company, when acting strictly in line with RBI conditions, do not amount to supply under GST law. [In RE: *Takko Holding Gmbh* - 2019-VIL-48-AAR]

No exemption under Notification No. 51/96-Cus. to OEM suppliers supplying to specified institutions: GST AAR Odisha has held that benefit of Notification No. 51/96-Cus. read with Notification No. 43/17-Cus. is not available to the OEM supplier importing specified machinery and supplying to research institution. It observed that the applicant (research institute) can avail the exemption benefit only if it directly imports or purchases before the goods being imported into the country cross the customs frontier. The Authority however held that concessional rate under Notification No. 45/17-Central Tax (Rate) and 47/17-Integrated Tax (Rate) will be available to both imported and indigenous goods. Question whether GST Council's decision is binding in the absence of a notification, was answered in negative, observing that exemption must be as per the statutory notification. [In RE: *Indian Institute of Science Education and Research* - 2019-TIOL-54-AAR-GST]

Payback points not redeemed by customers are not actionable claim: AAAR Haryana has held that supply of providing payback points under loyalty programme of the partner clients to the end customers, ceases to be actionable claim post lapse of validity period for the claim. The Appellate Authority was of the view that such supply would hence become a supply of service liable to GST. The AAAR in its ruling upheld AAR ruling holding that amount retained in lieu of expiry of payback points is supply of services attracting GST. It observed that since the consideration for the unredeemed payback points has flown from the partners, the same has become applicant's revenue after expiry of validity period. [In RE: *Loyalty Solutions and Research P. Ltd.* - 2019-VIL-05-AAAR]

EU VAT - Motor vehicle driving tuition is not school or university education: CJEU has held that motor vehicle driving tuition by a driving school for acquiring licences to drive vehicles, is not exempt from VAT. The EU Court in this regard held that such tuition is not covered by the exemption in VAT Directive for 'school or university education'. It held that such tuition, even if it covers a range of practical and theoretical knowledge, is not transfer of knowledge and skills covering a wide and diversified set of subjects or their furthering and development which is characteristic of school or university education. [*A & G Fahrschul-Akademie* v. *Finanzamt Wolfenbüttel* – Judgement dated 14-3-2019 in Case C-449/17, CJEU]

Customs

Notifications and Circulars

MEIS benefit on exports directly from EOU/SEZ on behalf of DTA unit: Export of goods produced by the EOU/SEZ unit and exported directly from the EOU/SEZ to the foreign consumer with the name of DTA unit on whose behalf the exports are made, are eligible for the benefits under Merchandise Exports from India Scheme (MEIS). According to the DGFT Policy Circular No. 20/2015-20, dated 22-2-2019, MEIS benefits may be taken by SEZ/EOU or DTA unit and not both, based on disclaimer from the other firm. Certain criterion as specified in the circular, however, need to be fulfilled for availing such benefit.

Printing of Advance/EPCG Authorisation on security paper to be discontinued: DGFT will discontinue printing of advance authorisations and EPCG Authorisations where port of registration is an EDI port. This system is applicable for authorisations issued from 1-3-2019 onwards. Details of authorisation will be available on ICES and process of registration of authorisations and taking bond/bank guarantee remain unchanged. According to CBIC Circular No. 7/2019-Cus., dated 21-2-2019, no physical copy of even amendment will be sought from authorisation holder. TRA facility would however not be available for such authorisations.

SEZ – Value of indigenous inputs not includible in net forex earning: Ministry of Commerce has amended Special Economic Zone Rules, 2006 to provide that sum of value of inputs in the formula for calculating positive net foreign exchange [B in formula A-B>0], will not include value of indigenous inputs, used for authorised operations. It may be noted that prior to 21-9-2018 the position was same and the reference to indigenous inputs was inserted in Rule 53 of SEZ Rules by Notification dated 19-9-2018. SEZ Notification No. G.S.R. 200(E), dated 7-03-2019 has been issued for this purpose.

Trust can also establish SEZ – SEZ (Amendment) Ordinance promulgated: President of India has, on 2nd of March, promulgated the Special Economic Zones (Amendment) Ordinance, 2019. According to the latest amendments, which came into effect from 2nd of March 2019, trust or any entity notified by the Central Government, can also establish a Special Economic Zone for manufacture of goods or for rendering of services. Definition of 'person' as available in clause (v) of Section 2 of the Special Economic Zones Act, 2005 has been amended for this purpose. The Union Cabinet had approved the Ordinance on 28-2-2019.

Transport and Marketing Assistance scheme for agriculture produce approved: Central government has approved a scheme titled Transport and Marketing Assistance (TMA) for specified agriculture produce. This scheme will provide for reimbursement of international component of freight and marketing assistance for export by air as well as by the sea. It will mitigate disadvantages of higher cost of transportation of export of specified agriculture products and promote brand recognition for Indian agricultural products in the overseas market. Department of Commerce & Industry has issued a notification on 27-02-2019 in this regard.

Ratio decidendi

Valuation – Demurrage not includible – Explanation to Valuation Rule 10(2) is bad: Observing that demurrage is a kind of penalty and that the legislature did not intend to include it in the value of goods under Section 14 of the Customs Act, 1962, Orissa High Court has held that provisions for inclusion of demurrage charges, under the Customs Valuation Rules, are *ultra vires* Section 14 of Customs Act. Explanation to Rule 10(2) was hence struck down. Observing that the provisions in the Customs Act were silent about demurrage, the High Court held that it is beyond the legislative powers to include demurrage charges in the rules for Customs valuation. Supreme Court judgements in *Wipro ltd*, *Essar Steel Ltd.* and *Mangalore Refinery and Petrochemicals Ltd.* were relied on. [*Tata Steels* v. *UOI* – W.P.(C) No. 7917 of 2009, decided on 14-2-2019, Orissa High Court]

Advance authorisations – 'Prior import condition' quashed: Gujarat High Court has quashed the 'pre-import condition' under Advance Authorisation regarding prior imports for manufacture of export goods. The Court observed that the government cannot grant benefit by one hand and take it away by other and say that it is up to the beneficiary to take it or leave it. It observed that such condition, after introduction of GST, lead to cash blockage and made imports under Advance Authorisation next to impossible. The condition was also held as not meeting test of reasonableness. It may be noted that this condition was in force from 13-10-2017 to 9-1-2019. [*Maxim Tubes Company Pvt. Ltd.* v. *Union of India* - R/Special Civil Application No. 14558 of 2018 and Ors., decided on 4-2-2019, Gujarat High Court]

Green pepper as raw produce to be classified as vegetable and not as pepper: CESTAT Bangalore has held that green pepper as raw produce shall be classified as a vegetable under Chapter 07 of the Customs Tariff and it can be classified as spice under Chapter 09 only when it is dried and processed. It observed that the goods classifiable under specific item cannot be classified under residuary item. The Tribunal in this regard held that all the products of 'pepper vine' do not necessarily fall in the chapter pertaining to spices and that spice is not the produce of the plant but the product of processing of such produce. [*Herbal Isolates (P) Ltd.* v. *Commissioner* – 2019 (365) ELT 820 (Tri. – Bang.)]

No penalty on CHA for exports without Let Export Order: In a case involving loading of export containers without Let Export Order (LEO), CESTAT Mumbai has set aside penalty on the Customs House Agent. It held that restriction on placing goods on board without proper clearance is applicable to person-in-charge of conveyance, or custodian, and not to CHA. The Tribunal also noted that contents of the container were not in breach of any prohibition. Department's plea that there was substantial lapse on part of the CHA in handing over containers without first obtaining clearance under Section 51 of the Customs Act, 1962, was rejected. [*Delta Logistics* v. *Commissioner* - Order No. A/85297/2019, dated 15-2-2019, CESTAT Mumbai]

Anti-dumping duty not to be imposed on second hand machinery: CESTAT Chennai has held that import of second hand machinery cannot be subjected to imposition of anti-dumping duty (ADD) meant for new machinery. It observed that purpose of anti-dumping is served, in case of second-hand machinery, by way of re-

appraisement of declared value, and imposition of ADD would be nothing but double jeopardy. The Tribunal while holding so, dismissed the appeal for ADD imposition and for transfer of the matter to the ADD Bench. It also observed that anti-dumping duty notification which came in 2009, cannot be back-pedalled to be imposed on goods which have been manufactured and exported in 2007 from a particular country. [*Commissioner* v. *Trinity Exporters* - Final Order No. 40357/2019, dated 20-2-2019, CESTAT Chennai]

Central Excise and Service Tax

Ratio decidendi

Job work of textile goods – Liability under Excise Rule 12B explained: Noting that Central Excise Rule 12B and the notification talked about 'aggregate value' of clearances of job worker, the Supreme Court has held that assessee manufacturing textiles through job workers would be liable once aggregate value crossed the threshold. The Apex Court rejected assessee's reliance on third illustration in CBEC Circular dated 30-10-2003. It held that third illustration did not fit in the scheme of Rule 12B. The assessee had pleaded that liability will be only in respect of a particular job worker whose clearance had exceeded threshold. [*Dinesh Textiles* v. *Commissioner* - Civil Appeal Nos. 9740-9741 of 2018, decided on 28-2-2019, Supreme Court]

Refund claim by buyer and manufacturer to be treated differently: Supreme Court has rejected time-barred refund claim of central excise duty by the buyer, in a case where duty was paid under protest by the manufacturer-seller. It observed that scheme of Excise Section 11B makes a distinction between rights of a manufacturer and that of the buyer. Supreme Court's earlier decision in the case of *CCE v. Allied Photographics India Ltd.* was relied on. The Apex Court hence refused buyer's refund claim filed beyond period of limitation, for which excise duty was paid by the manufacturer under protest and was never claimed though decided in favour by the court. [*Western Coalfields Ltd*. v. *Commissioner* - Civil Appeal No(s). 807 of 2006 and Ors., dated 20-2-2019, Supreme Court]

In-house corporate guarantee not liable to service tax: CESTAT Chennai has held that commission received/paid for issuance of corporate guarantee to associate/subsidiary companies is not exigible to service tax under Section 65(12)(a)(ix) of Finance Act, 1994. The Tribunal observed that corporate guarantee is not same as bank guarantee since corporate guarantee is an in-house guarantee issued to safeguard financial health of associate enterprises and is not issued to customers generally. It was also held that only the services listed in Section 65(12)(a)(ix) ibid would be exigible to service tax under Banking and Other Financial Services. The Tribunal in this regard also observed that it was also not the case that the corporate guarantee was issued / procured to enable the bank to issue bank guarantee. [*Sterlite Industries* v. *Commissioner* - Final Order No. 40318/2019, dated 19-2-2019, CESTAT Chennai]

Service tax exemption to transport from factory to gateway port – Conditions: CESTAT Delhi has held that exemption under Notification No. 31/2012-ST, to transportation of goods from factory to the gateway port, cannot be denied for belated filing of declaration EXP-1, EXP-2. Delay in submission of form was of 22 days. The Tribunal while holding so, observed that once form EXP-1 was filed it would be valid till details therein change. It was held that the form was not required to be given with each consignment, as the form did not contain the details of the particular consignment. [*Makson Healthcare Pvt. Ltd.* v. *Commissioner* - Final Order No. 50299/2019, dated 21-2-2019, CESTAT Delhi]

Cenvat credit reversal - Exempted value cannot be used in formula: CESTAT Chennai has held that where a portion of taxable service is exempt, it is not justified in considering exempted portion also in the formula for determining amount of Cenvat credit to be reversed. The appellant had availed exemption for 90% of the value of Financial Leasing services under Notification No. 4/2006-S.T. Tax was demanded considering this 90% as exempted service under Cenvat Rule 6(3A) formula. Tribunal observed that service is not wholly exempted and cannot be considered as exempted services. [*Sundaram Finance* v. *Commissioner* - 2019-VIL-127-CESTAT-CHE-ST]

Commission paid by exporter to foreign subsidiary – Exemption: CESTAT Allahabad has held that benefit of service tax exemption was available on commission paid by exporter to its foreign based subsidiary for procurement of orders from foreign companies. It noted that denial of exemption would apply only in cases where export was made to own joint venture or wholly owned foreign subsidiary. The Tribunal held that benefit of exemption from service tax under Notification No. 18/2009-ST was available on such commission paid to own subsidiary company. The demand was also held as time-barred. [*Super House Limited Shoe Div.* v. *Commissioner* - 2019-VIL-111-CESTAT-ALH-ST]

Cenvat credit on GTA services when goods cleared on FOR basis: CESTAT Ahmedabad has held that Cenvat credit was available on GTA services for delivering goods to buyer's doorstep, in a case involving both MRP and non-MRP sales. Period involved was after 1-4-2008. The Tribunal observed that goods were cleared on FOR basis and freight/damages in transit was responsibility of assessee. Supreme Court judgement in *Ultratech* was distinguished noting that it did not consider Point of Sale or FOR price issue. CBIC Circulars dated 22-12-2014 and 23-8-2007, as in force during relevant time, were relied upon. [*Sanghi Industries* v. *Commissioner* - Final Order No. A/10374-10375/2019, dated 25-2-2019, CESTAT Ahmedabad]

Appeal – Filing of appeal for different units at principal place of business: In a case for refund claims pertaining to different units, CESTAT Ahmedabad has held that appeal can be filed at principal place of registration since under GST regime there is centralization of State jurisdiction. Appeal before Commissioner (Appeals) having jurisdiction over principal place of business, was held to be correct. The Tribunal also relied on CBIC Circular No. 1056/05/2017-CX, meant for large taxpayer units (LTU). The department had contended that Commissioner (Appeals) Rajkot erred in admitting appeals pertaining to a unit located at Dahej. [*Commissioner* v. *Reliance Industries* - 2019-VIL-163-CESTAT-AHM-CE]

Value Added Tax (VAT)

Ratio decidendi

State enactment for saving VAT recovery post GST, valid: Kerala High Court has held that Kerala VAT Act does not stand fully repealed with the 101st Amendment to the Constitution and that the State has legislative powers to enact saving clause under Section 174 of the Kerala GST Act allowing department to levy and recover VAT for transactions prior to GST. It rejected the plea that States have been denuded of the legislative power to enact Section 174 because of the amendment to Entry 54 of List II of Seventh Schedule to the Constitution of India. It observed that there is always a presumption in favour of the constitutionality and where the validity of a statute is in question, the interpretation which makes the law valid is preferred. The High Court hence upheld the constitutional validity of Section 174 providing for repeal and savings and rejected as inapplicable the petitioners' other propositions, the survival of the sunset clause, the impact of a temporary statute, and inapplicability of Section 6 of the General Clause Act vis-à-vis a repealed enactment. [*Sheen Golden Jewels* v. *STO* - WP(C). No. 11335 of 2018, decided on 11-1-2019, Kerala High Court]

Levy of advertisement tax by State govt is *ultra vires* post 101st amendment: Allahabad High Court has held that levy and collection of Advertisement Tax by Nagar Palika Parishad, Hathras is without legislative/statutory competence and is *ultra-vires* Article 265 of the Constitution. The High Court observed that by 101st Amendment to the Constitution, Entry-55 of List-II of Seventh Schedule to Constitution of India, under which State government had competence to levy/collect advertisement tax, was omitted. It noted that taxation power with municipalities under Section 128(2)(vii) of the UP Municipalities Act stood omitted by Section 173 of the UPGST Act. [*Pankaj Advertising* v. *State of U.P.* - 2019-VIL-70-ALH]

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