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ITC reversal on sale of used capital goods

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GST law is moving towards its second anniversary and yet the so called simple tax does not seem to have settled down much. Every other day some new issues also arise which more often leave the taxpayers in implementational deadlock. Thus far, we all have come across various issues which prominently arose because GST law was silent on such issues. However, in this article, we will discuss about one peculiar issue which has been catered not by one but by two separate provisions in the law leading to ambiguity and implementational complexity for the taxpayers.

Section 18 of the CGST Act, 2017 contains the provision regarding availability of credit in special circumstances, of which sub-section (6) refers to the case where the registered person who is selling the capital goods after use, on which he has taken input tax credit, shall pay an amount equal to the input tax credit taken on the said capital goods reduced by such percentage point as may be prescribed (in the CGST Rules, 2017) in this regard or pay the tax on the transaction value of such capital goods or plant and machinery determined as per Section 15, whichever is higher.

In CGST Rules, there are two provisions which refer to the above-mentioned Section 18(6) and prescribes the method for calculating the input tax credit for the said purpose. First method is prescribed under Rule 40(2) of the CGST Rules which states that input tax credit in the case of supply of capital goods and plant and machinery shall be calculated by reducing five percentage point for every quarter or part thereof from the date of issue of invoice. This appears to be a simple and straight forward prescription or formula for determining the quantum of ITC which requires to be reversed when used capital goods are disposed.

Further Rule 44(6) read with Rule 44(1)(b) of the CGST Rules also prescribes the method of determining an amount for the purpose of Section 18(6), by stating that input tax credit involved in the remaining useful life in months shall be computed on pro rata basis, taking useful life as five years. These two provisions tend to produce different results when quantum of ITC reversal is computed. Let us understand this issue with the help of an example.

Suppose, Mr. X sold his machinery for Rs. 1,44,550/- (inclusive of GST at the rate of 18% of Rs. 22,050/-) on 10.05.2019 which he purchased on 01.07.2017 for Rs. 2,36,000/- (inclusive of Rs. 36,000/- as GST @ 18%).

As per Section 18(6) of the CGST Act, Mr. X has to pay an amount equivalent to higher of the following:

a) an amount equal to the GST levied on transaction value on supply (sale) of the machinery, that is of Rs. 22,050/-, or
b) An amount of input tax credit as reduced by such percentage point as prescribed under the rules:

As per Rule 40(2), the amount to be determined is as follows:	As per Rule 44(6) read with Rule 44(1)(b), the amount to be determined is as follows:
• Machinery has been used for total 1 year, 10 months and 10 days which constitute 8 quarters. • Percentage amount to be reduced: 8 quarters x 5% = 40% • The amount to be considered = 36000- (36000 x 40%) = Rs. 21,600/- • Amount payable (ITC to be reversed / Output liability) = **Rs. 22,050/-** **(**Being higher of Rs. 22,050/- and Rs. 21,600/-)	• Machinery has been used for total 1 year, 10 months and 10 days which constitute 23 months. • Useful life left for use (according to CGST rules) is 37 months • The amount to be considered: 36000 x (37/60) = Rs. 22,200/- • Amount payable (ITC to be reversed / Output liability) = **Rs. 22,200/-** **(**Being higher of Rs. 22,050/- and Rs. 22,200/-)

From the above illustration, it is evident that the two provisions provide two different results. However, if we go strictly by the phrase used in Section 18 (6), provisions of Rule 40(2) seems more appropriate as it prescribes a method of determining the input tax credit with reduction in the percentage point unlike the pro rata basis as mentioned in the other rule. But the department may adopt the provision which is more beneficial to it and may demand credit reversal / amount payable as per Rule 44(6). If such interpretation is adopted, taxpayers (sellers) will have to take the hit of incremental liability on himself in such instances. Besides this, it will also prejudice the subsequent buyer as he will only be entitled to avail the input tax credit to the extent of GST calculated on the transaction value i.e., Rs. 22,050/- as mentioned in the supply invoice used for disposal of used capital goods whereas, the government will get tax revenue of Rs. 22,200/-.

It appears there exists incongruency between the two provisions prescribing two different formula and hence, cannot be implemented together leaving taxpayers in a fix as to which provision is to be adopted. Hence, it is desirable that appropriate clarification is issued by the CBIC.

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Goods and Services Tax (GST)

Notifications and Circulars

Time provided to apply for revocation of cancellation of registration: A one-time opportunity to apply for revocation of cancellation of registration has been provided to persons whose registrations were cancelled till 31-3-2019 due to non-furnishing of returns in Form GSTR-3B or GSTR-4. Such persons can apply for revocation of cancellation on or before 22-7-2019. As per new proviso in CGST Rule 23(1), if registration is cancelled with retrospective effect, returns, for the period from effective date of cancellation till date of order of revocation of cancellation, shall be filed within 30 days from date of order of revocation. CGST Rules, 2017 have been amended by Notification No. 20/2019-

Central Tax (Rate), dated 23-4-2019. Removal of Difficulty Order (RoD) No. 05/2019-Central Tax, dated 23-4-2019 have been issued for this purpose and Circular No. 99/18/2019-GST, dated 23-4-2019 clarifies the same.

Order of utilisation of ITC of IGST clarified: CBIC has clarified the recently inserted CGST Rule 88A which allows utilization of ITC of Integrated Tax (IGST) towards payment of CGST and SGST, in any order, subject to the condition that entire IGST credit is completely exhausted first before CGST or SGST / UTGST credit is utilized. CBIC Circular No. 98/17/2019-GST, dated 23-4-2019 also provides number of illustrations. However, it states that till the new order of utilization is implemented on the common portal (GST portal), taxpayers may continue to utilize ITC as per the functionality available.

Non-filers of returns for two consecutive periods cannot generate E-Way Bill from 21st June: CGST Rule 138E relating to restriction on furnishing of information in Part A of Form GST EWB-01 will be effective from 21-6-2019. Rule 138E was introduced by Notification No. 74/2018-Central Tax on 31-12-2018 but was not brought into force then. Hence, no person (including a consignor, consignee, transporter) will be allowed to furnish information in Part A of Form GST EWB-01 and generate e-way bill if he has not furnished the returns for two consecutive tax periods. Notification No. 22/2019-Central Tax, dated 23-4-2019 has been issue for this purpose.

Composition suppliers to file quarterly statement and annual return: Composition suppliers [both under CGST Section 10 and under Notification No. 2/2019-CT (Rate)] are now required to furnish a statement every quarter, containing details of payment of self-assessed tax in Form GST CMP-08, till 18th day of the month succeeding such quarter. Further, as per Notification No. 21/2019-Central Tax, dated 23-4-2019, such persons would also be required to furnish a return for every financial year in Form GSTR-4 on or before 30th of April following the end of said financial year. CGST Rules have also been amended for this purpose by Notification No. 20/2019-Central Tax, dated 23-4-2019.

FAQ on real estate sector – Ongoing project and liability on cancellation of bookings clarified: In cases where more than one completion certificate is issued for one real estate project, it will be considered as an ongoing project unless all completion certificates, for every part (block) of the project, are received for the entire project. Clarifying so, FAQ released by CBIC with reference F. No. 354/32/2019-TRU, dated 7-5-2019 also states that where commencement certificate is issued prior to 1-4-2019 even for a part of project, it will fall under ongoing project, subject to conditions. Similarly, it is stated that a project where construction has started prior to 31-3-2019 but apartment bookings have not started, would not be an ongoing project. Further, developer who has paid GST at higher rate for apartment booked before 1-4-2019 is entitled to take adjustment of such tax against other liability upon cancellation of said booking on or after 1-4-2019, provided the entire amount received from the buyer is refunded. FAQ also states that in case apartment booked prior to 1-4-2019 is cancelled and rebooked at new rate of 1% / 5% (without ITC) or sold after completion certificate, ITC taken in respect of such apartment for supply of service till 31-3-2019 is to be reversed.

Exemption on upfront amount for long term lease clarified: GST exemption on upfront amount payable for long term lease (thirty years, or more) of industrial plots or plots for development of infrastructure for financial business, under Entry No. 41 of Notification No. 12/2017-Central Tax (Rate) is admissible irrespective of whether such upfront amount is

payable in one or more instalments, provided the amount is determined upfront. CBIC Circular No. 101/20/2019-GST dated 30-4-2019 clarifying the above also notes that this upfront amount may be called as premium, salami, cost, price, development charges or by any other name.

Ratio decidendi

Interest payable on total tax liability including portion of ITC available for set off: Telangana High Court has held that liability to pay interest under Section 50 of the CGST Act, 2017 is confined not only to the net tax liability. The High Court held that interest is payable on total tax liability including the portion liable to be set-off against Input Tax Credit. The High Court in this regard observed that until a return is filed as self-assessed, there is no entitlement to credit and no actual entry of credit in the electronic credit ledger takes place. It noted that if no payment is made, mere availability of ITC will not tantamount to actual payment. The Court for this purpose also noted that the liability to pay interest under Section 50(1) arises even without any assessment and that recommendations of the GST Council's 31st Meeting, regarding charging of interest on net tax liability, have not been implemented. [*Megha Engineering & Infrastructures Ltd.* v. *Commissioner* - 2019-VIL-175-TEL]

Detention of conveyance - Carrying LR issued by transporter is not mandatory: Gujarat High Court has directed to release the truck carrying goods which was detained by authorities under Section 129(1) of the CGST Act. The truck was detained on the ground that the lorry receipt issued by the transporter was a photocopy without the computerized serial number and contact number details. The Court observed that carrying lorry receipt issued by the transporter is not mandatory under Rule 138A(1) of CGST Rules, 2017 and that the detention was without the authority of law. [*F S Enterprise* v. *State of Gujarat* - 2019-VIL-154-GUJ]

Seizure of goods from premises of job-worker, when not valid: Observing that allegations regarding evasion of tax, against person engaged in the business of hallmarking, can only be with reference to its business activity, Kerala High Court has held that seizure of the gold jewellery, belonging to petitioners but seized from the premises of the hallmarker, was not justified. The Court also observed that goods entrusted by principal, with hallmarker, and covered by delivery challan, cannot be subject matter of confiscation order under Section 130 of the CGST Act, passed in relation to the hallmarker. [*Josco Bullion Traders Pvt. Ltd.* v. *Commissioner* - 2019-VIL-151-KER]

No writ of mandamus lies against GST Council: Observing absence of mechanism in the Constitution or any other statute for the GST Council to adjudicate grievances raised by general public, Division Bench of Kerala High Court has set aside order of Single Judge allowing the prayer for issue of mandamus against the GST Council. It observed that such writ is limited to enforcement of any obligation imposed by law. Further, observing that even before receipt of representation by the Central and State governments, the writ petition was filed, the Court also held that there was lack of *bona fides* in filing the writ petition. [*Union of India* v. *Shiyaad* - 2019-VIL-161-KER]

Imprisonment – Power invokable only post determination of demand: Madras High Court has held that power to punish under Section 132 of the CGST Act, relating to imprisonment, is invocable only when it is established post determination of demand that assessee has committed offence. The High Court held that when recovery is made subject to assessment,

punishment for offence prior to such assessment is incorrect. The High Court in this regard was of the view that exceptions to this rule are only where assessee is a habitual offender. Judgement in *Make My Trip* was relied on. It was, however, observed that revenue interest can be protected by provisional attachment. [*Jayachandran Alloys* v. *Superintendent* - Writ Petition No.5501 of 2019, decided on 4-4-2019, Madras High Court]

Anti-profiteering – Comparison with pre-GST rate – Delhi HC stays NAA order: Delhi High Court has stayed the order passed by the National Anti-profiteering Authority wherein NAA had rejected the plea that CGST Section 171 was not applicable 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. NAA had ruled that assessee had indulged in profiteering as tax incidence was reduced from 30.06% during pre-GST to 28% and later 18% under GST regime. The petitioner, however, undertook to pay certain sum along with interest in the Consumer Welfare Fund. [*Abbott Healthcare Pvt. Ltd.* v. *Union of India* - 2019-TIOL-1016-HC-DEL-GST]

Anti-profiteering – ITC benefit to be passed on periodically: In a case alleging non-passing of ITC benefit, where the real estate developer had pleaded that benefit be calculated at time of completion of project after considering the unsold flats, NAA has held that assessee had profiteered by not reducing basic prices. It was held that benefit needs to be passed on periodically. The NAA also held that there was no provision to withdraw the complaint and the DGAP had rightly pursued the investigation. Further, objections against method for calculating profiteered amount, was also rejected noting that there is no straight jacket formula and no set prescription can be laid as the NAA was empowered to 'determine' the methodology and not 'prescribe' the same. The contention that the respondent made purchases from traders who did not pass the benefit of ITC to him, was also rejected. [*Pallavi Gulati* v. *Puri Constructions Pvt. Ltd.* – Case No. 30/2019 decided on 8-5-2019, National Anti-profiteering Authority]

Anti-profiteering - Not reducing price since same not changed post GST, fatal: NAA has held that non-reduction of price on decrease in GST rate, as the price was not increased earlier at the time of introduction of GST, was not sustainable. It observed that reduction can only be in absolute terms, such that final price payable by consumer must get reduced commensurate with reduction in tax rate. It was held that the benefit of rate reduction from 28% to 18% as per Notification No. 41/2017-CT (R) had to be passed to end consumers. Argument that pre-GST prices and post reduction prices should be compared, was rejected. [*Kerala State Screening Committee on Anti-profiteering* v. *TTK Prestige Ltd.* - 2019-VIL-23-NAA]

Construction service - Service of preferential location naturally bundled: Service of preferential location, right to use car parking space and common areas and facilities, are naturally bundled along with construction service provided by a developer. AAR West Bengal also held that construction service is the dominant element and noted that recipient must buy these services only as a package with construction service describing the essential character. Entire value of composite supply was hence held taxable under Sl. No. 3(i) of Notification No 11/2017-CT (Rate). [In RE: *Bengal Peerless Housing Development Co. Ltd.* - 2019-VIL-130-AAR]

Valuation - Cost of diesel provided by service recipient includible for charging GST: AAR Chhattisgarh has ruled that cost of diesel provided by the service recipient has to be included by the transporter in the freight amount

for charging GST. The Authority in an advance ruling observed that diesel provided by service recipient for vehicles of applicant formed an integral component of business process, without which supply of cement could not materialize. It noted that any amount supplier is liable to pay and which has been incurred by the recipient and not included in the price actually paid is includible in the taxable value. [In RE: *Navodit Agrawal* - 2019-VIL-117-AAR]

ITC available even if consideration is paid through book adjustment: West Bengal AAR has held that recipient can claim ITC when consideration is paid through book adjustment. The Authority observed that credit of input tax cannot be denied unless specifically restricted by law. It was also observed that while West Bengal VAT Rule 19(8) required specific mode of payment, no such restriction exists under the GST regime. The AAR observed that Section 49 of CGST Act does not deal with mode of transaction between recipient and supplier and that recipient can pay consideration by setting-off book debt. It was noted that the definition of consideration as provided under Section 2(31) of the CGST Act, 2017 cast its scope so wide that almost no form of payment is excluded. [In RE: *Senco Gold Ltd.* - 2019-VIL-133-AAR]

DFIA – Supply of DFIA scrip covered under exemption: Supply of DFIA scrips is covered under exemption as per Notification No. 2/2017-Central Tax (Rate) as amended by Notification No. 35/2017-Central Tax (Rate). According to Maharashtra Appellate Authority for Advance Rulings, the trade treats duty credit scrips and DFIA as same in trade parlance due to their common functionality, objectives and nature and therefore, despite the differences in technicalities of their issuance, supply of DFIA scrip will be covered by exemption. Setting aside the ruling of AAR, the Appellate Authority observed that both duty credit scrips and DFIA are transferrable, tradable and used for the same purpose. Reliance was placed on judgement of Supreme Court in *Atul Glass Industries* and CBIC Circular dated 6-6-2018. [In RE: *Spaceage Syntex Pvt. Ltd.* – Order No. MAH/AAAR/SS-RJ/23/2018-19, dated 13-3-2019, Maharashtra AAAR]

Sale of ice cream in retail pack and in scoop is supply of goods: In a case involving sale of ice creams both in retail packs and as scoops, AAR Maharashtra has held that since retail packs were sold at MRP, the same constitutes sale of goods with no service being involved. With respect to the ice cream scoops, the Authority was of the view that the transaction of receiving ice cream in bulk and selling them in scoops is akin to sales made by grocery shops in the case of sale of edible oil wherein the grocer sells such oil in various lesser quantities after receiving the same in bulk quantity. Accordingly, it was held that since the predominant element of the transaction is that of sale of goods, the said transaction was held to be a “supply of goods”. The issue under consideration was whether the supply of ice cream would be treated as supply of "goods" or supply of "service" or a "composite supply”. [In RE: *Arihant Enterprises* - 2019-VIL-116-AAR]

Transfer of business as going concern on slump sale basis - Exemption available: The applicant sought an advance ruling on whether transfer of business as a going concern on slump sale basis is exempted from the levy of GST. The Authority referred to the meaning of “business” as provided under Section 2(17) of the CGST Act, 2017 and observed that the acquisition of goods/services for commencement of business is covered under the said definition. Further, transfer of a business as a going concern is sale of a business including assets. In terms of the financial transaction, 'going concern' has the meaning that at the point in time to which the

description applies, the business is live or operating and has all parts and features necessary to keep it in operation. It was held that the applicant had supplied services by way of transfer of business as a going concern and as per serial no. 2 of Notification No. 12/2017-Central Tax (Rate), the same was held as exempt. [In RE: *Innovative Textiles Limited* - 2019-VIL-125-AAR]

Work Books which test child's knowledge classifiable as 'Printed books': Delhi High Court has held that work books (*Sulekh Sarita*) which test child's knowledge and facilitate evaluation of his understanding are classifiable under HSN 49.01, '*printed books including braille books'* that are exempt from GST. The Court overruled AAR ruling which classified said books as exercise books under HSN 4820. It termed the books as practice books after observing that attempt was to enhance the educational value addition and that such books did not merely require child to copy words from printed text. [*Sonka Publication (India) Pvt. Ltd.* v. *Union of India* - W.P.(C) 10022/2018, decided on 7-5-2019, Delhi High Court]

Installation and maintenance of LED/fixtures is not works contract: AAR Maharashtra has held that installation of energy efficient street lights and its maintenance is a composite supply since maintenance of LEDs is not possible without its installation and therefore naturally bundled. The AAR ruled that applicant has to discharge GST as per tariff rate for LEDs and fixtures which is 12%. It held that supply will not be covered under Sl. No. 3(vi)(a) of Notification No. 11/2017-CT(R) since it covers supply of services only. Plea of coverage under works contract was also rejected. [In RE: *Ujjwal Pune* - 2019-TIOL-135-AAR-GST]

GST Appellate Tribunal – Delhi HC asks govt. not to appoint persons without prior intimation to Court: Considering that the matter was to be heard finally and an adjournment was sought by Union of India, Delhi High Court has directed the respondent - Union of India to not, without prior intimation to the Court, proceed to appoint persons to the GST Appellate Tribunal till the next date. The matter has been listed for hearing on 26th of July 2019. [*Bharatiya Vitta Salahkar Samiti* v. *Union of India* – Order dated 2-5-2019 in W.P.(C) 6900/2018, Delhi High Court]

Customs

Notifications and Circulars

Exports – New Shipping Bill Regulations introduced: CBIC has introduced Shipping Bill (Electronic Integrated Declaration and Paperless Processing) Regulations, 2019. The new Regulations issued in supersession of Shipping Bill (Electronic Integration Declaration) Regulations, 2011 requires authorised person to retain assessed copy of shipping bill and all supporting documents in original, for a period of 5 years. Provision has also been made for generation of authenticated copy of shipping bill. As per the Regulations issued on 25-4-2019, penalty upto Rs. 50,000 is imposable in case of any contravention.

SEZ - Management and Business Consultant services is authorized service: SEZ Board of Approval in its 85th meeting has decided that "Management and Business Consultant Services" may be included in the list of default authorized services in SEZ. As per SEZ Instruction No. 94, dated 8-5-2019, such services would be limited to the extent of such value of services availed of/consumed by the SEZ entity only. Further, the unit will have to produce evidence that the said service was consumed in relation to their authorized operations only. It may be noted that 66 services are already permitted as default authorized services.

Exports – 250 shipping bills can now be filed online in single ANF 3D: The number of entries of shipping bills/ airway bills which can be filed in a single online ANF 3D application has been increased from 50 to 250 for claiming Merchandise Exports from India Scheme (MEIS) benefit. ANF 3D which itself was notified recently has been amended for this purpose by DGFT Public Notice No. 7/2015-2020 issued on 7-5-2019. MEIS is a duty credit scrip issued under Chapter 3 of the Foreign Trade Policy with an objective to provide rewards to exporters to offset infrastructural inefficiencies and associated costs.

FTP - No requirement to submit physical copy of RCMC for incentives: The requirement to submit physical copies of RCMC for the purpose of availing incentives under the Foreign Trade Policy 2015-20 will be discontinued from 1-7-2019. According to DGFT Trade Notice dated 13-5-2019, validity of RCMCs will be checked directly from the DGFT's database which has the uploaded data of RCMCs from EPCs. The Trade Notice while noting that as on 31st April, 32,060 valid RCMCs are available on DGFT's data base, also advises all exporters to ensure that their valid RCMCs are duly uploaded by their respective EPC in the DGFT server.

Milk and milk products from China – Import prohibition extended: Prohibition on import of milk and milk products including chocolates, candies, confectionary, food preparations with milk or milk solids as ingredients, from China has been extended. As per DGFT Notification No. 1/2015-20, dated 23-4-2019 this prohibition will be in place until the capacity of all laboratories at ports of entry has been suitably upgraded for testing melamine. The ban was earlier effective till 23-4-2019.

Ratio decidendi

Customs valuation - Rules 3 to 5 to be exhausted before going to Rule 7 & 9: Supreme Court has reiterated that Rules 3 to 5 of Customs Valuation Rules are to be exhausted before proceeding to Rules 7 & 9. The Apex Court observed that if statutory rules exist and provide for sequential implementation, assessing authority has no option. It noted that electrical decorative lighting is normally not highly branded product and import of the same under trademark *Diyas* and *mAntra* does not make them exclusive. It observed that since data was available on prices of similar goods from UK, it could be utilised. [*Anil Kumar Anand* v. *Commissioner* - Civil Appeal No. 3138 of 2018, decided on 22-4-2019, Supreme Court]

Belated payment of redemption fine - Govt. not to return excess amount from auction: Larger Bench of Delhi High Court has held that Government can retain excess auction proceeds after adjusting customs duty, redemption fine, etc., where order under Section 125 of the Customs Act, 1962 has attained finality and the payment is made belatedly but prior to the auction date. The High Court noted that Sections 125 and 126 are not to be read disjunctively. It observed that once there is failure to pay redemption fine in time, whether goods are *prohibited goods* or *other goods*, transient nature

of confiscation ends and vesting of goods with the govt. becomes absolute. [*Gillette India Ltd.* v. *Commissioner* – Judgement dated 23-4-2019 in W.P. (C) No. 1735/2016, Delhi High Court Larger Bench]

FTP – Clubbing of Advance authorisations when not possible: In a case involving clubbing of Advance Authorisations issued in 2004 and 2010, Delhi High Court has held that clubbing can be provided only if export obligation period of authorization issued at a prior point of time allowed under Paragraph 4.22 of the HoPv1 has not expired. The High Court rejected clubbing as petitioner had made no application for extension of export obligation period under license dated 22-8-2004 and maximum period for extension had also expired. It also held that amendment in HoP on 13-10-2011 was not applicable. [*Jindal Poly Films Ltd.* v. *DGFT* – Judgement dated 22-4-2019 in W.P.(C) 7806/2014, Delhi High Court]

IGST refund not deniable even if shipping bill is shut in computer system: Madras High Court, in the light of alternate mechanism under CBIC Circular No. 8/2018-GST, has held that IGST amount on exported goods must be refunded to petitioner who mistakenly availed higher drawback by selecting Drawback code 680203A instead of 680203B in the shipping bill. The High Court held that the petitioner cannot be made helpless just because computer system did not enable refunding the IGST amount as Export General Manifest for the shipping bills was closed. [*VSG Exports (P) Ltd.* v. *Commissioner* - 2019-TIOL-977-HC-MAD-GST]

SAD exemption available to goods cleared from SEZ to DTA on stock transfer: CESTAT Mumbai has held that exemption from SAD would be available to goods cleared from SEZ to DTA on stock transfer. Dismissing department's appeal, it upheld the relief under Section 3(5) of Customs Tariff Act in terms of Notification 45/2005-Cus., to clearance of various medicinal plants. It observed that VAT exemption test cannot be applied except when the transaction takes place. It was held that in the present case payment of VAT was merely postponed till actual sale. The Tribunal in this regard expressed that 'that which cannot be subjected to the test cannot fail the test'. [*Commissioner* v. *Serum Institute of India* - 2019-TIOL-1168-CESTAT-MUM]

Absolute confiscation of prohibited good when not necessary: In a case involving non-compliance of norms prescribed by BIS, CESTAT Mumbai has set aside confiscation of parts of electric irons, without base receptacle and power supply unit. It observed that such goods were most vital components of electric iron but ruled that the same need to be re-exported. The Tribunal disagreed on absolute confiscation of prohibited goods observing that possession of confiscated goods with the government will lead to cost to exchequer. It also held that option of redemption is not to be linked to re-export. [*Global Enterprises* v. *Commissioner* - Final Order No. A/85734/2019, dated 15-4-2019, CESTAT Mumbai]

No confiscation under Customs Section 113(d) when attempt to export absent: In a case where goods were not presented to proper officer for export and thus formalities as per Regulation 6 of the Courier Imports & Exports (Clearance) Regulations were not completed, CESTAT Mumbai has set aside confiscation of goods seized from the courier agency. The Tribunal observed that language of Sections 113(d) and 2(19) of Customs Act, 1962 convey that only goods which are attempted to be exported are liable to confiscation. It also observed that the appellant had filed FIR for missing goods and that goods were booked for export by somebody else. [*Dalumi Hongkong Ltd.* v. *Commissioner* - Order No. A/85757/2019, dated 18-4-2019, CESTAT Mumbai]

DFIA – Classification under particular tariff heading not relevant: Walnuts in shell are covered under description of food flavour / flavouring agent / flavour improvers or dietary fibre, and eligible for benefit of transferred DFIA issued against export of biscuits. Rejecting the plea that walnuts fall in different heading than food flavour, CESTAT Hyderabad noted that neither SION nor notification specifies relevance of ITC (HS) for DFIA. On usability of walnuts, it held that walnuts can be used in biscuits with some processing as a dietary fibre, flavour, etc. [*Uni Bourne Food Ingredients LLP* v. *Commissioner* - 2019-VIL-181-CESTAT-HYD-CU]

Santa Clause suit comprising 9 pieces sold as set classifiable separately under respective headings: US Court of Appeals for Federal Circuit has upheld US CIT Order on classification of goods consisting of 9-piece Santa Claus costume packaged and sold together as a set. The US CIT had held such goods to be classifiable under HTSUS 6110.30.30, 6103.43.15, 6116.93.94 and 4209.92.30 separately. Appellant-importer had contended that all 9 pieces of Santa Suit fall under HTSUS Chapter 95 as 'festive . . . articles' requiring duty-free entry. The Court, however, observed that jackets and pants were durable and that the articles were normal wearing apparel. [*Rubies Costume Company* v. *US* – Opinion dated 29-4-2019 in 2018-1305, US Court of Appeals for Federal Circuit]

Casings made of textile with plastic coating – Classification: US Court of Appeals of Federal Circuit has affirmed US Court of International Trade decision on classification of sausage casings. CIT had classified casings as made-up textiles under subheading 6307.90.98 while the appellant had pleaded for classification under Ch. 39 as plastics. The product comprised of woven textile sheet coated with a thin layer of plastic on one side to only fill interstitial spaces between textile fibers. It rejected the argument that casings were completely embedded in plastics and thus excluded from Section XI. [*Kalle USA, Inc* v. *US* – Opinion dated 2-5-2019 in 2018-1378, US Court of Appeals of Federal Circuit]

Central Excise and Service Tax

Ratio decidendi

Interest payable on differential duty payable due to retrospective price escalation: Larger Bench of Supreme Court has held that interest for delayed payment of Central Excise duty is liable to be paid on the differential excise duty payable due to retrospective price escalation. Earlier, doubting the correctness of the Supreme Court decision in the cases of *CCE v. SKF India Ltd.* [2009 (13) SCC 461] and *International Auto* [2010 (2) SCC 672], the matter was referred to the Larger Bench in *Steel Authority of India* case [2015 (16) SCC 107]. The Referring Bench was of the view that excise duty paid on the date of clearance of goods was not treatable as 'short-paid' as it was not possible to pay duty based on price escalation which took place later. Rule 7 of the Central Excise Rules relating to provisional assessment, according to which interest is to be paid, was relied on. The Apex Court observed that assessee had not opted for provisional assessment, and that the law will have to be

interpreted in a manner that it is fair and equal to similarly situated group of assessees. [*Steel Authority of India Ltd.* v. *Commissioner* - Civil Appeal No. 2150/2012 and Ors, decided on 8-5-2019, Supreme Court Larger Bench]

Bagasse not a manufactured product – Allahabad High Court quashes CBIC Circular: Allahabad High Court has held that Cenvat credit need not be reversed in respect of bagasse which is an agricultural waste and not a manufactured final product. The High Court quashed CBIC Circular No.1027/15/2016-CX, dated 25-4-2016 which treated bagasse as exempted product. It also observed that amendment in 2015 in the Cenvat Credit Rules may have the effect of treating bagasse as exempted good but cannot result in it being manufactured goods. Judgement in *UoI v. DSCL Sugar Ltd.* was relied on. [*Balrampur Chini Mills Ltd* v. *Union of India* - 2019-VIL-157-ALH-CE]

Cenvat credit on towers for providing telecommunication services: Karnataka High Court has stayed the CESTAT Order dated 5-2-2018 whereby Cenvat credit was denied on towers, angles and beams for erecting towers for transmission and prefabricated buildings / shelters / PUF panels used for housing, storage of generating sets and other equipment, to the assessee providing telecommunication services. The Tribunal in its impugned order had relied upon Larger Bench Order in the case of *Tower Vision (India) Pvt. Ltd.* which had answered the reference in favour of the Revenue department. The question before the High Court is whether, the Tribunal was correct and justified in holding that tower would not qualify as 'part' or 'component' or 'accessory' of the capital goods as defined under Cenvat Credit Rules. The High Court will also consider whether the Tribunal was correct in holding that tower and shelter did not qualify as 'inputs' for provision of output services as defined under Cenvat Credit Rules. [*Vodafone Mobile Services Ltd.* v. *Commissioner* – Order dated 8-4-2019 in CEA No. 32 of 2018, Karnataka High Court]

Valuation of goods self-used but not in production – Excise Valuation Rule 8 not applicable: CESTAT Chennai has held that goods cleared to sister units and also used internally in construction activity, in various expansion projects, are not covered under Excise Valuation Rule 8. It was held that such goods cannot come under the fold of "self-consumption". Department's view that for Rule 8, goods are required to be consumed in manufacture of other articles and not merely utilised in expansion, was upheld. The Tribunal upheld adjudication orders requiring adoption of Rule 4 read with Rule 11 for valuation in such case. [*JSW Steels Ltd.* v. *Commissioner* - 2019-VIL-262-CESTAT-CHE-CE]

Cenvat credit on input/capital goods not confined to registered site: CESTAT New Delhi has allowed Cenvat credit on capital goods, input services and inputs received in one SSA (Secondary Switching Area) and distributed to another. The assessee had, for convenience, taken registration in different areas but undertook maintenance through its wing which catered to different SSAs. The Tribunal noted that Cenvat credit of inputs or capital goods, was not confined to registered premises, but can be availed even if capital goods were received beyond registered premises for providing output services. [*Bharat Sanchar Nigam Limited* v. *Commissioner* - Final Order No. 50553/2019, dated 16-4-2019, CESTAT Delhi]

Cenvat credit available on photography, repair of MD car and debris removal: CESTAT Bangalore has held that Cenvat credit of service tax can be availed in respect of repair of MD's car

and on service of car used to ferry employees inside manufacturing unit and also to transport work-in-progress. It held that both are indirectly related to manufacture. The Tribunal also held that photography for ground breaking function, hiring charges as well as cleaning and debris removal also fell within the definition of input service, being directly or indirectly related to manufacture. [*Plansee India High Performance Materials Pvt. Ltd.* v. *Commissioner* - 2019-VIL-240-CESTAT-BLR-ST]

Excise - No appeal before High Court if matter involves valuation also: In a case involving clandestine removal along with under-valuation, Bombay High Court has held that even if the order of the Tribunal has dealt with other issues besides valuation, the appeal against such order must be brought before the Supreme Court. Denying own jurisdiction, the High Court observed that order of the Tribunal cannot be bifurcated and must be challenged as a whole before one forum. It relied on Central Excise Section 35L and directed the return of Memorandum of Appeal to enable the department to file appropriate proceedings before Supreme Court. [*Commissioner* v. *Durian Industries* - 2019-TIOL-847-HC-MUM-CX]

Valuation, related person – Directors being member of HUF and sharing infra: In a case involving clearances to alleged related person, CESTAT Ahmedabad has held that fact that directors of two companies were members of a HUF, was immaterial for deciding relationship between two companies. It observed that the statute required that assessee and buyers be related and not that directors of two entities were related. Similarly, use of certain common basic infrastructure and staff was held as not relevant. [*Vishesh Dhatu Industries* v. *Commissioner* - 2019-VIL-271-CESTAT-AHM-CE]

Medicaments cleared to hospitals – DPCO para 14 & 15 not applicable: CESTAT has held that provisions of para 14 and 15 of the Drugs (Price Control) Order 1995, are not attracted in respect of sales to hospitals which are not further offered for retail sale. Valuation under Section 4 of the Central Excise Act was upheld. The Tribunal noted that supplies had 'Hospital supply not for sale' marked on them. It observed that sale appearing in para 14 and 15 of DPCO is only to be read in respect of the goods 'offered for retail sale' and that what is covered in DPCO is only the items which are sold in retail. [*USV Ltd.* v. *Commissioner* - Final Order No. A/10790-10799/2019, dated 6-5-2019, CESTAT Ahmedabad]

Value Added Tax (VAT)

Ratio decidendi

No power with State gov./Municipal Corp. to legislate on advertisement tax: Allahabad High Court has set aside demand of advertisement tax from the petitioners for the period after 1-7-2017. The High Court in this regard observed that provision of Section 172(2)(h) of the Municipal Corporation Act was omitted by Section 173 of the U.P. GST Act with effect from 1-7-2017 and even the power of the State legislature to legislate with regard to advertisement tax stood deleted with effect from 12-9-2016 by the Constitution (101) Amendment Act. It held that

there is no power left with the State Government or the Municipal Corporation to legislate tax on advertisement. [*Selvel Media Services Private Limited* v. *State of U.P.* - 2019-VIL-215-ALH]

Delivery of possession, not custody of goods, sine qua non for VAT: Allahabad High Court has reiterated that unless possession and control of the vehicle are transferred there cannot be transfer of right to use the goods under Section 3F of the U.P. VAT Act. The High Court set aside the order of Assessing Officer and the Tribunal on demand of tax under Section 3F on contractor operating tank trucks for haulage and delivery of petroleum products belonging to Hindustan Petroleum. Relying on *Rashtriya Ispat Nigam Ltd.*, High Court reiterated that delivery of possession of thing must be distinguished from its custody. [*Gopal Oil Company* v. *Commissioner* - 2019-TIOL-1009-HC-ALL-VAT]

Questions allowed to be challenged cannot be barred on plea of res judicata: Supreme Court has held that plea of constructive *res judicata* cannot be used to prevent appellant from raising a question allowed by court to be asked in a separate petition. It noted that the 9 judges Bench and the regular Bench had restricted themselves to applicability of Entry Tax and had left demand of interest to be challenged separately. The Court remanded case to High Court for determining interest on State Entry Tax. It also rejected submission on absence of any substantive law on interest under U.P. Tax on Entry of Goods into Local Areas Act. [*Indian Oil Corporation Limited v. State of UP* - Civil Appeal Nos. 3257-3268 of 2019, decided on 22-4-2019, Supreme Court]

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