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An e-newsletter from
Lakshmikumaran & Sridharan, India

November 2019 / Issue – 101

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November
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Articles

CGST Rule 36(4) - 20% of which credit are you eligible for?

By **Vatsal Bhansali, Nivedita Agarwal and Chaitanya Bhatt**

'*Change is the only constant*' - A phrase the CBIC seems to have adopted with the trade being bombarded with a barrage of amendments and day to day clarifications in the GST laws since the implementation of GST. The CBIC by way of Notification No. 49/2019-Central Tax dated 9th October 2019 has notified yet another round of amendments to the CGST Rules which may have far reaching implications for the trade and industry both from the point of view of increased burden of compliances and financial hit that the companies may now be forced to take on account of blocked mis-matched input tax credits.

By Notification No. 49/2019-Central Tax sub-rule (4) has been inserted in Rule 36 in the Central Goods and Services Tax Rules, 2017 ("CGST Rules") which restricts the input tax credit ('ITC') in case of mis-match of invoices. The said Rule 36(4) is reproduced below:

> *"(4) Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, <u>shall not exceed 20 per cent. of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers</u> under sub-section (1) of section 37."*

Thus, Rule 36(4) aims to limit the availment of ITC by the recipient in respect of invoices/debit notes, details of which have not been uploaded by the supplier in its FORM GSTR-1 filed under Section 37(1) of the CGST Act, 2017.

Let us decode the new insertion with a simple example. If an assessee has total input tax credit of Rs. 150 of which Rs.100 is reflected in GSTR-2A and Rs. 50 remains un-reflected, the total input tax credit that can be availed is Rs. 120 i.e. 100 + Rs 20 (20% of Rs. 100). Thus, input tax credit of Rs. 30 out of Rs. 50 which remained unreflected cannot be claimed.

The above amendment has been brought about to give effect to the matching concept which had been envisaged as the backbone of GST by the lawmakers. However, since GSTR-2 and GSTR-3 continue to remain non-operational, the matching of inward and outward supplies remained largely theoretical. With the above amendment, the government has reinforced its intention to disallow the input tax credit on account of mis-match and also put to rest any litigation on this account by codifying disallowance of credit in case of mis-match by way of insertion of Rule 36(4) in the CGST Rules.

While the intention of the Government remains very clear, the amendment does not seem to be very well thought of, as lot of unanswered questions have emerged due to the amendment. One of the lingering question before the assessees for implementing the above provision is "What is eligible credit" for determination of 20%. It is pertinent to note that the term 'eligible credit' is not defined under the CGST Act or IGST Act.

Whether the amount of eligible credit is to be derived from the GSTR 2A as it is, or is the said credit required to be subjected to reversal of

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common credit as per Rules 42 and 43 before calculating the 20%, is not clear. Also, assuming that an assessee computes the eligible credit after reversal as per Rule 42 and Rule 43, what will be the implication of re-computation of the common ITC reversal under Rule 42(2) of the CGST Act, where excess credit is to be claimed or say is to be reversed at the end of the year?

A question may also arise as to whether the credit accruing on account of GST paid under reverse charge mechanism (RCM) being an eligible credit will also be includible in the calculation of Rule 36(4), in light of the use of the words "…. *which have been uploaded by the supplier under sub-section (1) of section 37*." The GST in case of tax paid under RCM being majorly by way of self-generated invoices, the same would not be uploaded by the supplier in the GSTR-1 prescribed under Section 37(1) who in majority of the cases would not be registered under GST. There would be similar situation in case of importation where the supplier is not required to file GSTR-1 under Section 37(1).

However, the said doubt has been clarified to some extent by the Sl. No. 1 of the Circular No. 123/42/2019-GST, dated 11-11-2019, which states that IGST paid on import, documents issued under RCM, credit received from ISD, etc., are outside the ambit of sub-section (1) of Section 37, hence the provisions of Section 36(4) shall not apply to such cases.

However, what about suppliers who are registered and yet making supplies which are taxable on reverse charge basis? In such cases, the suppliers upload their invoices in GSTR-1 under Section 37(1) of the CGST Act. Therefore, the question arises as to whether the restriction contained in Rule 36(4) would apply or not. This has not been specifically clarified by the Circular dated 11-11-2019.

Further, there may be cases where the supplier has uploaded an invoice for supply in the GSTR-1 of previous months, say May 2019 and the same is reflecting in the GSTR-2A of the assessee for May 2019 but the assessee has not availed ITC on account of non-receipt of invoice or goods in that month. Now, in October 2019 the assessee receives the invoice and avails input tax credit in the GSTR-3B for the month of October 2019. What happens in this situation? In other words, a question arises whether the phrase '20% of the eligible credit available' restricts the available eligible credit as referred in the rule only to the amount visible in GSTR 2A for the month of October 2019?

Further what treatment is to be afforded to an invoice which pertains to a previous tax period but is uploaded by the supplier in his October 2019 GSTR-1 return? An issue which shall also garner a lot of attention is the question as to whether the calculation as per the rule is to be done on a consolidated basis for all the four taxes namely IGST, CGST, SGST & UTGST or on standalone basis for each tax type? If a stand beneficial to the assessee is taken and the calculation is done on a consolidated basis, then what would be the ratio in which the credit as per Rule 36(4) is to be availed among the tax heads?

Yet another question before the assessees in computing the eligible credit is the implication of reclaiming of ITC after reversal as per the 2nd Proviso to Section 16(2) of the CGST Act, i.e. reversal of ITC in case payment of value and tax is not made within a period of 180 days from the date of invoice.

As can be seen, even after the issuance of a clarificatory circular the questions which remain unanswered seem to be aplenty. The practical implementation of this rule looks very challenging and the trade and industry should brace themselves to ensure proper compliance with the rule to avoid uncertainties and litigation to the

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extent possible. Appropriate representations may also be filed by the industry to highlight the problems being faced and to seek appropriate resolutions from the government. The government on its part is expected to issue further detailed clarifications on the practical aspects of implementation of the rule to ensure a smooth ride for the industry which already seems to be grappling with other issues amongst the slowing economy.

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Pre-import condition and Rule 96(10) - Misplaced comforts and GST implications for Advance Authorization holders

By **Astha Sinha and Nirav S. Karia**

With the end of 2019 right around the corner, it is interesting to reflect back on the changes that the tax fabric has seen in the past year. One of the major reliefs that the assessees received at the beginning of 2019 (in January) was the removal of a ghost known as "Pre-import condition" specifically for manufacturers who were Advance Authorization holders.

To understand the implications of the same, it is pertinent to have a quick re-look at the position prevailing prior to January 2019. The objective of Advance Authorization scheme was always to allow "duty-free" imports of raw materials (inputs) which are to be physically incorporated in the export products.

History of "Pre-Import Condition"

Duty-free import for Advance Authorisation holders prior to the GST regime was governed by Notification No. 18/2015-Customs as issued under the Customs Act, 1962. However, with the implementation of GST, there was no similar notification for exemption of IGST on import of inputs and thus in respect of imports made by Advance Authorisation holders, ITC of IGST paid on import against Advance Authorisation started getting accumulated.

After various representations were made to the department, the Central Government issued Notification No. 79/2017-Customs dated October 13th, 2017 amending the Customs Notification No.18/2015-Customs to allow upfront exemption from payment of IGST at the time of filing of Bill of Entry for home consumption. The amending notification however inserted a "pre-import condition" to allow upfront exemption from payment of IGST for goods imported under Advance Authorisation.

With the pre-import condition in place, there were various inquiries and litigations that were initiated against "importers" who failed to comply with the pre-import condition and IGST exemption was being denied to them. Gujarat High Court however in the matter of *Maxim Tubes Company Pvt. Ltd.* [2019 (368) ELT 337 (Guj-HC)] struck down the pre-import condition as being *ultra vires* the Advance Authorisation Scheme as contained in the Foreign Trade Policy, 2015-20 as well as the provisions of the Handbook of Procedures.

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To address the said issue of 'pre-import' and provide impetus to 'deemed export' supplies, the Government of India through Notification No. 01/2019-Customs dated 10-01-2019 amended Notification No. 18/2015-Cus. and Notification No. 20/2015-Cus in order to remove the 'pre-import condition' from Notification No. 79/2017-Customs, so as to enable the importers to avail the benefit of exemption from payment of IGST prospectively and also extended the said exemption to supplies which were treated as "deemed exports" under GST as well.

Essentially, the timeline of advance authorisation holder gets split into three phases:

(i) Period prior to 13th October 2017

(ii) Period from 13th October 2017 to 10th January, 2019

(iii) Period from 10th January onwards

History of Rule 96(10) of the CGST Rules, 2017

Parallelly, Rule 96 of the CGST Rules, 2017 was split into Rule 96(9) and Rule 96(10) w.e.f. 23rd October, 2017 *vide* Notification No. 3/2018-Central Tax. The same states:

> *"96(10). The persons claiming refund of integrated tax paid on exports of goods or services should not have received supplies on which the supplier has availed the benefit of the Government of India, Ministry of Finance, notification No. 48/2017- Central Tax dated the 18th October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3 Sub-section (i), vide number G.S.R 1305 (E) dated the 18th October, 2017 or notification No. 40/2017-Central Tax (Rate) 23rd October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1320 (E) dated the 23rd October, 2017 or notification No. 41/2017-Integrated Tax (Rate) dated the 23rd October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1321 (E) dated the 23rd October, 2017 or notification No. 78/2017-Customs dated the 13th October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1272(E) dated the 13th October, 2017 or notification No. 79/2017-Customs dated the 13th October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1299 (E) dated the 13th October, 2017."*

According to Rule 96(10) as introduced originally (extracted above), the "**<u>exporter</u>**" was allowed to export goods on payment of IGST ***<u>only</u>*** if the said exporter has not received goods from a "supplier" who had availed the benefit of any of the notifications specified in the said rule.

However, after multiple amendments, the rule now provides that an exporter who is availing the benefit of the notifications specified in (b) or receives supplies from a person who is availing the benefits under clause (a) of Rule 96(10) will not be entitled to claim refund of IGST paid on export of goods w.e.f 9-10-2018. The same is extracted as under:

> *"(10) 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 the Government of India, Ministry of Finance notification No. 48/2017-Central Tax, dated the 18th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1305 (E), dated the 18th October, 2017 except so*

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far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme or notification No. 40/2017-Central Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1320 (E), dated the 23rd October, 2017 or notification No. 41/2017-Integrated Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1321 (E), dated the 23rd October, 2017 has been availed; or

(b) availed the benefit under notification No. 78/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1272(E), dated the 13th October, 2017 or notification No. 79/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1299 (E), dated the 13th October, 2017 except so far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme.".

It is pertinent to note that the timeline of Rule 96(10) also has a timeline that can be divided into three phases:

(i) First is position till 23rd October, 2017.

(ii) Second is position between 23rd October, 2017 to 9th October 2018.

(iii) Third is the position after 9th October, 2018.

Missing connection for Advance Authorization holders and CGST Rule 96(10)

It is pertinent to note that till 23rd October, 2017 there was no implication of Rule 96(10) of the CGST Rules, 2017 on anyone including the Advance Authorisation holders. However, with the introduction of pre-import condition and Rule 96(10) from 23rd October, 2017 till 10th January, 2019 there was a double whammy on the "importer" and corresponding "exporter".

The importer was not getting the benefit of IGST exemption on imports which they were promised at the time of being given the scheme and also were being barred from refund while exporting goods on the payment of IGST. Thus, anyone undertaking transactions within the said timeline were hit by two draconian provisions prevailing at the time.

However, it is even more interesting to note that the removal of the pre-import condition from 10th January, 2019 onwards was accompanied with the additional benefit of allowing the Advance Authorization holders to fulfil their export obligations even by domestically clearing goods as per Notification No. 48/2017-Central Tax (relating to deemed exports).

Big hit to exporters who actually missed to see the huge impact on account of Rule 96(10)

While this amendment was viewed as a relief to the assessees (importers), the overall impact of that same actually came out to be a big surprise for Advance Authorisation holders as Rule 96(10) of the CGST Rules, 2017 was not amended which bars the exporters from claiming refund in case of export of goods on payment of IGST if the said exporters have availed the benefits of Notification No. 79/2017-Cus. What this implies is that any Advance Authorisation holder must forget about exporting goods on

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payment of IGST and availing the benefit of the quick refund as offered by the Customs portal of ICEGATE.

Various assessees as on date are unaware about the fact that they are hit by provisions of Rule 96(10) of the CGST Rules, 2017 by merely being holders of Advance Authorisation. All exports made by such assessees shall be under the scrutiny of the department.

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Goods and Services Tax (GST)

Notifications and Circulars

ITC restrictions when details of invoices not uploaded, clarified: CBIC has clarified in respect of recently inserted provision relating to restrictions for taking ITC when details of invoices or debit notes are not uploaded by the suppliers. As per Circular No. 123/42/2019-GST, dated 11-11-2019, the availment of restricted credit in terms of sub-rule (4) of Rule 36 of CGST Rules shall be done on self-assessment basis by the tax payers, and the restriction, applicable only on the invoices / debit notes on which credit is availed after 09-10-2019, will be applicable only in respect of those invoices / debit notes, details of which are required to be uploaded by the suppliers under Section 37(1). The restriction is not supplier wise and those invoices on which ITC is not available under any of the provision would not be considered for calculating 20% of the eligible credit available. Providing illustrations, the Circular clarifies that the 20% ITC shall be available in such a way to ensure that the total ITC availed does not exceed the total eligible credit. It has also been clarified that taxpayer may avail full ITC in respect of a tax period, as and when the invoices are uploaded by the suppliers to the extent Eligible ITC/ 1.2.

GST annual returns for 2017-18 to be filed by 31-12-2019: Registered person, other than an Input Service Distributor, a person paying tax under Section 51/52, a casual taxable person and a non-resident taxable person, can now furnish GST annual return/reconciliation statement in FORM GSTR-9/FORM GSTR-9C, for the period from the 1st July, 2017 to the 31st March, 2018, by 31st of December 2019. As per Central Goods and Services Tax (Eighth Removal of Difficulties) Order, 2019, dated 14-11-2019, the said returns for the period from the 1st April, 2018 to the 31st March, 2019 shall be furnished by 31st of March, 2020.

Electronic refund process through Form GST RFD-01 - Procedure for electronic submission and processing of refund applications: Necessary capabilities for making the refund procedure fully electronic, in which all steps of submission and processing shall be undertaken electronically, have been deployed on the common GST portal with effect from 26-9-2019. CBIC has now issued Circular No. 125/44/2019-GST, dated 18-9-2019 to lay down the procedure for electronic submission and processing of refund applications. These guidelines will be applicable in supersession of various earlier

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circulars on the subject. However, it may be noted that the provisions of the earlier circulars shall continue to apply for all the refund applications filed on the common portal before 26-9-2019, which shall continue to be processed manually. This further clarifies in respect of types of refund which shall be filed in said form and the modalities which need to be followed. It also clarifies Deficiency Memos, Provisional Refund, Scrutiny of Application, Re-crediting of electronic credit ledger on account of rejection of refund claim, Supplies to SEZ, Disbursal of refunds, refund of unutilised ITC, refund in case of deemed exports, refund of Compensation Cess, zero-rated supplies, transitional credit, etc.

Optional filing of GST annual return clarified: Clarifying through Circular No. 124/43/2019-GST, dated 18-11-2019 about optional filing of annual return by the assessees whose aggregate turnover in a financial year does not exceed INR 2 crores, CBIC has stated that the tax payers, may, at their own option file Form GSTR-9A for 2017-18 and 2018-19 before the due date. It states that the common portal will not permit furnishing of the return after the due date. The Circular also clarifies that if any registered taxpayer, during course of reconciliation of his accounts, notices any short payment of tax or ineligible availment of input tax credit, he may pay the same through Form GST DRC-03.

Job work – Rate of tax clarified: Relying on definition of 'job work' provided in Section 2(68) of the CGST Act, CBIC has clarified that Entry at item (id) under Heading 9988 of Notification No. 11/2017-Central Tax (Rate) covers only job work services as defined in said provision, that is, services by way of treatment or processing undertaken by a person on goods belonging to another registered person. Circular No. 126/45/2019-GST, dated 22-11-2019 also states that Entry at item (iv) covers only such services which are carried out on physical inputs which are owned by persons other than those registered under the CGST Act.

Job work in relation to bus body building – 'Bus body building' to include building of body on any vehicle: CBIC has amended Notification No. 11/2017-Central Tax (Rate) to insert an explanation against Serial No. 26, item (ic), to state that the term "bus body building" shall include building of body on chassis of any vehicle falling under Chapter 87 of the Customs Tariff. It may be noted that item (ic), providing for rate of 9% CGST on services by way of job work in relation to bus body building, was inserted with effect from 1-10-2019 by Notification No. 20/2019-Central Tax (Rate), dated 30-9-2019. The explanation has now been inserted by Notification No. 26/2019-Central Tax (Rate), dated 22-11-2019. Amendments in this regard have also been made in notifications relating to Integrated Tax and Union Territory Tax.

CBIC implements digital DIN for correspondence with taxpayers: CBIC has implemented a system of digital generation of Document Identification Number (DIN) for all communication sent by its offices to taxpayers. This will create a digital directory for maintaining an audit trail of such communication. As per Circular No. 37/2019-Cus. and Circular No. 122/41/2019-GST, both dated 5-11-2019, no authorization, summons, arrest memos, inspection notices and letters in the course of an inquiry shall be issued on or after 8-11-2019 without a computer-generated DIN. Communication may be issued without DIN in exceptional circumstances, but after recording the reasons in writing. Any specified communication which does not bear DIN and not covered under specified exceptions shall be invalid.

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Ratio decidendi

GST transitional credit – Non-filing of TRAN-1 by 27-12-2017 not fatal: Observing that there was no intention to deny carry forward of unutilized credit of duty/tax already paid, on the ground of time limit, Punjab & Haryana High Court has directed the Revenue department to allow petitioners to file or revise incorrect TRAN-1 either electronically or manually before 30-11-2019. Credit was held as vested right which cannot be taken away on procedural or technical grounds. Reiterating the findings in the Gujarat High Court and Delhi High Court decisions, the Court observed that department was at liberty to verify genuineness of claim of petitioner, but nobody shall be denied to carry-forward legitimate claim of Cenvat credit / ITC on the ground of non-filing of TRAN-I by 27-12-2017. It noted that most people in India are not well conversant with the electronic mechanism. [*Adfert Technologies* v. *UoI* – Judgement dated 4-11-2019 in CWP No.30949 of 2018(O&M), Punjab & Haryana High Court]

GST transitional credit permissible of accumulated credit of Education Cesses and Krishi Kalyan Cess: Madras High Court has allowed GST transitional credit in respect of accumulated credit of Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess. It rejected the contention that the accumulated credit of cesses is dead and gone. The High Court noted that there is no notification/circular/instruction that expressly provides that credit of such cesses would lapse. It also noted that the credit was carried forward and reflected in the returns and that the department having permitted the assessee to carry forward the credit, cannot now take a stand that such credit is unavailable for use. The Court observed that all conditions under sub-sections (1) and (8) of Section 140 were satisfied by the petitioner who had centralized registration earlier, and the embargo placed by Rule 3(7)(b) of Cenvat Credit Rules, 2004 was long gone. [*Sutherland Global Services P. Ltd.* v. *Assistant Commissioner* – Order dated 5-9-2019 in Writ Petition No. 4773 of 2018, Madras High Court]

Good seized due to expiry of e-way bill cannot be released on indemnity bond: Uttarakhand High Court has declined to accede to petitioner's request for release of vehicle and goods seized on merely furnishing an indemnity bond. It observed that it would be inappropriate to issue a direction contrary to provisions of Section 129 of the CGST Act, 2017 which stipulates that goods can only be released on furnishing a bank guarantee. The goods were seized due to expiry of e-way bill while the goods were still in transit. The delay, as per assessee, was not deliberate and had occurred because of traffic diversions on account of Dussehra festival. [*Livguard Energy Technologies (P) Ltd* v. *State of Uttarakhand* – 2019 VIL 554 UTR]

Error in TRAN-1 – Filing of revised declaration after lapse of time: In a case where the assessee had filed FORM GST TRAN-1 within time but, on not understanding the nature of columns due to error, uploaded the details of balance credit in wrong column, Gujarat High Court has directed the revenue department to either open online portal so as to enable the assessee-petitioners to file the rectified form electronically or accept filing of the same manually with corrections. The Court was of the view that the department had no legal authority to retain the amount of credit to which the petitioner was duly entitled and retention of the same was violative of Article 265 of the Constitution of India which provides that no tax shall be collected except by the authority of law. The Court observed that facility of revision was rendered impractical and meaningless as the last date for filing the revised form was same as the last date of filing the original form which had lapsed.

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[*Jakap Metind (P) Ltd* v. *UoI* – Judgement dated 4-10-2019 in R/Special Civil Application No. 19951 of 2018, Gujarat High Court]

Best judgement assessment – Prescription of 30 days for challenge to be strictly construed: Taking note of the availability of alternative remedy, the Division Bench of the Kerala High Court has dismissed the writ appeals in *limine* and refused to declare best judgement assessment under Section 62(1) of CGST Act, as illegal. The Single Judge Bench in its order impugned before the DB had held that statutory prescription of 30 days from the date of receipt of the assessment order under Section 62(1) has to be strictly construed against an assessee and in favour of the revenue department, since this is a provision in a taxing statute that enables an assessee to get an order passed against him on best judgment basis set aside. The SJ was of the view that the provision must be interpreted in the same manner as an exemption provision in a taxing statute and that the Court may not be justified in granting an extension of the period contemplated. The DB reiterated the SJ's observation that assessee had continuously defaulted in filing returns and responding to notices and had even failed to avail the remedy under Section 62(2) and hence there was no circumstance to quash the assessment order in exercise of power under Article 226 of Constitution, bypassing the alternative remedy available. [*Bridge Hygiene Services (P) Ltd* v. *STO* – 2019 VIL 525 KER]

Presence of lawyers cannot be allowed during examination by GST officers: Delhi High Court has held that presence of lawyer cannot be allowed at the time of questioning or examination of a person by the officers under the GST provisions. The Court observed that officers under GST law are not police officers and have been conferred power to summon any person whose attendance they consider necessary to give evidence or to produce a document. Regarding the apprehensions of petitioner being physically assaulted or manhandled, the Court was of the opinion that it is well settled law that no investigation officer has a right to use any method which is not approved by law to extract information from a witness/suspect during examination. Supreme Court's decision in *Pool Pandi v. Superintendent, Central Excise*, was relied upon. [*Sudhir Kumar Aggarwal* v. *Directorate General of GST Intelligence* – 2019 VIL 557 DEL]

No ITC on detachable sliding glass partitions fixed to immovable property: AAR Karnataka has held that input tax credit (ITC) is not available on detachable sliding and stacking glass which is movable in nature and is capitalized as furniture and fixture and not as immovable property. The AAR was of the view that fixing of such glass amounts to addition or alteration to immovable property and that the term construction includes re-construction, renovation, additions or alterations or repairs to the extent of capitalization to the said immovable property. It observed that an asset classified as fixture and shown as discrete element in the books, could still be immovable property. The assessee was in the business of supplying shared workspace/office space to the freelancers. The AAR however held that fixing of detachable wooden flooring (14mm engineered wood with Oak top) is not covered under construction of immovable property and hence ITC would be available on the same. [In RE: *We Work India Management (P) Ltd.* – 2019 TIOL 416 AAR GST]

Mere providing place to consume food not prepared there is not restaurant services: Kerala AAR has held that where a bakery sells ready to eat items and provides a place to consume them, but the food is not prepared in the premises, the service will not amount to

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restaurant services for purposes of GST. The AAR held that a restaurant is a place of business where food is prepared within the premises and served based on the orders received from the customer. The Authority also held that products sold in the ready to eat form are liable to be taxed at the respective rates specified according to their HSN. [In RE: *Square One Homemade Treats* – 2019 VIL 413 AAR]

GST on expenses incurred by employees on behalf of employees and on remuneration to Directors: An advance ruling was sought on (a) whether the expenses incurred by the employees on behalf of the company exceeding Rs.5000/- a day and then reimbursed periodically are liable to tax; and (b) whether GST under reverse charge (RCM) is applicable on remuneration paid to the Directors. AAR Karnataka, relied on Clause 1 of Schedule III of the CGST Act, 2017 and the definition of 'consideration', and held that the amount paid by the employees to the supplier of services was covered under the term "consideration" as if it was paid by the applicant-company for the services received by them on behalf of the company. Accordingly, it was held that the amount reimbursed by the applicant to the employees will neither be a supply of goods nor supply of services. With respect to applicability of GST under RCM on remuneration paid to the directors, it was held that since the directors are not the employees of the company, the services provided by them will be liable to GST. The AAR was of the view that the applicant will be liable to pay GST under RCM on such services as per Serial No. 6 of Notification No. 13/2017-Central Tax (Rate). [In RE: *Alcon Consulting Engineers (India) Pvt. Ltd.* – 2019 VIL 363 AAR]

No GST on volume and sales discount received by way of financial credit notes: The issue under consideration was whether the volume discount and sales discount received by the applicant by way of issue of financial credit note by the supplier, are liable for GST. The AAR Karnataka referred to Section 15(3) of the CGST Act, 2017 and observed that since the credit note was issued as a post-sale event, the same was not covered under clause (a) of the Section 15(3). Further, as the applicant had not reversed the ITC attributable to the discount received in the form of credit note from the supplier, the same could not be covered under clause (b) of the said section. Accordingly, it was held that the credit note issued by the supplier in the instant case did not affect the value of supply. The credit notes were held as only financial documents, for account adjustment of the incentive provided. It was held that there was no effect on GST in respect of discount given to the applicant. [In RE: *Kwality Mobikes (P) Ltd.* – 2019 VIL 357 AAR]

GST liability on transfer of assets fastened to a building: Karnataka AAR has held that transfer of assets fastened to the building on delivering back possession to the lessor without receipt of consideration, shall amount to supply within the meaning of 'supply' within the Section 7 of the Central Goods and Services Tax Act, 2017. The applicant had taken a premises on lease for business purposes and had invested in furnishing of the building to suit his requirements. They intended to vacate the said premises and hand over the possession of the premises to the owner along with the fixtures. The applicant had capitalized these fixtures in the books of accounts in the pre-GST regime and no credit of Cenvat or VAT was availed. The Authority observed that in case the transaction under consideration gets effected prior to the amendment in CGST Act, 2017 in February 2019, the same will fall under the ambit of 'supply' as per Schedule II to the CGST Act, 2017. Further, referring to the definition of 'consideration' it held that the writing-off of the value of assets in the balance sheet is an act

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related to the transfer of property in assets and the monetary value of that act would form the consideration in relation to the supply. It was held that the said transaction will be covered under the ambit of 'Supply' under GST post amendment as well. [In RE: *Aquarelle India Private Limited* – 2019 VIL 344 AAR]

GST liable under RCM on payment towards District Mineral Foundation and National Mining Exploration Trust: Karnataka AAR has held that applicant who was allotted a lease area for mining activities and was paying royalty and an amount towards District Mineral Foundation ('DMF') and National Mining Exploration Trust ('NMET') under the provisions of Mines and Minerals (Development and Regulation) Act, 1957, is liable to pay GST under reverse charge mechanism for payment towards DMF and NMET. The Authority observed that leasing of government land to the applicant to carry out the activity of mining was a supply of service to the applicant. Referring to the provisions of Section 15(2)(a) of the CGST Act, 2017, it observed that the value of the taxable supply of service not only includes the amount of royalty paid to the government but it also includes the amount paid towards DMF and NMET as these payments were made under statutory requirements. With respect to applicability of RCM on the said amount, the authority referred to Sl. No. 5 of the Notification No. 13/2017- Central Tax (Rate). [In RE: *JSW Steel Ltd.* – 2019 VIL 347 AAR]

No ITC on electrical works, pumping systems & tanks, lighting system, physical security system and fire system fitted in warehousing space meant for letting: AAR Karnataka has held that input GST credit is not available on the electrical works, pumps, pumping systems and tanks, lighting system, physical security system and fire system as it is blocked under Section 17(5) of the CGST Act 2017. The Authority noted that what the assessee intended was to give on rental the space with all infrastructure and once these immovable properties come into existence, they get merged into the common 'building space with modern infrastructure and facilities' and hence are excluded from the definition of 'plant and machinery'. It also observed that merely accounting of an immovable property as a movable property in the books of accounts of the applicant does not divest the exact nature of the item and when what is procured is an immovable property, it remains an immovable property, no matter how the same has been accounted for. [In RE: *Embassy Industrial Park Private Limited* – 2019 VIL 389 AAR]

Services of coal beneficiation and transportation are two different supplies and not covered under composite supply: The issue under consideration was whether charging GST at the rate of 5% on transportation services provided by GTA by road under RCM and 18% on coal beneficiation and loading charges was in compliance with the provisions of GST Law. Madhya Pradesh AAR observed that both the coal beneficiation and transportation services were different from each other although supplied together by the supplier. It noted that the price charged by the supplier for both the services were separately mentioned in the price bid invited by the company and none of the services could be considered as predominant over the other service. Therefore, it was held that the said services will not fall under the ambit of 'composite supply' and would fall under different SAC and would be assessed to GST as separate services. [In RE: *Madhya Pradesh Power Generating Company Limited* – 2019 VIL 430 AAR]

No composite supply even if number of works entrusted by way of single document: Madhya Pradesh AAR has held that mere fact that number of works have been entrusted to the assessee by way of a single document will not make it entitled to be categorised as 'composite

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supply' in terms of Section 2(30) of the CGST Act, 2017. It observed that the tender document was a consolidated contract entrusted to the applicant, but it had specific details of all the work to be executed under such contract. Further, the said contract specifically provided the remuneration payable to the applicant for each such work. It was also held that the work entrusted under the said contract will not be entitled to concessional rate in terms of Notification No.11/2017-CT(R) and that the rate of GST will be determined separately in respect of supply provided under the said contract. It was however held that that the supply of goods and/or services which squarely fall within the scope of work entrusted to MPPGCL by the Government of Madhya Pradesh shall be entitled for concessional rate under Sr.No.3(vi) to said notification. [In RE: *Kalyan Toll Infrastructure Ltd.* – 2019 VIL 428 AAR]

Customs

Notifications and Circulars

Deemed export drawback can be claimed on All Industry Rate: Drawback on the inputs used in manufacture and supply as per para 7.03(b) of the Foreign Trade Policy (deemed exports) can now also be claimed on 'All Industry Rate' of Duty Drawback Schedule notified by Department of Revenue, provided Cenvat credit has not been availed by the supplier of goods on excisable inputs. DGFT has amended, with effect from 5-12-2017, para 7.06 of FTP relating to conditions for refund of deemed export drawback. Consequential amendments have also been made for this purpose in paras 7.02 and 7.06 of Handbook of Procedures Vol.1. Notification No. 28/2015-20 and Public Notice No. 40/2015-20, both dated 31-10-2019 have been issued for this purpose.

Companies whose cases are referred to NCLT are required to inform outstanding export obligations: A new para has been added in Chapter 2 of Foreign Trade Policy 2015-20 about the cases referred to the National Company Law Tribunal (NCLT). According to the new Para 2.15A, any firm / company coming under the adjudication proceedings before the NCLT shall inform the concerned Regional Authority and NCLT of any outstanding export obligations/liabilities under any of the schemes under FTP. Further, according to the new para **P**ara 2.29A of the Handbook of Procedures 2015-20, providing for operational modalities to be followed for cases referred to NCLT, companies/firms shall make a summary of statement of outstanding export obligations/liabilities under the FTP schemes, indicating duty saved amounts and applicable interest till the date of start of proceedings before the NCLT, any penalty imposed under the FTDR Act, any other dues such as fee etc. The said summary of statement is to be submitted to the concerned RA and the NCLT before the proceedings commence as part of statutory filings. DGFT Notification No. 25/2015-20 and Public Notice No. 39/2015-20, both dated 18-10-2019 have been issued for this purpose.

Import of PET flakes prohibited: Import of PET flakes made from used PET bottles, etc., has been prohibited in addition to the earlier prohibition on import of PET bottle waste/ scrap. Notification No. 26/2015-20, dated 24-10-2019 in

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this regard amends Policy Condition No. 2 under Chapter 39 of Schedule-I of ITC (HS), 2017.

Export policy for onions revised: Earlier, the Central Government had imposed prohibition on export of onions *vide* Notification No. 21/2015-20, dated 29-9-2019. Now, the export policy condition has been amended to provide for export of Bangalore Rose Onions covered under item description of Serial Number 52 of Chapter 7 of Schedule 2 of ITC (HS), upto a quantity of 9000 MT, for the period up to 30th November, 2019. The aforesaid exports will be allowed subject to obtaining a certificate from the Horticulture Commissioner, Government of Karnataka certifying the item and the quantity of Bangalore Rose Onions to be exported. Notification No. 27/2015-20, dated 28-10-2019 has been issued for this purpose.

Ratio decidendi

Valuation – Proviso to Rule 9(2) of Customs Valuation Rules can be invoked only when freight not ascertainable: CESTAT Ahmedabad has held that proviso to Rule 9(2) of the Customs Valuation Rules can be invoked only when freight cost is not ascertainable. The Tribunal was of the view that the proviso cannot be invoked just because the importer had not received the actual freight element at the time of filing of bill of entry. Considering the facts of the case, the Tribunal observed that the cost of freight was very much ascertainable and importer had also ascertained the same in respect of 10 out of 15 bills of entry. It was observed that method of calculating freight agreed between importer-appellant and freight forwarder was clear as per terms of the agreement and that only variable in cost could be currency adjustments. Distinguishing the Supreme Court judgement in the case of *Weston Components*, the Tribunal further rejected department's plea of confiscation of goods already released. [*Asia Motor Works* v. *Commissioner* – 2019 TIOL 3268 CESTAT AHM]

Valuation - Evidentiary value of export declarations, public ledger, commodity trade statistics data: CESTAT Chennai has held that the transaction value adopted by the importer cannot be rejected merely based on export declarations received from Turkish Customs, public ledger and Commodity Trade Statistics Data (Comtrade). It noted that the Tribunal, while disposing of a batch of cases in regard to similar imports of the very same goods and where similar evidence was adduced by Department, had held that the transaction value cannot be rejected on the basis of such evidence. [*Haji Sumar* and *Diamond Traders* v. *Commissioner* – 2019 TIOL 3301 CESTAT MAD]

Cutting and slitting of imported running length tapes to produce Velcro is 'manufacture' – No anti-dumping duty if Velcro cleared into DTA: CESTAT Allahabad has upheld the Commissioner (Appeals)'s Order holding that cutting and slitting of Narrow Woven Fastening Tape Hook and Loop into various sizes and converting the same to Velcro, amounted to manufacture. Allowing benefit of exemption from anti-dumping duty when final goods were cleared into DTA, the Tribunal observed that revenue department did not advance any arguments to show that the resultant product i.e. Velcro is not known differently in the market than the running length tapes imported by the assessee. [*Principal Commissioner* v. *R V Fashions* – 2019 TIOL 3172 CESTAT ALL]

Classification of goods - Reference to chemical structure when not correct: Observing that by referring to chemical structure of a product every product in the universe can be classified into organic and inorganic chemicals, CESTAT Mumbai has held that such a classification will render the entire scheme of

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Tariff redundant. The Tribunal upheld the impugned order classifying the imported Medium Chain Triglyceride and Caprylic Capriate Triglyceride under CTH 1516 20 91 observing that the literature for the goods in question mentioned the same as re-esterified fat/oil. It further observed that although the Ruling of US Customs and Kenya Customs which supported the findings of the Commissioner were not binding, they are persuasive as the classification followed by them are based on HSN explanatory notes up to at least six-digit level and said classification system is also adopted by Indian Customs. [*Pioma Chemicals* v. *Commissioner* – 2019 TIOL 3072 CESTAT MUM]

Interest on delayed refund - Wrong/excessive collection of duty is not 'deposit': Madras High Court has held that an amount determined as 'duty' by processing the bill of entry and collected by the revenue department can never be termed as a 'deposit'. It observed that 'deposit' is either offered by importer on their own or in compliance pending disposal of proceedings as an interim measure whereas 'duty' is a statutory liability collected as revenue. The Court hence allowed interest on delayed refund of the amount so collected earlier by the department. The Court observed that wrong or excessive collection of duty cannot make such collection as 'deposit' in the hands of the revenue department so as to escape the clutches of Section 27A of Customs Act, 1962. Further, taking note of the fact that there was no factual dispute between the parties except on the nomenclature of the amount paid by the petitioner, the High Court held the writ petition filed against adjudication order was maintainable. [*Global United Shipping (I) Pvt. Ltd.* v. *Asst. Commissioner* – 2019 VIL 515 MAD CU]

Drawback - Customs cannot re-assess already assessed shipping bill: Punjab & Haryana High Court has held that customs department has no powers to re-assess a shipping bill which was duly assessed by the proper officer at the time of export of goods in terms of Rule 16 of Drawback Rules, 1995 as well as Valuation Rules, 2007. The Court observed that goods which stand exported do not fall within the ambit of 'export goods' as defined under Section 2(19) of Customs Act, 1962, thus the department cannot invoke Rules 6 and 8 of Valuation Rules, 2007. Relying upon recent Supreme Court judgement in the case of *ITC Ltd*., the Court was of the view that the order of self-assessment is required to be followed unless modified in appeal. The department had sought to deny drawback alleging overvaluation of goods exported. [*Jairath International* v. *UoI* – 2019 VIL 518 P&H CU]

Mis-declaration by SEZ – Permission based on project report to be relied: Relying on the permission which was granted in terms of project report made before the Development Commissioner, which stated that the SEZ unit was permitted to import garments that were almost new but could be out of fashion in terms of time as far as the country of production is concerned, CESTAT Ahmedabad has set aside the confiscation of goods under Section 111(m) of the Customs Act, 1962. The Tribunal though noted that new clothes imported could not be called rags and hence there was misdeclaration, it observed that the letter of permission was specifically issued referring to the project report and also permits the assessee to manufacture reconditioned clothing. Further, confiscation under Section 111(d) was also set aside observing that no testing was done by the department. [*Texool Wastesavers* v. *Commissioner* – 2019 VIL 710 CESTAT AHM CU]

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Customs Broker License - Mere reference to additional foreign degree is no ground for disqualification for writing examination: Madras High Court has held that a mere reference to the additional foreign degree obtained by the petitioner as a disqualification is unfounded, since the petitioner had otherwise qualified himself to participate in the written examination. The Court was of the view that impugned order rejecting application for appearing in written examination, was contrary to the Customs Broker Licensing Regulations, 2013. The petitioner had applied for the written examination prescribed for issuance of Customs Broker License under Regulations 5 and 6 of CBLR but, was served with the rejection order stating that the petitioner had completed his Master's degree from a foreign university, but had not submitted any proof to the effect that degree is equivalent to MBA degree awarded by universities recognized by UGC/AICTE. [*T. Radhakrishnan* v. Commissioner - 2019 (368) ELT 453 (Mad.)]

Conversion of shipping bill – Request to be made within reasonable period: In a case involving conversion of free shipping bill to advance license shipping bill, the Delhi High Court has held that the request for conversion/amendment should be made within a reasonable period. The High Court was of the view that merely because no time limitation is prescribed under Section 149 of Customs Act, 1962 for seeking amendment/ conversion, it does not follow that a request in that regard could be made after passage of any length of time. The Court observed that the department could not have entertained the application for such conversion without examination of the records and that it was not fair to expect the department to maintain, and be possessed of, the records after passage of five long years. The department had earlier rejected the request for conversion relying on Circular No. 36/2010-Cus., dated 23-9-2010. [*Commissioner* v. *E.S. Lighting Technologies (P) Ltd.* - 2019 (11) TMI 736 Delhi High Court]

Refund claim without challenging assessment of bill of entry is premature, however, time given to assessee to challenge: The refund claim was held to be premature in view of the decision of the Supreme Court in the case of *ITC Ltd.* [2019 TIOL 418 SC CUS LB], since no appeal was filed challenging the assessment of the bill of entry. However, Madras High Court has granted liberty to the assessee-petitioner to file an appeal challenging such assessment within 2 weeks from the date of receipt of the order of the Court. The Court directed the authorities to decide the appeal so filed on merits without reference to the period of limitation, as it observed that the refund application itself was filed by the assessee within two months from the date of self-assessment order. [*Nipman Fastener Industries Pvt. Ltd.* v. *Deputy Commissioner* - 2019 (11) TMI 196 Madras High Court]

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Central Excise, Service Tax and VAT

Ratio decidendi

No demand under Cenvat Rule 6(3)(i) on electricity generated from bagasse: Relying upon Supreme Court decision in the case of *DSCL Sugar Ltd*., Delhi High Court has held that since bagasse is non-marketable, sale of electricity generated entirely from such non-excisable bagasse, will not attract demand under Rule 6(3)(i) of the Cenvat Credit Rules, 2004. However, the Court recorded its disagreement with Allahabad High Court's decision in *Gularia Chini Mills v. UoI* and held that non-specification of any rate of duty, against a particular sub-heading of the Tariff, would not result in the product becoming non-excisable. It held that electricity was thus 'excisable'. It also rejected the plea of the department that the Tribunal was limited by the stand taken by the parties before it. The High Court observed that judicial authority is guided by the legal position as it exists and not by the legal position as urged. [*Commissioner* v. *Nangalamal Sugar Complex* – 2019 VIL 529 DEL CE]

Agreement to purchase property with intention to sell – Liability under Real Estate Agent service: Chhattisgarh High Court has held that when a person from the first day enters into an agreement to purchase some property with an intention to sell it to some other person, it cannot be said that the transaction was a simple sale and purchase of immovable property. It held that such act attracts definition of real estate agent with appellant coming under the purview of service provider. The Court observed that the act of appellant entering into agreement of purchase of land with original owner, but not executing the sale deed with itself but in favor of third party directly from landowner cannot be termed as simple sale and purchase of immovable property. The Court also rejected the plea of non-invocability of extended period for limitation. [*Chhattisgarh Steel Casting (P) Ltd.* v. *UoI* – 2019 VIL 555 CHG ST]

Cenvat credit on outdoor catering activity and rent-a-cab services: Observing that definition of input service was very wide and that the only condition precedent was that it should be the activity relating to business, CESTAT Mumbai has allowed Cenvat credit on outdoor catering services and rent-a-cab services for the period 2007-2010. It noted that outdoor catering services was availed for the clients who visited the office for business meeting during business hours and not as personal or welfare measure for its employees. The expense was not recovered from employees and was debited in profit and loss account. In respect of rent-a-cab services, the Tribunal noted that the said service, for attending business meetings, was availed before 2011 and was an expenditure in relation to business. [*Mediacom Media India Pvt. Ltd*. v. *Commissioner* – 2019 VIL 625 CESTAT MUM ST]

Sale from SHA at departure terminal of international airport is 'export': CESTAT Mumbai has held that goods sold by the assessee at its outlets situated at the Security Hold Area at the departure terminal of an international airport, are exports and the respondent is an exporter. It was hence held that the assessee was eligible for rebate under Notification No. 41/2012-S.T. of the service tax borne by him on the rent paid to Mumbai

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International Airport Ltd. for its outlets in the international airport. It observed that there was no option for the passengers going abroad but to take the goods, purchased by them from outlets of assessee, out of India. The Tribunal in this regard was of the view that the assessee (outlet at airport) was the exporter and that the passenger was only the carrier of the goods. [*Commissioner* v. *Flemingo Airport Retail Pvt. Ltd.* – 2019 VIL 665 CESTAT MUM ST]

Service tax exemption to units in SEZ – Exemption to depend only on terms and conditions prescribed in SEZ provisions: High Court for the State of Telangana and Andhra Pradesh has held that availability of exemptions under Section 26 of the SEZ Act would depend only on the terms and conditions prescribed under Section 26(2), and not on the terms and conditions prescribed in the notifications issued under various enactments such as Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944, Central Excise Tariff Act, 1985, Finance Act, 1994 and Central Sales Tax Act, 1956 etc., listed in clauses (a) to (g) of sub-section (1) of Section 26 of the SEZ Act. Allowing the writ petition against denial of service tax exemption, the Court was of the view that notifications issued under Section 93 of the Finance Act, 1994 cannot be pressed into service for finding out whether a unit in a SEZ qualifies for exemption or not. It observed that the petitioners had complied with the prescriptions contained in Rule 22 of the SEZ Rules, 2006, and that the said Rule does not stipulate the filing of forms A1 and A2 as prescribed in the three notifications issued under Section 93. It observed that the moment a set of rules is issued either in respect of matters covered by Section 7 or in respect of matters covered by Section 26(1), there is no scope for invoking any other law for imposing any other condition. Department's contention that Section 51 of the SEZ Act cannot be pressed into service was also rejected. [*GMR Aerospace Engineering Limited* v. *Union of India* - 2019-VIL-489-TEL]

Bees wax – Washing, melting and packing not amount to 'manufacture': CESTAT Mumbai has held that merely because certain processes are carried out on the raw bees wax to make the product in a presentable and better marketable form, without significant change in the character and use between the raw bees wax and the cleaned/purified bees wax, the processes undertaken cannot result in manufacture. Relying on the decision of the Supreme Court in the case Shyam Oil Cake Ltd., the Tribunal observed that merely because the product bees wax was mentioned under chapter sub-heading 1507, it cannot be considered that the processes carried out on the raw bees wax resulted in 'manufacture' within the definition of Section 2(f) of Cental Excise Act, 1944. Commissioner (Appeals) in its order impugned before the Tribunal had held that process of melting, water-washing and re-melting, acid washing, slabbing by drying in a tray and then packing in corrugated boxes of 25 kg, involves series of processes by which the wax is manufactured. [*Shree Laxmi Textile Processors Pvt. Ltd.* v. *Commissioner* – 2019 TIOL 2755 CESTAT MUM]

Cenvat credit on motor vehicles – No need for exclusive use in listed services: CESTAT Hyderabad has held that as long as the assessee used motor vehicles for rendering Cargo Handling Services on which they had paid service tax, they were entitled to Cenvat credit on such motor vehicles as capital goods. The Tribunal was of the view that the motor vehicles need not be used exclusively for providing cargo handling or other listed services, and that mere fact that the assessee had also used such motor vehicles for some other purposes did not deprive them of their Cenvat Credit. Observing that show

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cause notice had not brought forth any evidence that the vehicles in question were not used for cargo handling services, the Tribunal rejected the department's view that the vehicles were used for Port services which was the main service of the assessee. [*Srinivasa Transports* v. *Commissioner* – 2019 VIL 708 CESTAT HYD ST]

Ground of limitation can never be impliedly rejected: Limitation/time-bar issue was raised before the Tribunal but the it gave no finding in that regard and remanded the matter to the assessing officer for considering taxability issue. The appellant moved an application for modification of the order which was rejected by the Tribunal on the ground that it had impliedly rejected the plea on limitation. Chhattisgarh High Court however has held that when a quasi-judicial authority considers legality and validity of an order on certain grounds including the ground of limitation, the said ground can never be impliedly rejected. The Court was of the view that plea of limitation being an important defence available to the assessee and therefore, the said plea cannot be impliedly rejected as the authorities are required to be satisfied about existence of the pre-requisites as contained in the provisions. [*Rakesh Singh* v. *Commissioner* - 2019 (368) ELT (Chhattisgarh)]

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