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An e-newsletter from
Lakshmikumaran & Sridharan, India

October 2018 / Issue – 88

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October
2018

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TDS under GST law – Certain issues

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Ever since Goods and Service Tax (GST) has been implemented, it has really kept the taxman as well as the implementers along with the taxpayers on their toes. A whole lot of effort has gone into making compliance with the GST law simple, but clarifications have continued unabated to resolve certain issues and to convey the intention of law. Recently, the provisions relating to deduction of tax at source (TDS) have been made effective which has also created a few implementation issues. Let us briefly examine them in this article.

Transitional issue

TDS is deductible only at the time of making payment towards value of supply as per the mandate of the provisions and there is no correlation with the date of invoice. However, the same does not seem to be the intention as one can discern from the Standard Operating Procedure (SOP) issued by the GST Council. The SOP states that TDS is not required on the payments made post 1.10.2018 where invoice was already issued before the said date. When payment for the supply is the point which triggers TDS provisions, reference to issuance of invoice and reconciling such position may be difficult. This clarification in SOP may be due to the fact that time of supply gets completed on issuance of invoice and tax payment would have been made by the supplier. But the provisions contained in Section 51 of CGST Act do not reflect such position as the deductor is mandated to deduct whenever he makes payment.

TDS on advances for procurement of goods

Another area of confusion or lack of clarity pertains to payment of advance for supply of goods. Due to certain practical issues, the provisions relating to tax liability getting triggered on payment made in advance for procurements of goods have been kept in abeyance. This means that the recipient of supply is not liable to make TDS deductions as no taxable event has occurred yet. When the actual supply of goods will flow from the vendor, recipient would be left with nothing to secure his TDS compliances as he has already made the payment earlier and the customer cannot make TDS deduction subsequently. This leaves the taxpayers in a strange situation as even when they would like to ensure compliance, the system may not support the same.

Issuance of TDS certificate

Compliance with TDS provisions does not end with filing the returns by the deductor. The provisions mandate issuance of certificate to the deductee in five days, failing which deductor shall be liable to pay late fee for every day of delay. The CGST Rules seem to take away that obligation by providing for automatic generation of TDS certificate to the deductee, through common portal. Now, the question arises as to how the responsibility of the deductor for issuance of certificate is to be fixed in case the common portal fails to generate the certificate to the deductee within the prescribed time limit. Whether the deductor will still be held liable for late fees?

Is there is a revenue loss to government?

There is no exemption from the TDS provision in respect of supplies made by a government department (if such supplies are taxable) and TDS will be required to be made by the recipient. This means credit of the amount to the extent of TDS to the Consolidated Fund of India (CFI) gets deferred which will have an impact on government's finances. In the absence of TDS provisions, payment made in respect of such supplies would have directly flowed to CFI, however, due to deduction of TDS, the deducted portion shall be credited to the CFI at a subsequent date which temporarily creates a stress on the inflow of funds. This may require the immediate attention of the taxman.

Intention of the law

TDS is not an alien concept in the indirect tax regime, it was also existent in the erstwhile VAT laws. Undoubtedly, the benefits of these provisions achieved by the revenue authorities not only in the erstwhile VAT regime but also in the direct tax regime, cannot be questioned. The government aims to plug every gap that could have led to evasion of tax, and so have remained the intention of the taxman when the provisions of TDS were rolled out. However, keeping a provision like TDS limited to only certain categories of assessees and that too only to the government departments or its bodies raises everybody's eyebrows. Already matching of supplier's invoices as populated in GSTR-2A and credit taken in GSTR-3B is in place which creates a check that no supply goes unreported, then what purpose would these TDS provision serve is not at all clear. Moreover, considering the fact that no TDS implication is attracted on the exempt supplies or on procurements from unregistered dealer, it is not known how any irregularities arising will attract the attention of the department.

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Goods and Services Tax (GST)

Notifications and Circulars

Refund to exporters – CGST Rule 96(10) amended prospectively and retrospectively: Rule 96(10) of the Central GST Rules, 2017, relating to refund of IGST to exporters has been amended again on 9-10-2018, both retrospectively and prospectively by way of two different notifications. The first amendment by Notification No. 53/2018-Central Tax, is retrospective and is applicable with effect from 23-10-2017. It restores the position as it was before the said sub-rule was amended by Notification No. 39/2018-Central Tax, dated 4-9-2018, also with effect from 23-10-2017. Broadly, it withdraws the provision which denied refund of IGST to exporters who are availing the exemption from IGST under Customs notifications issued for Advance Authorisation/EPCG schemes.

The second amendment, by Notification No. 54/2018-Central Tax, restores the position as present till 8-10-2018 (though with slight change). It again prohibits refund of IGST to persons who are availing exemption from IGST under two specified Customs notifications amending few notifications issued for Advance authorisation or EPCG schemes. However, additionally, according to the latest amendments which are applicable prospectively, IGST refund would be available even if capital goods are procured domestically under EPCG scheme (deemed export). Rule 89(4B) has also been aligned with Rule 96(10) by this notification.

Refund of Compensation Cess to diplomatic missions and UN organisations – CGST notification to be adhered: UN and specified international organizations, foreign diplomatic missions or consular posts in India, or diplomatic agents or career consular officers posted therein are entitled to refund of Compensation Cess payable on the intra-state and inter-state supply of goods and services received by them. CBIC Circular No. 68/42/2018-GST, dated 5-10-2018 while observing so, states that Notification No. 16/2017-Central Tax (Rate) issued under the CGST Act, 2017 would be applicable for the purpose of such refund of Compensation Cess. Provisions of Section 9(2) and 11 of the Goods and Services Tax (Compensation to States) Act, 2017 have been relied on for this purpose.

GST on trusts for advancement of religion, spirituality or yoga clarified: CBIC has reiterated that services provided by an entity registered under Section 12AA of Income Tax Act by way of advancement of religion, spirituality or yoga are exempt from GST. Residential programmes or camps where the fee charged includes cost of lodging and boarding are also exempt if primary and predominant activity, objective and purpose is advancement of religion, spirituality or yoga. Circular No. 66/40/2018-Central Tax, dated 26-9-2018 also reiterates that if such trust merely or primarily provides accommodation or serves food against consideration, the same will be taxable.

Detention and seizure – CGST Section 129 not to be invoked in all circumstances: CBIC has clarified that proceedings under Section 129 of the Central GST Act may not be initiated in all cases if goods are accompanied by an e-way bill. Circular No. 64/38/2018-GST issued for this purpose states that a simple penalty of Rs. 500 each under CGST and SGST be imposed if there is spelling mistake in name, error in pin-code not increasing validity of bill, error in address of consignee if locality and other details are correct, error in 1-2 digits of document number, error in 4 or 6 digit level of HSN if fist 2 digits are correct with right tax rate, and error in 1-2 digits/characters of vehicle number.

Budgetary support scheme claims for specified States to be filed online: Budgetary support claims by units located in States of Jammu & Kashmir, Uttarakhand, Himachal Pradesh and North East including Sikkim, are to be mandatorily filed online from quarter ending September 2018. Units registered manually till now would also be required to file fresh application for registration online on ACES-GST portal till 15-10-2018. These will be approved without any verification and additional documents. Circular No. 1067/6/2018-CX, dated 5-10-2018 in this regard also lays down steps involved in registration for the scheme.

Ratio decidendi

GST (Compensation to States) Act, 2017 is constitutionally valid: GST (Compensation to States) Act, 2017 and the Rules framed thereunder are constitutionally valid. The Act has been held as not beyond legislative competence of Parliament, as not transgressing the Constitution (101st Amendment) Act and not a colourable legislation. The Supreme Court observed that when Constitution provision empowers the Parliament to provide for compensation to the States for loss of revenue by law, the expression "law" used therein is of wide import which includes levy of any cess for the above purpose.

The Court also observed that levy of Compensation Cess on the same taxable event is permissible. Rejecting the plea of double taxation, it said that if the taxes are separate and distinct imposts and levied on different aspects, then there is no overlapping in law. Observing that State Compensation Cess is "with

respect to" goods and services tax, and is a tax, the Apex Court held that power to make law regarding goods and services tax, shall include power to levy cess on goods and services tax. Further observing that Clean Energy Cess and Compensation Cess are entirely different from each other, it disallowed the set-off of former paid till 30-6-2017. [*UOI* v. *Mohit Mineral Pvt. Ltd.* - Civil Appeal No. 10177/2018 and Ors., dated 3-10-2018, Supreme Court]

GST transitional credit – CGST Section 140(3)(iv) is unconstitutional: Provisions of Section 140(3)(iv) of the CGST Act, 2017, restricting transition of Cenvat credit relating to Central Excise duty paid by dealer, based on invoice issued more than 12 months before GST regime, are unconstitutional. Differing with the view taken by the Bombay High Court in *JCB India*, Gujarat High Court observed that the said condition without any basis retrospectively limited the scope of a dealer to enjoy existing tax credits which are his vested right. It also observed that had the statutory provision given a time limit from the appointed day for utilization of such credit, the issue would have stood on an entirely different footing. The judgement was however stayed till 31-10-2018. [*Filco Trade Centre Pvt. Ltd.* v. *Union of India* – Judgement dated 5-9-2018 in R/Special Civil Application No. 18433 of 2017 and Ors., Gujarat High Court]

CGST Section 67 authorises search and not sealing of premises: Delhi High Court has allowed a writ petition against complete sealing of premises in a case where assessee could not produce books of accounts and other documents and asked 24 hours for the same. It observed that Section 67(4) of the Central GST Act, 2017 merely authorises officials to search premises and if resistance is offered, to break open the locks. While observing that complete sealing was illegal, the Court directed that the premises, which was in possession of the department for more than a month, be handed over to the petitioner within 12 hours. [*Napin Impex* v. *Commissioner* - W.P.(C) 10287/2018, decided on 28-9-2018, Delhi High Court]

Anti-profiteering – GST rate benefit not to be passed through another product: National Anti-profiteering Authority has held that benefit accrued due to rate reduction on one product cannot be passed on to the customers through another product. The respondent had reduced price of other packs in lieu of benefit on a particular pack of noodles. It was submitted that price reduction would have been around 21 paise to the retailer and around 25 paise to the ultimate consumer which would have been inconvenient to both the retailer and the consumer, and hence the price was reduced on the bigger pack taking into consideration the price reduction on the smaller pack as well.

The Authority in this regard observed that the respondent could not deny benefit of reduction of tax due to problem of legal tender and had no liberty to choose products for passing of benefit. It was held that the benefit accruing to one customer cannot be given to another nor can be arbitrarily enhanced and set off against another. [*Ankur Jain* v. *Kunj Lub Marketing* – Case No. 10/2018, decided on 8-10-2018, National Anti-Profiteering Authority]

Charging enhanced base price to nullify rate reduction is profiteering: In a case involving alleged profiteering by keeping the price including taxes unchanged after the GST rate reduction on Vaseline, from 28% to 18%, National Anti-Profiteering Authority has held that re-stickering of stock was mandatory and that such benefit of tax reduction was to be passed on each and every product. It observed that there was no commercial impossibility in doing so and by charging an enhanced base price to exactly nullify the impact of GST rate reduction, the respondent was guilty of profiteering. The NAA

also held that being a registered person, the respondent-distributor cannot escape his liability under Section 171.

Further, observing that determination of quantum of tax benefit to be passed on and MRP reduction only require mathematical calculation of the quantum of tax reduction, it rejected the argument that there was no methodology to determine quantum of benefit to be passed on. The respondent was ordered to reduce prices and return benefits to consumers (if identifiable) or deposit the alleged benefit to consumer welfare fund along with interest. Penalty was held as imposable. [*Sharma Trading Company* - 2018-VIL-05-NAA]

Anti-profiteering – Benefit to be passed to each customer – Law of average not applicable: Rejecting the contention that discounts were offered to pass on the benefit, National Anti-Profiteering Authority has held that any discount offered could not be in lieu of reduction of GST rate as such discounts are offered in the regular trade practice. The Authority in this regard reiterated that the benefit of rate reduction has to be passed on for each and every customer in respect of each and every product, and accordingly, every transaction has to be independently seen and law of averages cannot be applied. While the applicant argued that NAA could have legally limited its investigation only to the extent of the complaint filed, the Authority rejected the same stating that all violations of Section 171, anywhere in the country can be investigated by the DGAP.

The NAA held that by charging an enhanced base price which was legally not chargeable, the respondent has issued incorrect tax invoice, for which a penalty has been prescribed under the CGST Act and accordingly, there was no case of creating substantive liability under the rules. The NAA also held that relief from penalty was not grantable, as every breach of law has to be penalised, even if the quantum of alleged profiteering was miniscule. [*Lifestyle International Private Limited* - 2018-VIL-07-NAA]

Anti-profiteering – Base price increase in lieu of denial of ITC is not profiteering: In a case involving restaurant services where the GST rate was reduced from 18% to 5% without ITC, National Anti-profiteering Authority has held increase in base price by the assessee-restaurant, post GST rate reduction, to nullify the impact of loss of ITC does not amount to profiteering. The Authority in this regard observed that the average base price was increased by 12.14% to neutralize the denial of ITC of 11.80% and such increase was commensurate with the increase in the cost of the product on account of denial of ITC. It was held that therefore, the allegation of not passing on the benefit of rate reduction was not established. The Authority was also of the view that there was no profiteering when an enhanced base price was charged on 14-11-2017 while the rates were reduced only from 15-11-2017. [*NP FOODS* - 2018-VIL-08-NAA]

Profiteering when ITC benefit not passed-on: National Anti-profiteering Authority has rejected the argument of the respondent that no benefit could be passed on by him (construction service provider) as there was increase in tax rate. It observed that while the rate of GST on construction was effectively increased from 5.25% under the erstwhile regime (service tax) to 12%/8% under GST, the respondent had become entitled to claim ITC. It was noted that the price quoted by the asssessee was the maximum permissible price as per the policy and there was no restriction on him to reduce this price. The NAA rejected the contention of the respondent that the ratio of ITC in the pre and post GST period was incorrect inasmuch as it should consider the cost of construction and not the reported taxable turnovers, considering that it

was a fact from reported GST returns that most of the GST liability of the respondent was now being paid using ITC.

The argument of the respondent that the sub-contractors who were earlier exempt are now charging GST and hence, costs of the respondent have gone up was rejected considering that both the respondent and the sub-contractor have become eligible for ITC under GST, which was earlier not available. The respondent was found guilty of profiteering and was ordered to reduce the price to be realized from the buyers of the flats in commensurate with the benefit of ITC received by him and to return the excess along with interest. [*Pyramid Infratech Pvt. Ltd.* - 2018-VIL-06-NAA]

No ITC on transport of petrol from refinery to export warehouse: AAR West Bengal has held that input tax credit on railway freight for transportation of HSD, petrol and ATF from refinery to export warehouse is not available. The applicant had pleaded that such supply being for export was zero rated within IGST Section 16(1)(a), and that ITC was admissible under Section 16(2). The submission that re-warehousing at depot was sufficient evidence of export was rejected by the Authority to hold that removal from refinery to warehouse was not export and that warehouse was not a mere transit point, but point of storing and final clearance, as movement of goods to depot was not occasioned by an export order. [In RE: *Indian Oil Corporation Ltd.* – Order No. 17/WBAAR/2018-19, dated 18-9-2018, AAR West Bengal]

Restaurant cannot choose to pay GST@ 18% with ITC: GST AAR Karnataka has held that the applicant-restaurant was not entitled to pay GST @ 18% with input tax credit as services offered are classified under a heading attracting GST @ 5%, without ITC. The AAR rejected the plea that Notification No. 46/2017-Central Tax (Rate) did not prevent a restaurant from paying tax at 18% under Sl.No.35 of Notification No.11/2017-Central Tax (Rate) and avail ITC. The service was held classifiable under Heading 9963 and liable to GST @ 5%. The applicant is running restaurants, serving non-alcoholic beverages and food items. [In RE: *Coffee Day Global Ltd.* - Advance Ruling No. KAR ADRG 21/ 2018, dated 21-8-2018, AAR Karnataka]

Marketing service is 'intermediary' and not naturally bundled with aftersales: Observing that agreement between applicant and foreign principal for facilitation of supply to Indian customers, call applicant an agent for soliciting customers in India, negotiating prices, terms, etc., AAR Karnataka has held that predominant nature of transaction was 'intermediary' for purpose of place of supply. Further, since incidence of after-sale services was contingent upon successful supply of materials and not upon marketing intermediary services, it was held that it cannot be called as naturally bundled services. [In RE: *Toshniwal Brothers* - Advance Ruling No. KAR ADRG 23 / 2018, dated 19-9-2018, AAR Karnataka]

Co-owners of rented property individually eligible for threshold exemption: In a case where one of the co-owners, for administrative purposes, was to collect rent and distribute among all co-owners of immovable property let out, AAR Kerala has held that each individual co-owner would be eligible for the threshold limit. The AAR relied on Section 26 of the Income Tax Act to observe that merely by joining hands of 2 or more persons, a different and distinct legal entity does not come into existence, unless there is an intention to do so. CESTAT Order on jointly owned rented property was also relied upon. [In RE: *Elambrancheri Khaldoon* – Advance Ruling No. KER/12/2018, dated 19-9-2018, AAR Kerala]

Demo cars being capital goods are eligible for ITC to car dealer: AAR Kerala has held that input tax paid a vehicle dealer on purchase of

motor car used for demonstration purposes can be availed as input tax credit as capital goods and set off against the output tax payable under GST. The AAR in this regard observed that demo cares are indispensable tools for promotion of sales, purchase being made for furtherance of business, and that the applicant capitalises them in books of accounts. It was also held that the activity did not come under the negative clause under Section 17(5), as after the limited period the vehicles are sold at written down book value. [In RE: *A.M. Motors* - Advance Ruling No. KER/10/2018, dated 26-9-2018, AAR Kerala]

Providing complimentary tickets is covered as 'supply': GST Authority for Advance Rulings Punjab has held that free tickets given as complimentary tickets fall within the definition of supply under CGST Act, 2017 and that ITC is available on inputs and input services used in respect of such tickets. The Authority in this regard observed that by giving free tickets, the applicant is displaying an act of forbearance by tolerating persons who are receiving the services provided by the applicant without paying any money, which other persons not receiving such complimentary tickets would have to pay for. It was held that such act of forbearance would qualify as 'consideration' under Section 2(31)(b) of CGST Act, monetary value of which would be the amount of money charged from other persons not receiving the 'complementary tickets' for availing same services. The AAR also observed that Schedule II of CGST Act deems 'agreeing to the obligation to refrain from an act or to tolerate an act or situation, or to do an act' as supply of service, and that when Section 7(1)(d) of CGST Act makes reference to Schedule II, it does not contain any requirement of presence of consideration. Further, the applicant was held as eligible to avail credit of input and input services going into provision of supply of complimentary tickets. [In RE: *KPH Dream Cricket Pvt. Ltd.* - 2018–VIL–209–AAR]

Lease for mining taxable at rate as applicable on supply of goods: The applicant was granted lease for mining of red boulder, soft boulder and GSB by the Government of Haryana. Advance ruling was sought on the issue of classification of service provided by Haryana Government against receipt of royalty from the applicant along with the rate of GST applicable on the said service. The AAR Haryana in this regard observed that Annexure to Notification no. 11/2017-Central Tax (Rate) covers '*Licensing services for the right to use minerals including its exploration and valuation' under the heading 9973 and group 99733. It was held that royalty paid by the applicant to Haryana Government is a consideration for transfer of right to use minerals as per the lease granted by the Government to the applicant. It was also held that the subject service is covered at residual Entry No. 17(viii) of the referred notification and shall attract same rate of tax as is applicable on supply of subject goods viz. 5%. Further, the ARA also held that in respect of service provided by Haryana Government, the applicant shall be required to discharge tax liability under reverse charge mechanism. [In RE: Pioneer Partners* - 2018-VIL-176-AAR]

Shampoo towel classifiable under Heading 3305 while bed and bath towel classifiable under 3307: Relying on Supreme Court order in *Madhan Agro Industries*, AAR Uttarakhand has held that shampoo towel meant for application on hair only is classifiable under Heading 3305 as distinguished from Wet Wipes, and Bed and Bath Towels which are covered under Heading 3307 of GST Tariff. Latter products were found to be similar as basic nature and working of these products was same. The department had contended that bed and bath towels were classifiable under Heading 3305. The Authority

also rejected classification under Chapters 34, 48 and 56 for these. All the products were held liable to GST @ 18% from 15th November 2017. [In RE: *Gini Filament Limited* – Ruling No. 5 of 2018, AAR Uttarakhand]

UK VAT - Electric mobility scooter when classifiable under Heading 8703 and not 8713: UK's Upper Tribunal Tax and Chancery Chamber has held that Headings 8703 and 8713 are not mutually exclusive as Heading 8703 is applicable to means of transport generally, which can include vehicles classifiable under Heading 8713, subject only to application of the GIRs. It was held that to fall within Heading 8713, vehicle should be designed *solely* for those with a limitation (disability). Electric mobility scooters were hence held as classifiable under 8703 in the absence of material countervailing disadvantages in use by an able-bodied person. [*Commissioner* v. *Invamed Group* - Appeal numbers: UT/2017/0052-0057, decided on 29-9-2018, United Kingdom Upper Tribunal Tax and Chancery Chamber]

EU VAT – Right to deduct VAT on supply when identification number inactive: Court of Justice of the European Union has allowed VAT deduction paid on acquisitions made during a period in which VAT identification number of the assessee was inoperative as it had been declared inactive due to non-filing of returns. The Court observed that company would be entitled to assert its right of deduction by means of VAT returns filed or invoices issued after the reactivation of its identification number. It noted that substantive requirements conferring a right to deduct input VAT was satisfied and that right of deduction was not invoked fraudulently or abusively. [*Siemens Gamesa Renewable Energy România SRL v. Agenţia Naţională de Administrare Fiscală* – Judgement dated 12-9-2018 in Case C-69/17, CJEU]

Customs

Notifications, and Circulars

SEIS benefits to firms providing educational services to NRI students: Benefits under Services Export from India Scheme (SEIS) of Foreign Trade Policy 2015-20 are available to Indian institutes providing educational services to NRI students. Benefits are available under Serial No. 4-A/B/C or D of Appendix 3D of FTP-Handbook of Procedures Vol.1. According to DGFT Policy Circular No. 13/2015-20, dated 5-10-2018, services given to Indian students sponsored by NRIs would not be eligible for such benefit, since such category of students cannot be considered as foreign consumers.

Cruise tourism – CBIC clarifies on applicability of Customs provisions: CBIC has clarified that cruise vessel calling on an Indian port would be liable to pay duty on liquor and other consumed stores during its transit through territorial waters or its period of stay at port in India. Instruction No. 15/2018-Cus., dated 4-10-2018 in this regard also reiterates that Chief Commissioner may ask a customs officer to escort cruise ships on domestic legs and that domestic passengers will be liable to Customs duty on on-board purchases of duty free goods, while international passengers can avail baggage allowance.

Customs duty increased on 19 products to narrow CAD: India has increased basic customs duty on import of 19 products with effect from 27-9-2018. This increase, according to the Finance Ministry Press Release, aims at narrowing the current account deficit. Products covered include air conditioners, household refrigerators, washing machines less than 10 Kg, compressor for air conditioners and refrigerators, speakers, footwears, radial car tyres, certain plastic articles, travel bags, ATF and certain diamonds and articles of jewellery. Notification Nos. 67 to 70/2018-Cus., were issued on 26-9-2018 for this purpose.

EOU, Advance authorisation and EPCG imports - IGST and Cess exemption extended: Ministry of Finance has again extended the exemption from Integrated GST and Compensation Cess in respect of imports under Advance Authorisations, Special Advance Authorisations and EPCG authorisations. The exemption would now be eligible till 31st of March 2019 instead of 1st of October 2018. Such exemption has also been provided in case of imports by Export Oriented Units (EOUs). Notification Nos. 65/2018 and 66/2018-Cus. have been issued for this purpose, making amendments in Notification Nos. 52/2003-Cus., 16, 18, 20 and 22/2015-Cus., and 45/2016-Cus. It may be noted that DGFT has also amended Foreign Trade Policy for this purpose.

India postpones again retaliatory measures against USA: India has again postponed implementation of its retaliatory tariff measures against the USA which are aimed to counter USA's certain measures on import of steel and aluminium from India. The higher basic customs duty (BCD) in respect of imports of commodities such as almonds, apples fresh and other diagnostic reagents, etc., will now be effective from 2nd of November 2018. It may be noted that the higher duty was initially scheduled for 4-8-2018 but was postponed to 18-9-2018. Notification No. 62/2018-Customs, dated 17-9-2018 has been issued for this purpose.

WCO holds 62nd Session of HS Committee, for classification: WCO Harmonized System Committee, held its 62nd Session from 17 to 28 September 2018. It was attended by more than 170 participants from 85 contracting parties. The HS Committee took 43 classification decisions relating to products, including a novel tobacco product, several petroleum products and a quadrocopter. It also adopted 3 sets of amendments to current Explanatory Notes and approved 21 new Classification Opinions. The Committee also provisionally adopted 16 sets of amendments to the Nomenclature and 2 sets of amendments to the future Explanatory Notes.

Ratio decidendi

DGFT Notification No. 9/2015-20, issued without jurisdiction, quashed: Calcutta High Court has quashed Notification No. 9/2015-20, dated 3-6-2016 issued by the DGFT, requiring actual user of newsprint to comply with certain conditions at the time of import and not at the time of clearance of goods. The Court in this regard observed that notification was issued under Section 3 of the Foreign Trade (Development & Regulation) Act, 1992 while Section 6 of said Act states that Central Government cannot empower DG to exercise powers under Sections 3, 5, 15, 16 and 19. Order dated 24-3-1994, giving sanction for DG to authenticate notification, was also held as not issued under Section 6(3). [*Sanmarg Pvt. Ltd.* v. *UOI* – W.P. No. 11957(W) of 2016 decided on 5-10-2018, Calcutta High Court]

No redemption fine when goods re-exported: Observing that the goods were re-exported, CESTAT Allahabad has set aside confiscation and thus imposition of redemption fine. It observed that order of the lower authority that

goods should be redeemed and be re-exported was contradictory. The case involved mis-declaration of description of goods. The Tribunal was of the opinion that the original authority had option of either ordering re-export without confiscation or option of confiscating the goods and giving an option to redeem the same on payment of redemption fine. [*Eminence Technologies* v. *Commissioner* - Final Order No. 72160/2018, dated 11-9-2018, CESTAT Allahabad]

EOU – Destruction of goods outside EOU – Prior permission when not required: In a case where rejected inputs and expired manufactured goods were sent outside EOU to the premises of MP Waste Management Project, CESTAT Delhi has allowed refund of duty paid mistakenly. The assessee had sent an intimation to the department but permission was not received from the department. The Tribunal termed the absence of permission as procedural lapse. It allowed refund observing that the EOU was otherwise not liable to pay duty and that prior permission or presence of the Customs Officer was not relevant. [*Teva API India Ltd.* v. *Commissioner* - Final Order No. 52953/2018, dated 14-9-2018, CESTAT Delhi]

CKD kits for cars – Customs exemption clarified: CESTAT Chennai has held that the sentence '*engine, gearbox and transmission mechanism not in a preassembled condition*' should be read as '*engine or gearbox or transmission mechanism not in a preassembled condition'* in Sl. No. 344(i) of Notification 21/2011-Cus. and Sl. No. 437(1)(a) of Notification 12/2012-Cus, during the period from 1-3-2011 to 11-4-2013. The Tribunal held that the word 'AND' between gearbox and transmission must necessarily be read as 'OR', since, any other interpretation would lead to absurdity and defeat the intention of the legislature. It was held that Entry 344 (1) (b) will not include automobile kit imported with engine or gearbox or transmission in preassembled form and mounted on a chassis / body assembly and will also not include such sub-assembly engine and / or gearbox and / or transmission mechanism if they are imported mated to each other. [*BMW India* v. *Commissioner* - Final Order No. 42430/2018, dated 17-9-2018, CESTAT Chennai]

Anti-dumping duty – DA's termination order appealable before CESTAT: Appeal can be filed before CESTAT under Section 9C of the Customs Tariff Act, 1975 in a case where Designated Authority proposes non-imposition of anti-dumping duty. Delhi High Court in this regard noted that negative final finding order or termination order is determinative, and not a mere recommendation as in the case of positive finding. It was held that such order is 'order of determination' under Section 9C. Disposing the writ petition as not entertained due to availability of alternative remedy, the High Court rejected plea of violation of procedural provisions. [*Jindal Poly Film* v. *Designated Authority* - Writ Petition (Civil) No. 8202/2017, decided on 20-9-2018, Delhi High Court]

EU Customs - Volatile camera classifiable under sub-heading 8525 80 30: Digital camera which can capture a large number of photographic images per second and can store them in its volatile internal memory, where they are deleted when the camera is switched off or new photographs are captured, is classifiable under sub-heading 8525 80 30 of the EU's Combined Nomenclature. The CJEU observed that the camera had the usual characteristic of a digital camera. Classification under 8525 80 19 as other television camera or under CN sub-heading 8525 80 91 or 8525 80 99 was rejected. [*Vision Research Europe BV* v. *Inspecteur* – Judgement dated 13-9-2018 in Case C-372/17, CJEU]

Central Excise and Service Tax

Ratio decidendi

No Cenvat credit on legal services if nexus absent: CESTAT Hyderabad has denied Cenvat credit on legal services received for acquisition of another cement plant and sale of shareholding in another plant, observing that the same did not have relationship with manufacture of cement. It rejected the plea that since service was covered under inclusive part of definition under Cenvat Rule 2(l), there was no requirement of relationship. The period involved was from April, 2014 to March, 2015. [*Sagar Cements* v. *Commissioner* - Final Order No. A/31171/2018, dated 18-9-2018, CESTAT Hyderabad]

Refund of Cenvat credit not deniable even when credit not reflected in ST-3 return: Refund of Cenvat credit on exports was held as not deniable by Mumbai Bench of CESTAT if credit particulars were not reflected in ST-3 returns for a particular period though provided in the accounting records. The Tribunal while remanding for verification of accounting records, directed the authority not to insist on nexus between input services and output service. It observed that the appellant was an EOU and no services were provided domestically, and thus, it could not be said that input services were not used for exports. [*3DPLM Software Solutions* v. *Commissioner* - Final Order No. A/87226/2018, dated 28-8-2018, CESTAT Mumbai]

Cenvat credit on hotel accommodation service when available: CESTAT Mumbai has observed that Cenvat credit can be availed on hotel accommodation service availed by employee of company providing Event Management Service. Rejecting the plea that hotel accommodation was taken for personal use of employees, it observed that event management service can never remain confined to place, and if the said place was situated at an outside location, then hotel accommodation could be considered as a basic requirement. The Tribunal however remanded the matter for scrutiny of documents. [*Procam International* v. *Commissioner* - Order No. A/87454/2018, dated 28-9-2018, CESTAT Mumbai]

Excise Valuation – Proprietorship and limited concerns are not related: CESTAT Ahmedabad has rejected department's contention of classifying assessee (a proprietorship company) and a private limited company as related, just because whole capital of the limited concern was contributed by the family members of the proprietor of assessee-manufacturer. The Tribunal was of the view that Section 6 of Companies Act, 1956 did not cover such situation. Demand was set aside observing that the price adopted by department did not relate to similar class of buyer buying substantial quantity of the total sale. [*K.R. Metals* v. *Commissioner* - Final Order No. A/12096/2018, dated 8-10-2018, CESTAT Ahmedabad]

Valuation of prototypes – Excise Valuation Rule 8 not applicable: In a case where prototypes were cleared to assessee's own another unit on returnable basis for extensive testing to determine their road worthiness, CESTAT Chennai has held that Excise Valuation Rule 8 (for captive consumption), was not applicable. Rejecting department's plea, the Tribunal was of the view that prototypes were not consumed in further manufacture of motor

vehicles and that similar model vehicles which were commercially manufactured can be said to be copies of prototypes. Valuation under Rule 4 was upheld. [*Commissioner* v. *Mahindra & Mahindra* - Final Order No. 42408/2018, dated 12-9-2018, CESTAT Chennai]

Value Added Tax (VAT) and other Taxes

Ratio decidendi

TNVAT – ITC available when inter-State sale made to State government: Supreme Court has upheld the Madras High Court Order which had in-turn upheld the constitutional validity of Section 19(5)(c) of the TNVAT Act and Rule 10(9)(a) of the TN VAT Rules, prescribing Form C in respect of inter-State sales, for the purpose of claiming ITC. The Apex Court however observed that in cases where a dealer makes sales exclusively to the other State Government(s), benefit of ITC would be allowed without insisting on furnishing of Form C. It was held that States would be deemed as registered dealers for this purpose. [*TVS Motor Company Ltd. v. State of Tamil Nadu* - Civil Appeal Nos. 10560-10564/2018 and Ors., decided on 12-10-2018, Supreme Court]

Premix coffee is not coffee, and frozen dessert when not dessert: Premix coffee, containing coffee powder, milk powder and sugar and used for preparation of beverage, was held as classifiable under residual Entry 141 of 1st Schedule to Kerala General Sales Tax Act. The High Court of Kerala rejected classification under Entry 42 covering coffee including coffee beans, seeds and powder, except branded powder. The Court also held that 'Kwality Walls Feast Chocolate' was a chocolate covered under Entry 45. It noted that mere nomenclature as frozen dessert did not make the product a dessert, to be served after food. [*State of Kerala* v. *Hindustan Lever Ltd.* - 2018-VIL-381-KER]

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