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Dear Reader

It gives me great pleasure to address you through this **100th issue of Tax Amicus**. I have always believed that the wealth of knowledge should be shared. We began this journey in May 2011 recalling the Sanskrit verse that the unique wealth of knowledge increases with spending or expending. I hope over these years we have been able to give business critical inputs and academic inputs in a timely manner. These days information is available practically everywhere but value addition results when relevant information is properly digested and communicated in a systematic manner. We intend to continue this endeavour. Your feedback to improve the newsletter is welcome.

Thank you.

Warm regards

V. Lakshmikumaran

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The dividend dilemma

By **Sadhvi Gupta**

In order to stay one step ahead, it is imperative for every business to take stock of its financial position to devise a suitable investment strategy from time to time. While some may settle with the traditional approach of buying and holding stable dividend paying stocks to generate a steady income stream, others may adventure in frequent trading, holding the stocks just long enough to capture dividend it pays.

With the advent of the GST regime, somewhere beyond striking a balance between the risks and returns, a business may have to consider the GST implications involved as well, while earning the sweet fruits of dividends earned on account of ownership of shares. This article is an attempt to analyse whether the investment income earned in the form of dividends arising on account of ownership of shares is to be taken into consideration for reversal of common input tax credit under Rule 42 and Rule 43 of the Central Goods and Services Tax Rules, 2017 (hereinafter "the CGST Rules").

The term 'dividend' has not been defined under the GST law. However, Section 2(35) of the Companies Act, 2013 defines the term 'dividend' to include any interim dividend. It is an inclusive and not an exhaustive definition. In common parlance, 'dividend' means the profits of a company, not retained in the business but distributed among the shareholders in proportion to the amount paid-up on the shares held by them.

The Supreme Court in *CIT v. Girdhardas & Co. (Private) Ltd*.[1] observed that the expression "dividend" has two meanings-

- As applied to a company which is a going concern, it ordinarily means the portion of the profits of the company which is allocated to the holders of shares in the company.
- In case of a winding up, it means a division of the realised assets among the creditors and contributories according to their respective rights.

In light of the above understanding, we may now refer to the relevant GST provisions for analysing whether such dividends need to be considered for reversal of common credit under GST. Section 17(2) of the CGST Act provides that where goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under CGST/IGST Act and partly for effecting exempt supplies (including non-taxable supplies), under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.

Further, Section 17(3) of the CGST Act provides that the value of exempt supply under Section 17(2) shall be as may be prescribed and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, **transactions in securities**, sale of land and,

[1] AIR 1967 SC 795.

subject to clause (b) of paragraph 5 of Schedule II, sale of building.

It is pertinent to note that Section 2(101) of the CGST Act provides that "securities" shall have the same meaning as assigned to it in Section 2(h) of the Securities Contracts (Regulation) Act. The term 'dividend' in itself is not included in the said definition. However, it becomes relevant to examine if the earning of dividend on account of holding shares *(qualifying as 'security' under the definition)* is in any manner connected to the expression, "transaction in security". Since this expression has not been defined under GST law, let us refer to the meaning of "transaction in securities" under foreign jurisprudence.

Section 709(2) of the Income and Corporation Taxes Act 1988 [UK] defines the term 'transaction in securities" as follows:

> *"(2) ... "transaction in securities includes transactions, of whatever description, relating to securities and in particular-*
>
> *(i) the purchase, sale or exchange of securities;*
>
> *(ii) the issuing or securing the issue of, or applying or subscribing for, new securities;*
>
> *(iii) the altering, or securing the alteration of, the rights attached to securities..."*

In this regard, there have been multiple discussions regarding the meaning and scope of term 'transaction in securities' by the House of Lords. For instance, in Her Majesty's Commissioners of Inland Revenue v. Laird Group Plc.[2], it was held that the payment of a dividend in respect of shares was not "a transaction in securities" or "a transaction relating to securities" for the purposes of the Income and Corporation Taxes Act 1988.

In light of the above, we need to understand whether dividends can fall under the ambit of 'transaction in securities' under GST. Explanation to Chapter V 'Input Tax Credit' of CGST Rules provides that for the purpose of determining value of exempt supply under Section 17(3) of the CGST Act, *the value of security shall be taken as 1% of sale value of such security.* Here, the term '*value of securities*' is used in the context of sale of securities. A plain reading of the said explanation suggests that the scope of the said term 'transaction in securities' is only limited to the transaction of *sale* of securities.

However, the question arises whether 'transaction in securities' should be restricted to sale of securities only or the same could extend to transactions *prior to the sale* of securities. Dividends are incomes earned *prior to the sale of shares* on account of ownership of shares held by a shareholder. Thus, a view may be taken that the payment of dividends does not amount to a 'transaction in securities' and hence, a registered person may not be required to reverse input tax credit on such dividend income under GST.

However, the tax authorities may take an argument that the term 'transaction in securities' is wide enough to cover *any transaction related to such security* and hence, dividends are nothing short from transaction in securities and the same merit credit reversals as much as the transaction of sale of such shares does.

Interestingly, even if a view is taken that receipt of dividends does not merit input tax credit reversals under GST, yet every business will have to make input tax reversals on sale of securities due to the presence of deeming fiction under Section 17(3) of the CGST Act. Such deeming fiction makes matters worse for a business that does not make any exempt supply *per se* as per Section 2(47) of the CGST Act and still will have to manage the uphill task of monthly reversals due to such 'transaction in securities'.

[2] [2003] UKHL 54.

Now that the concept of separate business verticals has been washed out, can taking separate (voluntary) registration be an escape from this vicious circle of reversal? Proper analysis needs to be done for taking such a recourse on a case to case basis.

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Goods and Services Tax (GST)

Notifications and Circulars

Central Goods and Services Tax Rules, 2017 – 6th amendment of 2019: CBIC has amended the Central Goods and Services Tax Rules, 2017 for the 6th time this year. Some of the important changes are highlighted below.

- Sub-rule (4) has been inserted in Rule 36 of the Rules to restrict the availment of Input Tax Credit by a registered person in respect of invoices or debit notes, the details of which have not been uploaded by their suppliers. Credit in respect of such invoices would be available only up to 20% of the eligible credit. It seems that said sub-rule has been inserted with effect from 9-10-2019 in view of new Section 43A (of CGST Act) which however has not come into force.
- Rule 61 has been amended with effect from 1-7-2017 to provide that where a return in Form GSTR-3B is required to be furnished by a person then such person shall not be required to furnish the return in Form GSTR-3. Hence the return GSTR-3B is to be treated as the return under Section 39 of the CGST Act.
- Rule 91 of the CGST Rules, 2017 has been amended with effect from 24-9-2019 to provide that the Central Government shall disburse the refund based on the consolidated payment advice.
- Rule 117 of the CGST Rules has been amended to provide for extension of due dates of GST TRAN-1 and GST TRAN-2 to 31st of December 2019 and 31st of January 2020, respectively. The extension will however be applicable in respect of registered persons who could not submit it by due date on account of technical difficulties in the GST portal and in respect of whom the GST Council has made a recommendation for such extension.
- Rule 142 relating to notice and order for demand of amounts payable under the CGST Act, has been amended to provide that before service of SCN, proper officer shall communicate the details of any tax, interest and penalty as ascertained by said officer, in Part A of DRC-01A. The taxpayer can also file any submissions against the proposed liability in Part B of DRC-01A.
- Rule 21A relating to suspension of registration has been amended to provide that the registered person shall not issue tax

invoice and collect tax during the suspension period. Explanation has been inserted in this regard to sub-rule (3) of Rule 21A, explaining the meaning of the expression "shall not make any taxable supply". Further, new sub-rule (5) has been inserted to provide that where the order of revocation of suspension of registration is passed, the provisions of Section 31(3)(a) and Section 40 of the CGST Act would be applicable.

Airlines not liable for GST on PSF and UDF collected from passengers as pure agents: CBIC has clarified that airlines are not responsible for payment of Service Tax/GST on the Passenger Service Fee (PSF) and User Development Fee (UDF) (for airport services provided by airport licensee), provided they satisfy the conditions of being a pure agent under Rule 33 of CGST Rules. Circular No. 115/34/2019-GST, dated 11-10-2019 notes that since PSF and UDF are charged by airport operators for providing the services to the passengers, airport operators are liable to GST and that the airlines which are merely collecting the fees as agents are not liable. The circular however notes that the collection charges paid by airport operators to airlines are a consideration and that airlines shall be liable to pay GST on the same under forward charge.

GST on supply of lending of securities clarified: Supply of lending of securities (through authorized intermediary) is classifiable under Heading 997110 and is leviable to GST@18% under Sl. No. 15(vii) of Notification No. 11/2017-Central Tax (Rate). As per Circular No. 119/38/2019-GST, dated 11-10-2019, activity of lending of securities is not a transaction in securities as it does not involve disposal of securities and hence is not excluded from the definition of services. The circular also states that the explanation added to the definition of services w.e.f. 01.02.2019 is only clarificatory. It notes that for the period from 1-7-2017 to 30-9-2019, GST is payable under forward charge by the lender and that with effect from 1-10-2019, the borrower of securities shall be liable to discharge GST as per Sl. No 16 of Notification No. 22/2019-Central Tax (Rate) under reverse charge mechanism.

Place of supply in composite supply of software/design services related to ESDM industry: Place of supply of software/design by supplier (Electronics, Semi-conductor and Design Manufacturing industry) located in the taxable territory to service recipient located in non-taxable territory by using sample prototype hardware/test kits in a composite supply, where testing is an ancillary supply, is the location of the service recipient as per Section 13(2) of the IGST Act. As per Circular No. 118/37/2019-GST, dated 11-10-2019, provisions of Section 13(3)(a) of IGST Act are not applicable separately for determining the place of supply for ancillary supply in such cases.

Service of display of name of donor in charitable organization when not liable: CBIC has clarified that there is no levy of GST on the service of display of name, in the premises of a charitable organization, of donors who have made donations or gifts to the organization. As per Circular No. 116/35/2019-GST, dated 11-10-2019, where all the three conditions are satisfied namely the gift/donation is made to a charitable organization, the payment has the character of gift/donation and the purpose is philanthropic (i.e. leads to no commercial gain) and is not advertisement, then GST is not leviable.

Construction service – Explanation in Sl. No. 3(vi) of Notification No. 11/2017-CT(R) effective from 21-9-2017: Insertion of explanation in Sl. No. 3(vi) in Notification No. 11/2017-CT(R) dated 28-06-2017 by Notification No. 17/2018-CT(R) dated 26-07-2018, is effective

from inception of the said entry 3(vi), i.e. from 21-09-2017 and not from 27-7-2018 as mentioned in the amending notification. The explanation states that the activities or transactions undertaken by the Govt. and local authority are excluded from the term 'business'. According to Circular No. 120/39/2019-GST, dated 11-10-2019, the line in the amending notification, which mentions the date of effect of such notification, will not alter the operation of the notification in terms of Section 11(3) of CGST Act. As per Section 11(3), the explanation inserted under said section within one year of the earlier notification shall have effect as if it had always been the part of the first such notification.

No GST on grant of liquor licenses has no applicability for grant of other licenses: Special dispensation of considering grant of liquor licenses by the State Government as neither supply of goods nor supply of services, has no applicability or precedence value in relation to grant of other licenses and privileges, where GST is payable on the fee. CBIC Circular No. 121/40/2019-GST, dated 11-10-2019 issued for this purpose also notes that grant of liquor license was exempted from service tax for the period 1-4-2016 till 30-6-2017 by Clause 117 of Finance (No.2) Act, 2019.

Ratio decidendi

Anti-profiteering – Breach of natural justice when matter heard by 3 NAA Members, but order signed by four: Bombay High Court has set aside the order passed by National Anti-profiteering Authority (NAA) finding violation of principles of natural justice when the matter was heard by three Members of NAA but the order was signed by four Members. Department's contention that oral hearing is not contemplated and that signing the order by the fourth member was a mere 'irregularity' inasmuch as no prejudice was caused to the assessee-petitioner, was hence rejected. It noted that Rule 134(2) of CGST Rules clearly contemplates oral hearing and deliberations within the Members before deciding and that presence of the Member during the hearing is not a formality. The High Court was also of the view that from conjoint reading of clauses 6 and 7 of the Methodology and Procedure notified by the NAA, it is seen that 'irregularity' contemplated in clause 7 thereof is not the one involving breach of principles of natural justice. Reliance in this regard was also placed on other clauses of the NAA Methodology and Procedure. Department's plea to extend the concept of institutional decision making to the anti-profiteering authority to state that no one member is authorized to take a decision, was also rejected observing that the present decision was by a designated quasi-judicial body. [*Hardcastle Restaurants Pvt. Ltd.* v. *Union of India* – 2019 VIL 512 BOM.]

Provisional attachment under CGST Section 83 to be taken only as a last resort: Gujarat High Court has held that the powers conferred on the department under Section 83 of the Central GST Act 2017, for provisionally attaching the property of assessee, is a tool to be used in rarity. It observed that such powers are to be used only in cases where there is an ongoing assessment or reassessment and there is an apprehension that assessee may default the ultimate demand. The High Court quashed the provisional attachment of bank accounts, also observing that there must be substantial material on record to indicate as to how assessing authority had formed an opinion of attachment. The High Court reiterated the opinion of the Bombay High Court in its judgement in *Gandhi Trading v. Asst. CIT*, where it was held that attachment should preferably be of the immovable properties and attachment of the bank accounts and trading assets should be seen as the last resort. It was however observed that

there is no hard and fast rule as to how and in what circumstances powers under Section 83 are to be exercised leaving it to the facts and circumstances of each case. It also held that it is not permissible for the authority to equate the provisional attachment envisaged under Section 83 with the attachment in the course of recovery proceedings. [*Pranit Hem Desai* v. *Additional Director General* – 2019 VIL 453 GUJ]

Confiscation of conveyance and goods – Hearing and passing of speaking order mandatory: Observing that principles of natural justice were violated by the adjudicating authority, the Gujarat High Court has set aside the order of confiscation of conveyance and goods, earlier found to be not in possession of mandatory documents. The Court noted that petitioner was not afforded opportunity of hearing inasmuch as matter was kept for hearing on 28-8-2019 but the impugned confiscation order was passed on 24-8-2019. It also observed that the confiscation order was not a speaking order and did not reflect the reason as to why the officer had concluded on confiscation. The impugned order was also found to be silent as regards which provision was violated and which clause of Section 130 was attracted. The Court also noted that the departmental officer had levied more than the maximum fine leviable in terms of Section 130(2) of CGST Act. The matter was remanded for decision afresh. [*Sitaram Roadways* v. *State of Gujarat* – 2019 VIL 510 GUJ.]

Service by Court Receiver is not 'supply' - Supply doctrine does not contemplate a wrongful unilateral act or those resulting in payment of damages: Bombay High Court has held that services rendered by Court Receiver fall under Paragraph 2 of Schedule III of CGST Act, and thus such services cannot be treated as 'supply' and be liable to GST. Observing that Court Receiver is an employee or department of High Court, the Court upheld the view that the services being charged by a permanent department of the Court, pursuant to orders passed by the Court, are to be considered as 'Services by any Court or Tribunal established under any law for the time being in force' under Schedule III.

The Court though noted that as per Section 92 of CGST Act, GST may be levied and collected from Court Receiver with respect to business under its control, it observed that it should be subject to taxable event of supply. Observing that the permission granted to Court Receiver to remain in possession of suit premises for royalty is to balance the equities of the case, the Court was of the view that the basis of this payment is the alleged illegal occupation and hence such payments lack the necessary quality of reciprocity to make it a 'supply'. Agreeing with the *Amicus Curiae*, the Court observed that supply doctrine does not contemplate or encompass a wrongful unilateral act or those resulting in payment of damages. It held that royalty paid to the Court Receiver will be payment towards a potential award of damages or mesne profits, therefore not liable to GST. It was also observed that although quantification of royalty involves ascertaining market rent payable with respect to property, the compensation paid for its possession does not acquire character of consideration to make it a supply. [*Bai Mamubai Trust* v. *Suchitra* – 2019 VIL 454 BOM]

Refund of IGST after adjusting higher rate of duty drawback: Kerala High Court has directed the department to adjust the amount already availed by the petitioner on account of higher rate of duty drawback and pay the balance of IGST payable to the petitioner on account of exports. The petitioner was earlier granted drawback of Central Excise component and denied refund of IGST paid on zero-rated transaction, during the transition period. The Court noted that the

department did not deny refund of IGST to petitioner, an exporter, on a zero-rated transaction under Section 16 of IGST Act but contended that the petitioner had already drawn higher rate of duty drawback and was supposed to refund the same. [*G NXT Power Corp.* v. *UoI* – 2019 VIL 456 KER]

Anti-profiteering – Discount due to slump in market is not passing of ITC benefit: Accepting the DGAP report that assessee-respondent availed additional benefit of ITC of 2.42% after implementation of GST as ITC ratio to the turnover during the pre GST period was 2.06% as compared to the post GST period, where it was 4.48%, NAPA has directed the respondent-builder to pass the benefit of ITC to the flat buyers. The Authority rejected the plea that amount had been passed to home buyers as shown in their ledger. It observed that there was no evidence to prove that the amount was released because of ITC benefit. Further, NAPA was of the view that entry was made on account of the discount which the assessee had offered to the buyers due to slump in the market. It also rejected the plea that it was difficult to calculate ITC in real estate business as benefit of ITC was available during the whole period of construction however the sale of houses was not linked to it. It observed that the assessee had obtained the completion certificate and hence complete details of ITC availed as well as the turnover realised were available. [*Gaurav Gulati* v. *Paramount Propbuilt (P) Ltd.* – Order dated 26-9-2019 in Case No. 47/2019, NAA]

Anti-profiteering – Agreement with buyer in violation of CGST Section 171 is void: NAPA has held that no flat buyer can be forced to forfeit his right of claiming benefit of ITC and any agreement executed in violation of the provisions of section 171(1) of CGST Act 2017 shall be void. It upheld the DGAP findings of profiteering in a case where the additional ITC on account of difference between pre-GST ratio of Cenvat credit to turnover and post-GST ratio of ITC to turnover, was required to be passed on to home buyers. It rejected the plea that computation of profiteered amount should be based on cost and not sale realization. On the contention that comparison of input credits with output taxes should be done covering the entire life span of the project, NAPA was of the view that assessee cannot enrich himself at the expense of the flat buyers by denying them the benefit of ITC till completion of the project and that he has to make periodical assessment of ITC benefit and pass it on to the eligible flat buyers. The Authority further observed that benefit of ITC must be passed through commensurate reduction in prices of flats and not through reduction in the VAT collected. Similarly, it held that charging value of the land as 35% to 40% of the total consideration instead of 33.33% as prescribed statutorily does not amount to passing of the ITC. [*Prasanth Nandulamattam* v. *Bhartiya City Developers (P) Ltd.* – Order dated 14-10-2019 in Case No. 49/2019, NAA]

Construction service - No abatement on preferential location services & car parking services: West Bengal AAAR has held that the abatement on the value of construction service is not available on Preferential Location Service (PLS) since it is a separate service having no association with the land. Observing that PLS was not naturally bundled with construction service in the ordinary course of business, it was held that said service should come under Sl. No. 3(iii) Construction services in Notification No. 11/2017-Central Tax (Rate). The Appellate Authority observed that separate invoices were raised for Unit Sales, PLC Charges and Floor Rise Charges thus affirming that PLS was in no way associated with the land. It held that PLS should be treated as builder's special services in the pre-GST service tax regime, having a

separate tax collection head, on which abatement was not available. Decision in respect of PLS was also held applicable for right to use car parking space. [In RE: *Bengal Peerless Housing Development Co. Ltd.* – 2019 TIOL 68 AAAR GST]

Recovery of parental health insurance premium from employees is not "supply": Maharashtra AAR has held that providing mediclaim policy to parents of employees through an insurance company and recovering 50% of insurance premium from employees is not a supply of service. The AAR was of the view that such provision neither satisfies the conditions of Section 7 of the CGST Act nor is it covered under the term 'business' of Section 2(17). The Authority observed that such activity cannot be treated as an activity done in the course of business or for the furtherance of business as applicant was not in the business of providing insurance. It also noted that said insurance scheme was optional for the employees and that non-provision of such insurance would not affect applicant's business. [In RE: *Jotun India (P) Ltd.* – 2019 VIL 296 AAR]

Additional amount charged by stock broker on delayed payment is not 'interest': Madhya Pradesh AAR has held that the additional amount charged by the stock broker on delayed payment, termed as interest, late fee or penalty, on the amount of brokerage and the amount of securities, cannot be bifurcated as such additional payment does not have its own classification. The AAR was of the view that the amount will take colour from the original supply i.e. supply of stock broking services. Denying exemption under Entry No. 27 in Notification No. 12/2019-Central Tax (Rate), the Authority referred to Circular No. 102/21/2019-GST, dated 28.06.2019 and held that the additional amount being charged could not be treated as interest. Further, with respect to taxability of the additional amount, it was held that the same would be taxed as per original supply, i.e., supply of stock broking services. [In RE: *Indo Thai Securities Limited* - 2019 VIL 268 AAR]

Prize money won in horse race competition is consideration against 'supply': Maharashtra AAR has held that receipt of prize money from horse race conducting entities, in the event of horse owned by the applicant winning the race, would amount to 'supply' under Section 7 of the CGST Act, 2017 and would be liable to GST @ 18%. The Authority observed that the applicant was undertaking the activity of rearing, training, maintaining and providing the horses which was specialized one and according to the requirement of appropriate race authorities, for participating in horse races, which was covered under Clause (a) of Section 2(17), and hence the activity undertaken was 'in the course or furtherance of business'. It was held that the prize money was the consideration received by the applicant and that the participation of horses for the purpose of events organized by the clubs was a supply of services to the event organizer. GST was held liable at the rate of 18% under Sl. No. 35 of Notification No. 11/2017-Central Tax (Rate). [In RE: *Vijay Baburao Shirke* – 2019 VIL 300 AAR]

No ITC in respect of goods or services attributable to incentives provided to dealers: Karnataka AAR has denied ITC in respect of goods or services which are attributable to the incentives provided in the form of gifts to the dealers and painters under various incentive schemes run by the applicant, a manufacturer of paints. The applicant incentivized its dealers/painters by providing them goods or services in the form of gifts or foreign or local trips and itself procured such goods or services on payment of applicable tax. The Authority referred to Section 17(5)(h) of the CGST Act, 2017, which provides that ITC in respect of goods

disposed by way of gifts shall not be available. Further, Circular No. 92/11/2019-GST, dated 07.03.2019, wherein it was clarified that "*ITC shall not be available to the supplier on the inputs, input services and capital goods to the extent they are used in relation to the gifts or free samples distributed without any consideration*", was also relied upon. [In RE: *Surfa Coats (India) Pvt. Ltd.* – 2019 VIL 30 AAR]

Valuation – Subsidy received from government is not includible in value of services: Subsidy received from the State Government for supply of food to the ultimate beneficiaries is excluded from the definition of consideration and would not form part of the turnover on which tax is liable. Karnataka AAR in this regard relied upon Section 2(31) of the Central Goods and Services Tax Act, 2017. It also held that the consideration collected from the beneficiaries is liable to tax after deducting the tax fraction, as the price collected for the food was inclusive of GST. The applicant had received subsidy from the Government in addition to the contracted price received from the beneficiaries towards the supply of meals. The applicant submitted that the price of food is fixed and notified by the Government. [In RE: *Rashmi Hospitality Services Pvt. Ltd*. – 2019 VIL 342 AAR]

ITC on goods and services received before effective date of registration: The applicant sought an advance ruling on whether a registered person can claim ITC of tax paid on goods or services received by it before its effective date of registration under GST. Referring to the provisions of Section 2(94), Section 25(11), Section 18(1) and Section 2(59) of the CGST Act, 2017, Karnataka AAR has held that a registered person is not eligible to claim input tax credit of the tax paid on input invoices of goods or services procured or availed before its effective date of registration. It observed that the applicant is only eligible to claim ITC of tax paid on goods (inputs) lying in stock on the day previous to the effective date of registration, which are intended to be used in the course or furtherance of business, in case the registration application is filed within 30 days from the date on which applicant became liable for registration. [In RE: *Knowlarity Communications Pvt. Ltd*. – 2019 VIL 343 AAR]

E-commerce platform not liable for supply of services by drivers through it: AAR Karnataka has held that e-commerce operator, connecting the drivers with the commuters, was not liable to pay GST for the supply of services by drivers through the e-commerce platform operated by the applicant, but the platform was liable to pay tax on the services provided by it to the drivers. The AAR was also of the view that the applicant was liable to collect tax under Section 52 of CGST Act on the net value of taxable supplies made by the drivers through it where the consideration with respect to such supplies was collected by the applicant. The Authority noted that applicant was not providing drivers to the customers but only facilitating the customers and drivers to come together and that the drivers were not hired by the applicant but were independent persons providing services on principal to principal basis. It was of the view that the drivers were providing manpower services namely "driving a motor vehicle services" which is not covered under Notification No.17/2017-Central Tax. [In RE: *Humble Mobile Solutions (P) Ltd.* – 2019 TIOL 346 AAR GST]

Customs

Notifications and Circulars

Drawback - Education Cesses, SWS and Clean Environment Cess to be factored in Brand Rate: CBIC has clarified that Education Cess, Secondary and Higher Education Cess (SHE Cess) and Social Welfare Surcharge (SWS) and Clean Environment Cess (earlier Clean Energy Cess) are to be factored in calculation of Brand Rate of duty drawback. However, according to Instruction No. 4/2019-Cus., dated 11-10-2019 clarifying so, Stowage Excise Duty cannot be considered for inclusion in calculation of duty drawback on any export goods since Coal Mines (Conservation and Development) Act, 1974 does not make any provisions of Central Excise Act or Customs Act applicable to the said levy.

Steel Import Monitoring System - DGFT clarifies: DGFT has clarified on number of issues relating to the new Steel Import Monitoring System (SIMS) which will be effective from 1st of November, 2019. As per Policy Circular No. 29/2015-20, dated 4-10-2019, SIMS will not be applicable on-air freighted goods and on returnable steel goods imported temporarily. This mandatory registration is also applicable to imports under Advance Authorization, DFIA and import to SEZs and such registration can be taken for one or more items with multiple HS Codes. Any number of consignments can be imported by a single registration within the validity of the registration. According to the circular, a reasonable variation of 5% to 10% in actual CIF value and stated CIF value is permissible.

Manufacture and other operations in warehouse under Customs Section 65 clarified: CBIC has issued Circular No. 34/2019-Cus. and the Manufacture and Other Operations in Warehouse (No. 2) Regulations, 2019 to cover the procedures and documentation for units operating under Section 65 of the Customs Act, 1962 in a comprehensive manner, including application for seeking permission under Section 65, provision of execution of bond by the licensee, receipt, storage and removal of goods, maintenance of accounts, conduct of audit etc. Consequently, the Warehouse (Custody and Handling of Goods) Regulations, 2016 and Warehoused Goods (Removal) Regulations, 2016 have been amended by notifications dated 1-10-2019 to exclude their application for warehouses operating under Section 65.

While the form for application under Section 65 is prescribed in Annexure A of the Circular, licensees manufacturing or carrying out other operations in a bonded warehouse shall be required to maintain records as per form prescribed in Annexure B. The application form is so designed that the process for seeking grant of license as a private bonded warehouse as well as permission to carry out manufacturing or other operations stand integrated into a single form. To facilitate timely clearances for continuous nature of operations in warehouse, it is provided that while the licensee shall file the due documentation and pay duties due and prior permission of proper officer is not an essential condition for the removal of warehoused goods.

No Advance Authorization for gold medallions and coins or any jewellery articles manufactured by mechanised process: DGFT has disallowed issuance of Advance Authorization when export items are 'Gold Medallions and Coins' or 'Any jewellery/articles manufactured by fully mechanised process'. Public Notice 35/2015-20, dated 26-9-2019 has been issued for this purpose.

Pre-Shipment Inspection Agencies - Extension of validity: The validity of recognition of Pre-Shipment Inspection Agencies (PSIAs) as listed under Appendix 2G of Appendices and ANF of the Foreign Trade Policy, whose validity expires between 30-9-2019 and 30-12-2019, has been extended up to 31-12-2019. Public Notice 37/2015-20, dated 27-9-2019 has been issued by DGFT for this purpose.

Transport and Marketing Assistance - Aayat Niryat Form 7(A)A amended: ANF 7(A)A of the Handbook of Procedure Vol.1 has been amended to substitute the word "CIF" wherever used with the words "CIF/C&F". According to Public Notice 38/2015-20, dated 30-9-2019 issued for this purpose, this amendment was necessary as C&F exports are also eligible for availing Transport and Marketing Assistance for specified agriculture products.

New online platform for filing and issuance of Preferential Certificate of Origin: A new platform has been developed, which is a single point access for all FTA/PTAs, for all designated certificate of origin issuing entities. The objective of the digital platform (http://coo.dgft.gov.in) is to provide paperless and contactless platform for certificate of origin application process. The authenticity of certificate so issued digitally will be done through a QR code. Exporters are required to register on the platform using their IEC. According to **T**rade Notice No. 34/2015-20, dated 19-9-2019, a digital signature is also required for e-verification in the application process.

Import and export of electronic cigarettes and parts or components thereof prohibited: The import and export of electronic cigarettes (e-cigarettes) and parts or components thereof including all forms of Electronic Nicotine Delivery Systems, Heat Not Burn Products, e-Hookah and like devices, falling under HS 8543 have been prohibited in accordance with the Prohibition of Electronic Cigarettes (Production, Manufacture, Import, Exports, Transport, Sale, Distribution, Storage and Advertisement) Ordinance, 2019. However, it may be noted that the said prohibition will not apply to any product licensed under the Drugs and Cosmetics Act, 1940. DGFT has issued Notification No. 20/2015-20, dated 26-9-2019 and Notification No. 22/2015-20 dated 30-9-2019 to amend the ITC(HS) Import Policy and ITC(HS) Export Policy, respectively.

Ratio decidendi

Drawback – Limitation for issue of SCN under Rule 16 of Drawback Rules, 1995: Punjab & Haryana High Court has held that any notice issued under Rule 16 of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 beyond 5 years from the date of export is barred by limitation. It observed that every action including show cause notice must be issued within a reasonable period where no limitation is prescribed. The Court was of the view that taking cue from Section 28 of Customs Act, 1962, three years as the period to issue show cause notice may not be reasonable, however, notice issued after five years cannot stand in the eyes of law. It observed that the department cannot open any assessment at its whims and fancies. Further, the Court observed that Rule 20(2) of Drawback Rules, 2017 does not deal with drawback claims filed and sanctioned prior to 1-10-2017 and does not save recovery proceedings of already paid duty drawback. It noted that had there not been

Rule 20(2) then Section 159A of Customs Act, 1962 would have saved all the rights and liabilities arising out of the 1995 Rules. [*Famina Knit Fabs* v. *UoI* – 2019 VIL 467 P&H CU]

DFIA – Benefit available even when specific name of import product not mentioned in licence: Observing that there was no doubt that the green cardamom was used in making biscuits and pickles as flavouring agent and food additives, respectively, CESTAT Ahmedabad has rejected the department's plea that since specific name of the product was not mentioned or ITC (HS) did not match in the DFIA licence, benefit thereunder was not available. It noted that the imported goods were covered under the broad description in the licence. The Tribunal also noted that there was no requirement of any actual use and that the only requirement was that whether the goods are capable of being used in export goods. [*Pace Ventures Pvt. LTD.* v. *Commissioner* – 2019 TIOL 2959 CESTAT AHM]

SAD refund - Deed of conveyance when satisfies requirement of sale invoice: In a case where imported goods were used in construction of immovable property, CESTAT Mumbai has allowed refund of SAD observing that it was a case of deemed sale or passing of the property in goods used in the construction. It was of the view that no separate tax invoice was required to be issued as the conveyance was done through the deed of sale duly registered before the competent authority. The Tribunal observed that goods imported were not in the nature of consumables but being tangible goods used in civil construction, were definitely deemed to be transferred to the buyer of property, attracting liability of sales tax under State VAT laws and service tax under the Central Act. It was also held that there was no question of passing of SAD to buyer as there was no tax invoice. [*Commissioner* v. *Palava Dwellers (P) Ltd.* – 2019 TIOL 2872 CESTAT MUM]

No late fee for delay in filing Bill of Entry where importer takes all efforts to clear goods within reasonable time: CESTAT Chennai has held that late fee imposed on the appellant for delay in filing of Bill of Entry was not proper, since the delay had occurred only because the original importer had failed to clear the goods. The Tribunal observed that present importer had taken efforts to get the IGM amended, get the earlier Bill of Entry cancelled within a reasonable time and filed the new Bill of Entry within three days from the cancellation order of the earlier Bill of Entry, and hence could not be saddled with the late fee. CBIC's standing order that the late charges due to delay in filing the Bill of Entry has to be considered judiciously, was also relied upon. [*ECOM Gill Coffee Trading Pvt. Ltd.* v. *Commissioner* - Final Order No. 41155/2019, dated 30-9-2019, CESTAT Chennai]

Prior contract for import does not affect validity of amendment to import policy: The petitioners had entered into contract to import yellow peas from an exporter in Singapore. Notifications were issued by the Central Government later amending the Import Policy, restricting the import of peas. The petitioner contended that these notifications could not be applied retrospectively as it had already entered into contracts for import of peas and the same are to continue till March, 2020. Rajasthan High Court however held that the notifications under challenge cannot be said to be retrospective, merely because they are likely to affect agreements entered into prior to the date of notification. The Court was of the view that regardless of the transactions, more particularly the private transactions, the restriction has to apply from the date the notification is issued. It was held that the petitioner's contract, which may be prior in time, has to concede or give way to

the statutory notification. [*Bafna Commodities* v. *Union of India* – Judgement dated 15-10-2019 in S.B. Civil Writ Petition No. 15609/2019, Rajasthan High Court]

Valuation - Ship demurrage charges are not includible: Following the decision of the High Court of Orissa in the case of *Tata Steel v. Union of India & Ors.* [W.P. (C) No. 7917 of 2009], wherein the Explanation to Rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 was struck down as ultra vires, being beyond the scope of Section 14 of the Customs Act, 1962, to the extent it includes demurrage charges in the assessable value of imported goods, CESTAT Delhi has held that ship demurrage charges are not includible in the assessable value of the imported goods. The Tribunal in this regard noted the fact that the department had not produced any ruling to the contrary. [*Jubilant Life Science Ltd.* v. *Additional Director General (Adjudication)* - Final Order No. 51288/2019, dated 3-10-2019, CESTAT Delhi]

Refund available even in absence of payment challan: A claim of refund was denied on the ground that the duty payment challans were not been produced. CESTAT Ahmedabad however observed that the amount had been deposited, received by the department through banker's cheque and had also been realized, and that no challan was taken by the assessee. It was held that even in the absence of challan, where such payment has been made correctly, the assessee was entitled for refund. [*Deep Exports* v. *Commissioner* – 2019 TIOL 2933 CESTAT AHM]

SAD refund - Time limit of one year starts from payment of sales tax/VAT: CESTAT Mumbai has held that the date of limitation for filing refund of Special Additional Duty (SAD) is one year from the date of payment of CST/VAT on sale. Allowing benefit of Notification No. 102/2007-Cus. in respect of refund SAD, the Tribunal observed that the cause of action can only arise upon payment of sales tax or VAT on sale of imported goods which is a market dependent condition and that sometimes sale may not occur even within period of one year. The Tribunal was also of the view that the amended para 2(c) of said notification which stipulates the time-period to file refund claim as one year from date of payment of additional customs duty, should be read as effective payment of additional duty by way of CST/VAT. [*Shandong Heavy Industry India Pvt. Ltd.* v. *Commissioner* – 2019 VIL 620 CESTAT MUM CU]

Nata De Coco, jelly, pudding and Yogo ice are classifiable under Tariff Item 1704 9090: CESTAT Ahmedabad has held that Nata De Coco, jelly, pudding and Yogo ice are appropriately classifiable under Tariff Item 1704 9090 of Customs Tariff Act, 1975 which covers 'sugar confectionary not containing cocoa' and are not classifiable under tariff item 2106 9099 which covers 'food preparation not elsewhere specified'. The Tribunal in this regard observed that the Heading 2106 is a residuary entry and that the products being not sweetened food preparation preserved by sugar, are not excluded from the scope of Heading 1704. The fact that even the Food Safety and Standard Authority of India had classified the items as pudding or jelly, was also noted. [*Magnum Chocolatier* v. *Commissioner* – 2019 VIL 618 CESTAT AHM CU]

Refund - No unjust enrichment when disputed amount shown as asset in balance sheet: CESTAT Delhi has held that the refund applications filed by the assessee are not hit by unjust enrichment in a case where the assessee had shown the amount as 'recoverable' under the asset side of the balance sheet when the contingent assets had arisen after pronouncement of a Supreme Court decision.

The Tribunal in this regard also observed that CA certificates are the best evidences to prove that duty has not been passed on to the buyers, and that the prices in the instant case remained constant even after increase in rate of duty which showed that sales prices were not linked to rate of CVD. It was also held that the provisions of Sections 28C and 28D of the Customs Act, 1962 are presumptive and rebuttable and hence, can be rebutted by an assessee by submitting proof in form of sales invoices, etc. [*Akshar Telecom P. Ltd.* v. *Commissioner* – 2019 VIL 596 CESTAT DEL CU]

Revocation of Customs Broker's Licence without disclosing reasons for disagreeing with findings of Inquiry Officer is not correct: Madras High Court has held that when the charges are levelled and an enquiry is conducted based on such charges, the inquiry report filed by the Inquiry Officer is a crucial document and if the disciplinary/punishing authority intends to disagree with the whole or any of the findings rendered by the Inquiry Officer, he has to necessarily put the person, against whom such charges are made, on notice, by specifically expressing his disagreement and call upon such person to give objections on such disagreement. The Court was of the view that if an order is passed by the disciplinary/punishing authority without doing the above, it should be construed as one passed in violation of principles of natural justice. Earlier, the inquiry officer appointed to inquire into charges made against the customs broker found the broker to be violating Regulation 11(d) of the Customs Broker Licensing Regulations, 2013 but not Regulation 11(m). However, the Commissioner, without assigning any valid grounds/reasons, passed the impugned order holding that both charges under Regulation 11(d) and 11(m) have been proved. Further, the Commissioner did not call upon the petitioner to file his objection to such finding. [*Leona Worldwide Logistics* v. *Commissioner* - 2019 (368) ELT 374 (Mad.)]

Central Excise, Service Tax and VAT

Ratio decidendi

Repeal of VAT Act – Savings clause saves all rules, regulations, orders, notifications, etc.: Section 78 of Maharashtra Goods and Services Tax Related Laws (Amendments, Validation and Savings) Act, 2017, which saves Section 64 of Maharashtra Value Added Tax Act, 2002 is constitutionally valid. Bombay High Court has held that by virtue of Section 78 of State GST Savings Act read with Section 19 of Constitution (One Hundred and First Amendment) Act, 2016, the VAT Act, the rules and regulations, and notifications issued thereunder continue to have effect including for assessment, reassessment, production and inspection of accounts and recovery of any tax under the VAT Act, relating to any period before the appointed day of the State GST Act. The Court was of the view that to survive the repeal, there is no need of specific mention of subordinate legislation in the saving clause and that saving provision is both explicit and expansive. It held that a saving clause saves all rules, regulations, orders, notifications, form, certificate and notices, appointments and delegation of powers issued under the VAT Act. [*Magma Fincorp Ltd.* v. *State of Maharashtra* – 2019 VIL 372 BOM]

Withdrawal of exemption from duty/tax – Principle of promissory estoppel not invokable if public interest so warrants: 3-Judge Bench of Supreme Court has held that the inapplicability of doctrine of promissory estoppel is established when the larger public interest demands so. Observing that pan masala (with or without tobacco) was found to be one of the causes of oral cancer, the Court was of the view that withdrawal of exemption for said items was in the larger public interest. Setting aside the High Court order, the Apex Court reiterated that an exemption notification does not make the items which are subject to levy as items not leviable to such duty. It only suspends the levy and collection, and that such an exemption by its very nature is susceptible of being revoked or modified or subjected to other conditions. The Court noted that under the General Clauses Act, an authority which has the power to issue a notification has the power to rescind or modify the notification in the like manner, and that supersession or revocation of an exemption notification in public interest is an exercise of the statutory power by the State under the law itself. [*Union of India v. Unicorn Industries* – Judgement dated 19-9-2019 in Civil Appeal No. 7432 of 2019, Supreme Court]

Provision of service to employee – Cenvat credit when available: In a case where assessee was obtaining services from the internet service provider, D2H operator, etc., and was further selling these services to the employees for a consideration, CESTAT Hyderabad has allowed Cenvat credit on such services. The Tribunal observed that assessee was collecting service tax from his employees and paying to the government, and that they were not in an employer-employee relationship as far as these services were concerned. It also noted that merely because a person happens to be their employee he does not cease to be a service recipient. [*Ultra Tech Cement Ltd.* v. *Commissioner* – 2019 VIL 603 CESTAT HYD ST]

No service tax on surrender charges for pre-mature termination of insurance policy: CESTAT Delhi has held that surrender charges in case of pre-mature termination of ULIP policy were not liable to service tax. It observed that the service tax was leviable only on management fee or fixed charges as approved by the IRDA or levied by the insurer, whichever was higher. The Tribunal in this regard noted that the legislature had clarified by substituting, on 1-7-2010, clause (ii) in Explanation to Section 65(105)(zzzzf) of the Finance Act, 1994, that service tax was leviable only on management fee or charges. Further, observing that explanation was meant for clarifying the provision of the main section and accordingly had retrospective effect, i.e. normally effective from the date of the statute, unless otherwise provided, CESTAT set aside the demand of service tax for the period 1-10-2008 to 30-6-2010. [*Max Life Insurance Co. (I) Ltd.* v. *Commissioner* – 2019 TIOL 2884 CESTAT DEL]

Cenvat credit on customer care services is proper: Observing that customer care services have direct nexus with manufacturing since every manufacturing unit has the responsibility to keep the customer informed and provide with the redressal, CESTAT Chennai has allowed Cenvat credit on services availed to attend to customer complaints. It noted that as per Rule 6(2) of Legal Metrology (Packaged Commodities) Rules 2011, customer help line number/address should also be provided on the packaged commodity. The Tribunal observed that every product is supposed to satisfy certain standards and that manufacturer is liable to defect in his product even when there is no express warranty offered by him. Major part of the period involved was after 1-4-2011. [*H&R Johnson (India)* v. *Commissioner* – 2019 VIL 642 CESTAT CHE ST]

Cenvat credit on transportation from job work to depot of principal – Matter referred to LB: CESTAT Ahmedabad has referred to Larger Bench the question as to whether appellant-job worker is entitled for Cenvat credit on outward GTA service used for transportation of goods from job worker premises to the depot of principal when the valuation was adopted under Section 4A of Central Excise Act, 1944. The Tribunal in this regard observed that there are contrary judgments not only in the Division Bench of CESTAT but also by High Courts of Rajasthan and Allahabad, and that there is no consistency on the legal position. [*Sweety Industries* v. *Commissioner* – 2019 TIOL 2989 CESTAT AHM]

Captive consumption exemption – Use of cement 'in relation' to manufacture enough: CESTAT Hyderabad has held that cement need not necessarily be used in the manufacture and that it will qualify for exemption under Notification No. 67/95-C.E. even if it is used in relation to the manufacture. While holding so, the Tribunal relied on Madras High Court judgement in the case of *Thiruarooran Sugars* where it was held that structures and foundations which are erected using steel and cement are integral parts of the capital goods as they hold plant and machinery used to manufacture the final product. [*Concast Ferro Inc.* v. *Commissioner* – 2019 VIL 630 CESTAT HYD CE]

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