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Discharge of indirect tax liabilities and procedural compliance during intervening period in case of amalgamation/ merger / demerger

By **Payal Nahar**

In order to sustain in the competitive environment, many companies go for number of amalgamations/ mergers / demergers. This leads to the re-organisation of basic structuring of a company. Such schemes are approved by the court and provides two dates – 'appointed date' & 'effective date'. These two dates are prominent aspect of the scheme. Both these dates are crucial in many respects, including, for purposes of indirect tax as well as direct tax.

The present article discusses about the significance of 'appointed date', 'effective date' and various clauses of the scheme of amalgamation/ merger/ demerger in the light of indirect tax laws.

Company needs to have audited financial records before applying for the scheme of amalgamation/ merger/ demerger since the valuation of assets and investments getting transferred and valuation of share price must be done. For this reason, the actual application for demerger/ amalgamation will be on a date after the latest available balance sheet. By the time scheme is lodged, the business would have carried on by the transferor/ old entity for the period pending the filing/grant of scheme.

As required under the Companies Act, 2013, every scheme of amalgamation/ merger/ demerger approved by the Court must necessarily provide for appointed date as well as effective date.

'Appointed Date' is the date with effect from which the Scheme shall, upon sanction of the same by the High Court, be deemed to be operative. 'Effective date' denotes the date on which the demerger is completed in all respects after having gone through the formalities involved, and a copy of the High Court's order sanctioning the scheme is filed with Registrar of Companies. With that, the process of amalgamation/ merger/ demerger is completed.

Practically, amalgamation/ merger/ demerger requires surrender of old registration and obtaining a new / amending registration by the successor. There could be transaction of supply of goods, services, etc., during the intervening period i.e., between the appointed date and effective date. Since tax registration to the successor is granted only after receiving court order approving the scheme, typically, indirect taxes on the transactions are being paid, issuance of invoices, filing of returns, other procedural compliances are continued by the transferor/ predecessor during the intervening period.

In the above background, the dispute may arise in respect of those transactions which were undertaken between the appointed date and effective date/till the fresh registration under Indirect Tax is obtained by the successor in its own name. The dispute may arise because of appointed date being retrospective to the effective date and the successor entity obtains registration post effective date.

The probable litigation objections may be (i) successor should have obtained registration w.e.f. from the appointed date; (ii) issue of invoices, discharge of tax liability, filing of returns, procedural compliance of indirect tax laws should have been done by the successor during the intervening period and not by the predecessor; (iii) scheme of demerger retrospectively effective from the appointed day would be contrary to the provisions of indirect tax laws and the rules made thereunder.

In similar circumstances, the issue arose before the Division Bench of Gujarat High Court in the case of *L&T Hydrocarbon Engineering Ltd.* v. *Union of India* [Judgment dated 3.2.2022 in Special Civil Application No. 11308 of 2019], whether the successor entity would again be liable to excise duty on the clearances made during the appointed date till effective date of de-merger, when the same duty was already discharged by predecessor in its old registration.

It was held that 'appointed date' is of no significance under the law till final demerger order is received from the Court. So, until transfer as a result of demerger is completed, transferor Company continues to pay tax, file returns as if there is no proposal for demerger as the case may be. Therefore, the Court provides for effective date also in the scheme and provisions of the scheme take care of these aspects.

The Court observed that in terms of the scheme approved by the Court, benefits of all statutory and regulatory permissions, registration or other licenses, and consents shall vest in and become available to the Transferee Company as if they were originally obtained by the Transferee Company. Therefore, the excise registration in the name of the predecessor stood vested in name of the successor automatically and without anything more. By interpreting various clauses contained in the scheme, the High Court held that despite the appointed date being retrospective, the supplies affected, payment of tax, raising of invoice and filing of return and other indirect tax compliance by the predecessor between the intervening period would be treated as compliance done by the successor and is in absolute compliance of the Central Excise laws. The High Court considered the ratio laid down in the landmark case of *Marshal and Co.* v. *ITO* [1997] 223 ITR 809 (SC)].

The High Court also observed that scheme of de-merger was sanctioned by the High Court and transfer of assets took place by operation of law. The Central Government was party to the scheme through the Office of the Regional Director, Ministry of Corporate Affairs and hence, was aware of the Scheme at all times. It noted that once, the Scheme was approved by the High Court, the Central Excise department was now barred to raise any objection to the said scheme in the present proceeding and was bound by the order passed by the High Court approving the scheme of demerger. The High Court agreed to the ratio laid down in *Sadanand Varde and Others* v. *State of Maharashtra* [(2001) 247 ITR 609 (Bom)].

Conclusion

The issue decided by High Court has general application across the country as this is applicable to every scheme of demerger/ merger/ amalgamation. Every such scheme would always be retrospectively effective from the appointed day. In such case, non-compliance of procedural requirement under various law by the transferee between the appointed date and effective date would always arise. So, this issue would arise under various other laws including GST.

Section 87(1) of Central Goods & Services Tax Act, 2017 ('**CGST Act**') provides that when two or more companies are amalgamated or merged in pursuance of an order of court or of Tribunal or otherwise and the order is to take effect from a date earlier to the date of the order

and any two or more of such companies have supplied or received any goods or services or both to or from each other during the period commencing on the date from which the order takes effect till the date of the order, then such transactions of supply and receipt shall be included in the turnover of supply or receipt of the respective companies and they shall be liable to pay tax accordingly.

Section 87(1) only provides for the liability in case of amalgamation and merger in respect of supply between the transferor and transferee during intervening period. In GST, there is no express provision which prescribes the liability to discharge tax liability in case of supply and receipt of goods or services or both to or from other than transferor/transferee. In the absence of any specific provision, the aforesaid dispute may continue and the judgment prevailing in earlier indirect tax regime as well as aforesaid High Court decision may be relevant.

Though specific facts in each case could lead to different conclusion, various courts have decided the issues by relying on the clauses contained in the scheme approved by the Court. Therefore, the companies must consider the terms of the amalgamation/merger/ demerger from taxation point of view and impact of this case. While framing scheme, the Company should consider the following amongst other various aspects like:

(i) Taxability of the transaction during intervening period.

(ii) Continuity of tax benefits exemptions and obligations.

(iii) Transferability of tax credit balance.

(iv) Procedural compliance of various laws.

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Goods and Services Tax (GST)

Notifications and Circulars

No detention on sole reason of undervaluation as compared to MRP – Kerala authorities issue circular to comply with the High Court decision: The Commissioner of State GST, Kerala has directed the field formations not to detain or issue any show cause notice in respect of goods under transport or stored in parcel agencies, raising the sole reason of undervaluation of the goods when compared to the maximum retail price (MRP). It may be noted that Circular No. 6/2022, dated 6 April 2022 has been issued in compliance of Kerala High Court decision in the case of *Alfa Group* v. *Assistant State Tax Officer*, wherein the Court had observed that there was no provision under the Goods and Services Tax law mandating that the goods should not be sold at prices below the MRP declared thereon.

Special composition scheme for brick kilns: The Central Board of Indirect Taxes and Customs ('CBIC') has notified the

recommendations of the 45th Meeting of the GST Council by bringing the brick kilns under the special composition scheme with threshold limit of INR 20 lakh, with effect from 1 April 2022. Bricks would attract GST at the rate of 6% without ITC under the scheme. GST rate of 12% would apply to bricks in case the benefit of ITC is availed. Notifications Nos. 1 and 2/2022-Central Tax (Rate), both dated 31 March 2022 (effective from 1 April 2022) have been issued for the purpose. Certain other consequential amendments have also been made by Notifications Nos. 3 and 4/2022-Central Tax to implement the above. While Notification No. 3/2022-Central Tax amends Notification No. 10/2019-Central Tax (relating to exemption from registration if aggregate turnover in the financial year does not exceed INR forty lakh), Notification No. 4/2022-Central Tax amends Notification No. 14/2019-Central Tax (relating to Composition Scheme for certain supplies).

Ratio decidendi

Refund due to inverted duty structure available even when input and output goods are same: The Calcutta High Court has held that refund due to inverted duty structure will be available to the LPG repackaging company when the input and output goods (LPG in this case) were same. The Revenue department had earlier denied the refund relying upon CBIC Circular No. 135/2020-GST, dated 31 March 2020 which states that tax-payers cannot claim refund in terms of Section 54(3)(ii) of the CGST Act, 2017 in cases where the input and output supplies remain the same. The rate of tax on the input supply (LPG in bulk) was 18% while the rate of tax on output supply (LPG in small containers for domestic consumers) was later reduced to 5%. The Court in this regard observed that the CGST Act does not restrict refund only in respect of supplies which are different at the input and output stage and that a circular cannot supplant or implant any provision which is not available in the Act. The High Court also stated that the circular was trying to restrict the refund to a particular set of supplies and was trying to create a class inside the class, which was impermissible. [*Shivaco Associates* v. *Joint Commissioner* – 2022 VIL 209 CAL]

Blocking of ITC – Post decisional or remedial hearing to be granted – Reasons to be recorded in every case: The Gujarat High Court has held that post decisional or remedial hearing would have to be granted to the person affected by blocking of his electronic credit ledger under Rule 86A of the Central Goods and Services Tax Rules, 2017. The Court was of the view that the twin requirements of satisfaction of competent authority and recording of reasons, may not be enough to guard against arbitrary exercise of power, given the nature of power under said Rule. The High Court in this regard added that such post decisional hearing may be granted within a reasonable period of time which may not be beyond two weeks from the date of the order blocking the ECL. Further, in respect of recording of reasons, the Court observed that though the statute uses the word 'may', it needs to be construed as conveying an imperative command of the rule maker, and that means, reasons must be recorded in writing in each and every case. It may be noted that the High Court also observed that blocking of a recipient's credit ledger on account of default of a supplier, under Rule 86A, is wanting of statutory authority at present. [*New Nalbandh Traders* v. *State of Gujarat* – 2022 VIL 217 GUJ]

Jurisdiction of State Officer when assessee allotted to Central Officer – Contributory error of jurisdiction: In a case involving an error of jurisdiction on account of non-allotment of the case of the petitioner-assessee to the State officer, the Allahabad High Court has dismissed

the writ petition challenging the show cause notice and the subsequent assessment order by the State Officer. The Court in this regard distinguished between the inherent lack of jurisdiction and error of Jurisdiction. It observed that the proper officer under the UPGST Act and proper officer under the CGST Act both have jurisdiction over assessees falling within their territorial jurisdiction and it was only for administrative convenience, assignment of the assessee was made by the designated committee at the State level. The Court also noted that the assessee themselves did not object, at the time of show cause notice, the issue of jurisdiction and challenged it only after the assessment order was issued. The Court hence was of the view that the error was contributory. [*Ajay Verma* v. *Union of India* – 2022 VIL 256 ALH]

Rule 96(10) restrictions – Recredit of ITC on voluntary repayment of IGST refund with interest: In a case where the assessee utilised the Input Tax Credit in payment of IGST on exports and got refund of IGST while it had imported some inputs under advance authorisation, the Gujarat High Court has allowed for restoration of ITC when the assessee had made repayments of the earlier IGST refund along with interest. The Court in this regard observed that there was no question of refund of ITC but the issue involved was of restoration of same. It was of the view that if the authorities had accepted that there was an error and resultantly, accepted repayment of the erroneous refund, as a corollary, the credit of the ITC must be restored. The High Court also stated that it cannot be said that for the purpose of repayment, there was an error, and for the purpose of restoration of the ITC, there was no error. [*I-Tech Plast India Pvt. Ltd.* v. *State of Gujarat* – 2022 VIL 259 GUJ]

Demand – Department not to threaten recovery in intimation under Section 74(5): The Gujarat High Court has reiterated that the intimation in accordance with Section 74(5) of the Central Goods and Services Tax Act, 2017 should be in the Form GST DRC-01A and not Form GST DRC-01. The Court in this regard noted that there is a vast difference between Rule 142(1)(a) and Rule 142(1A) of the Central Goods and Services Tax Rules, 2017. The High Court also stated that in a notice of intimation, the proper officer should not threaten the dealer that if he would fail to comply with the intimation, the department shall proceed to recover the tax. Allowing the writ petition, the Court rejected the preliminary objection of the Revenue department that the writ applicant could not have questioned the legality and validity of the intimation issued by the proper officer in Form GST DRC-01. [*Agrometal Vendibles Private Limited* v. *State of Gujarat* – 2022 VIL 260 GUJ]

Expiry of e-way bill during transit – Vehicle when should be allowed to continue: In a transaction involving two registered dealers, where the genuineness of the documents or the transaction was not in doubt, the Tripura High Court has held that the vehicles carrying goods ought to be permitted to continue even after the e-way bill has expired while the goods are in transit. The Court however held that this should be subject to the check gate officer informing the assessing officer where the buyer is located and provide an opportunity to the buyer or seller to take corrective steps. It stated that there is no justification for stoppage of goods in transit when the transaction is between two registered dealers. The High Court was of the view that any hinderance in the movement of goods or fray amounts to an obstacle in the development of the nation. It may be noted that the Court also stated that it was necessary for the rule making authority to reconsider whether the requirement

of fixation of time period in the e-way bill is at all appropriate. [*Podder & Podder Industries Pvt. Ltd*. v. *State of Tripura* – 2022 VIL 234 TRI]

Refund of ITC on exports when duty drawback claimed: The Madras High Court has held that refund of the input tax credit under Section 16(3) of the Integrated Goods and Services Tax Act, 2017 read with Section 54 of the Central Goods and Services Tax Act, 2017 and Rules 89 and 96 of Central Goods and Services Tax Rules, 2017 cannot be denied, merely because the petitioner-assessee has claimed duty drawback under the provisions of Customs and Central Excise Duties and Service Tax Drawback Rules, 2017. The petitioner had claimed duty drawback under Section 75 of the Customs Act, 1962 read with Notification No. 131/2016-Cus (N.T) as amended by Notification No. 73/2017-Cus (N.T), dated 26 July 2017. The Court in this regard also noted that the assessee exporting goods classifiable under Tariff Item 8483 40 00 of the Customs Tariff Act, 1975 was entitled to duty drawback at 2% irrespective of the fact that he had availed input tax credit under the provisions of the Central Goods and Services Tax Act, 2017. The High Court was also of the view that Paragraph No. 2.5 of Circular No. 37/2018-Cus, dated 9 October 2018 cannot be pressed to deny legitimate export incentive. [*Numinous Impex (I) Pvt. Ltd.* v. *Commissioner* – 2022 VIL 262 MAD]

Discrepancy in the date on the invoice when insignificant: The Kerala High Court has held as insignificant the discrepancy in the date on the invoice when the error occurred due to the default computer formatting system wherein instead of day-month-year (dd-mm-yyyy) formatting for the Indian system, the computer-generated bill provided for a month-day-year (mm-dd-yyyy) format. As a result, instead of 02-03-2021, the invoice bill mentioned the date as 03-02-2021. The Court in this regard was of the view that the situation in the present case could be even brought under the broader umbrage of clause (d) of para 5 of the CBIC Circular No. 64/38/2018, dated 14 September 2018 which stated that specified minor discrepancies cannot be penalized. The High Court also noted that all other details in the invoice and the e-way bill including the nature of goods transported, the details of consignor and consignee, the GSTIN of supplier and recipient, place of delivery, invoice number, value of goods, HSN code, vehicle number etc. tallied and had no discrepancy. [*Greenlights Power Solutions* v. *State Tax Officer* – 2022 TIOL 482 HC KERALA GST]

Conducting of examination covered under 'education' for GST exemption: The Gujarat High Court has held that the services provided by the assessee to schools or educational organisations in relation to the ASSET examination is exempted from GST under Entry No. 66(b)(iv) of the Notification No. 12/2017-Central Tax (Rate). Quashing the decision of the Gujarat Appellate AAR, the Court upheld the Ruling of the Gujarat AAR while it observed that examination is an essential component of education as it is one of the major means to assess and evaluate the skills of the candidates. It was also of the view that the word 'education' cannot be given a natural meaning by restricting it to the actual imparting of education to the students but should be given a wider meaning which would take within its sweep all the matters relating to imparting and controlling education. [*Educational Initiatives Pvt. Ltd.* v. *Union of India* – 2022 VIL 214 GUJ]

C&F services along with transportation of cargo, empty containers and obtaining customs permissions and certificates, covered as mixed supply: The Gujarat Appellate AAR has held that provision of bundled services comprising of Clearing and Forwarding Agency with the help of sister concern,

transportation of cargo containing agricultural produces, providing labours for loading of cargo into containers, transportation of empty containers, lift on/lift off charges to CFS/empty container yard, survey tally formality for goods loaded in container, obtaining Customs permission for self-sealing, and obtaining Customs related certificates/clearing, etc., under a consolidated price, would be covered as mixed supply taxable @ 18% and classifiable under HSN / Service Code (Tariff) 996719 with description as 'Other cargo and baggage handling services'. For the purpose of classification, the AAAR considered the predominant supply among the supplies attracting the highest rate. Allowing Input Tax Credit (ITC), the Appellate AAR held that there should be no question of denying ITC merely on the ground that one of the constituent service of mixed supply attracts Nil rate of tax, if provided separately. [In RE: *Shree Arbuda Transport* – 2022 VIL 23 AAAR]

Diagnostic imaging services to further provisioning of diagnostic services is not covered under healthcare services: In a case involving provision of input service of diagnostic imaging services under the contract/ agreement for further provisioning of diagnostic service to the patients by the medical practitioner/pathologist/radiologist, the Haryana Appellate AAR has held that providing diagnostic images is not equivalent to providing diagnosis. The services were hence held not eligible for the benefit of exemption under Notification No. 12/2017-Central Tax (Rate). Dismissing the appeal filed against the AAR ruling, the Appellate AAR noted that the AAR had held that the term 'by way of diagnosis' in the Explanation to the exemption notification, does not include any intrinsically linked processes. It noted that it was not the applicant but the hospital which was providing diagnostic services and thus health care services. [In RE: *Siemens Healthcare (P) Ltd.* – 2022 VIL 34 AAAR]

Valuation – Fair Trade Premium includible in value of goods supplied: Observing that the Fair-Trade Premium formed part of the 'consideration' and the value of taxable supply of the goods supplied, the Kerala AAR has held that the assessee-applicant is liable to pay GST on said premium on the same rate as the rate applicable to the respective goods supplied. Fair Trade Premium was held to be an additional consideration received in respect of the supply of goods and hence includible in the value of goods for the purpose of payment of GST. the AAR in this regard noted that the applicant received the fair trade premium from the recipient of supply itself and it had a clear nexus with the supply of goods as was determined/calculated as a prescribed percentage of the volume/quantity of each produce/commodity sold, including being collected from the ultimate consumer as a component of the price of the product itself. It held that therefore, the said premium was nothing but the part of the price that is actually paid /received in response to the supply of the goods made by the applicant. [In RE: *Fair Trade Alliance Kerala* – 2022 VIL 93 AAR]

Liquidated damages/penalties recovered for breach of contract are liable to GST: The Telangana AAR has held that penalties/ damages recovered by the applicant-assessee from the contractor are considerations for tolerating an act or situation arising due to contractual obligation and are classified as supply of service under Entry 5(e) of the Schedule II of CGST Act. Liquidated damages were claimed by the applicant from their contractors due to the delay in performance of the contract, beyond the date prescribed in such contract. The Authority also noted that the definition of 'consideration' under Section 2(31)(b) of the CGST Act includes the monetary

value of an act of forbearance and hence the applicant would be liable to pay GST on the consideration received for such at the rate of 18% under SAC 9997 at S. No. 35 of Notification No. 11/2017-CT (Rate). [In RE: *Singareni Collieries Company Limited* – 2022 VIL 108 AAR]

Transportation facility provided to employees under separate contract is liable to GST: The Haryana Appellate AAR has held that GST is attracted on transportation facility provided by the assessee-applicant to its employees where the services are provided free of cost or on charging nominal amount. The Authority in this regard observed that the provision of transportation facility to employees was emerging from a separate contractual relationship and cannot be regarded as perquisite provided under contract of employment. It observed that under income tax law, the use of vehicles for commuting to and from office is not considered as a component of salary. The AAAR noted that the facility was optional for employees and no compensation was paid to employees who did not opt for such facilities. Observing that the service was being provided to suit appellant's business requirements and was in furtherance to its business, the Authority was of the view that the same would be taxable under relevant provisions of the CGST Act on a value that exceeded the total gift value up to INR 50,000/- given by the applicant to an employee availing this facility in a financial year, in accordance with the proviso to Entry 2 of Schedule I to the CGST Act. [In RE: *Beumer India Pvt Ltd*. – 2022 VIL 33 AAAR]

No additional registration required in State where goods imported even if same sent directly therefrom to customers; ITC also available: The Telangana AAR has held that the assessee-applicant is not required to obtain registration in the State in which the goods are imported even if the said goods are directly sold from the port of importation to the customers located across different states in India. It observed that said supplies shall not be covered under Entry 8 of Schedule III to the CGST Act as applicant supplies goods after clearing them from customs in their own account. The Authority held that subsequent sale when made to a customer within the State of registration will be an intra State sale liable to CGST & SGST and when such sale is made to a customer in other States of a country it will be an inter-State sale liable to IGST. The Authority also held that the assessee would be entitled to avail Input Tax Credit of IGST paid on import of said goods even if same are not brought into the State of registration. [In RE: Euroflex Transmissions (India) Private Ltd. – 2022 VIL 109 AAR]

Tunnelling not covered under S. No. 3A of Notification No. 12/2017-CT (R): The Maharashtra AAR has held that assesses activities of tunnelling consisting of 91% earth work and 9% construction work, shall qualify as 'composite supply of works contract' as defined in Section 2(119) of the CGST Act and hence would not be eligible for exemption under S. No. 3A of Notification No. 12/2017-CT (Rate) as these were not 'composite supply of goods and services'. The Authority in this regard also relied upon the AAAR decision in the case of Soma Mohite Joint Venture [2020 VIL 60 AAAR]. However, it was held that the supply made to GMIDC, a Governmental Entity involving predominantly earth work which constitutes more than 75% of the value of the works contract shall be covered under the S. No. 3(vii) of Notification No. 11/2017-CT (Rate) as amended by Notification No. 31/2017-CT (Rate) only till 31 December 2021. [In RE: *Mahalaxmi BT Patil Honai Constructions JV* – 2022 VIL 110 AAR]

No ITC on inputs/capital goods used for construction of warehouse for self: The Haryana Appellate AAR has held that the assessee-applicant cannot claim input tax credit

of GST paid in respect of input/ capital goods used in construction of warehouse for itself and then leased out to another company as specified in the contract between applicant lessor and lessee. It was held that the applicant shall not be eligible for the input tax credit of goods and service used in construction of immovable property on its own account. The Authority in this regard also noted that the decision of Orissa High Court in case of *Safari Retreats Private Limited* [2019 VIL 50 SC] is pending before the Supreme Court after issuance of notice of admission, and thus was not binding. [In RE: *Dhingra Trucking Pvt Ltd*. – 2022 VIL 36 AAAR]

Customs

Notifications and Circulars

EPCG authorisation – Amendments made in Handbook of Procedures to reduce compliance burden and enhance ease of doing business: The Directorate General of Foreign Trade ('DGFT') has amended Chapter 5 of the Handbook of Procedures relating to Export Promotion Capital Goods ('EPCG') scheme. The amendments in various paragraphs of the scheme have been done with a view to enhance ease of doing business and to reduce the compliance burden. Importantly, among many changes, the request for extension in export obligation period can be made to the concerned RA within 6 months [earlier 90 days] from the date of expiry of original EO period. Further, the RA may consider the request for extension received after 6 months but within 8 years from the date of issue of authorisation, with a late fee of INR 10,000. In respect of annual reporting of EO fulfilment, as per the new changes, the authorisation holder has to submit a report on fulfilment of export obligation online by 30th of June instead of 30th of April every year. Any delay in filing such report can now be regularised on payment of INR 5000 late fee for every financial year per authorisation. DGFT Public Notice No. 3/2015-20, dated 13 April 2022 has been issued for the purpose.

Online scrip transfer recording module re-operationalised with additional features: The DGFT has re-operationalised the online scrip transfer recording module with many additional features like introduction of time-lag for transfer of scrip from the original scrip owner to the next transferee, introduction of time-lag for scrip transfer from one entity to another and introduction of time-lag for transfer of scrip subsequent to IEC modification. Further, a limit has been introduced on number of scrip transfers which can be initiated for transfer or accepted by each IEC per day. DGFT Trade Notice No. 1/2022-23, dated 11 April 2022 has been issued for the purpose.

Exemption from IGST and Compensation Cess for imports under advance authorisations or EPCG or by an EOU extended till 30 June 2022: Exemption from Integrated Goods and Services Tax and Compensation Cess in respect of goods imported under advance authorisations or Export Promotion Capital Goods (EPCG) authorisation or by an Export Oriented Unit (EOU), has been

extended by three more months till 30 June 2022. Notifications Nos. 18 and 19/2022-Customs, both dated 31 March 2022 have been issued for the purpose. Changes in this regard have also been made in the Foreign Trade Policy 2015-20. DGFT Notification No. 66/2015-20, dated 1 April 2022 amends Para 4.14, 5.01(a) and 6.01(d)(ii) of the FTP for this purpose.

Cotton, not carded or combed – Basic Customs Duty and Agriculture Infrastructure and Development Cess exempted: Cotton, not carded or combed has been fully exempted from Basic Customs Duty (BCD) and Agriculture Infrastructure and Development Cess (AIDC). Notification No. 21/2022-Cus., dated 13 April 2022 issued for the purpose is effective from 14 April 2022 till 30 September 2022.

Ratio decidendi

EPCG authorisation – Electricity 'transmission' and 'distribution' are two different things – DGFT Circular dated 4 January 2019 not legal: The Gujarat High Court has held that the DGFT Circular dated 4 January 2019 'clarifying' that transmission and distribution of electricity are one and the same, is not valid and legal. Para 5.01(g) of the EPCG scheme as introduced w.e.f. 18 April 2013 only used the term 'transmission' in the prohibited list of activities. The Court in this regard observed that 'transmission' and 'distribution' are separately understood in the trade concerning electricity and have been separately defined and dealt with under the Electricity Act. It was of the view that the attempt made by the authorities to give retrospective effect to the prohibition of distribution activity by using the nomenclature 'clarification' is liable to be quashed and set aside. Apart from being legally fallacious, the circular was also held to be manifestly arbitrary and violative of Articles 14 and 19(1)(g) of the Constitution of India further because earlier the department had granted the assessee the EPCG authorisations fully aware of the fact of use of capital goods in distribution of electricity. [*Torrent Power Ltd*. v. *Union of India* – 2022 TIOL 513 HC AHM CUS]

Conversion of shipping bill – Failure on part of department in conducting physical examination not to be attributed as lapse on part of assessee: The CESTAT Bengaluru has held that the failure on the part of the authorities in conducting physical examination cannot be attributed to as lapses on the part of the assessee. Allowing conversion of shipping bills under Section 149 of the Customs Act, 1962, from MEIS to Advance authorisation, the Tribunal also noted that the level of examination under both was same as stated under CBIC Circular No. 36/2010-Cus. [*Louverline Blinds* v. *Commissioner* - Final Order No. 20168/2022, dated 1 April 2022, CESTAT Bengaluru]

Conversion of shipping bill – Absence of provisions for limitation and requirement of physical examination: In yet another case of denial of conversion of shipping bills, this time for the period after the amendment in Section 149 of the Customs Act, 1962, with effect from 1 August 2019, the CESTAT Chennai has allowed conversion of free shipping bill into one against advance authorisation. The Tribunal noted that as per the amended provisions, the proper officer can allow amendment of a document if presented within such time, subject to restriction and conditions as may be prescribed however, no notification had been issued prescribing time limit or stipulating any conditions for amendment of shipping bill. Department's reliance on Circular No. 36/2010-Cus was rejected by the Tribunal observing that the same was issued prior to the amendment and hence was not applicable. On the question of denial of conversion as the goods were not physically examined, the Tribunal

observed that there was no requirement under Section 149 that the conversion can be allowed only if the goods had been subjected to physical examination. It also noted that the goods were stuffed under the supervision of the Preventive Officer. [*Visoka Engineering Pvt. Ltd.* v. *Commissioner* – Final Order No. 40073/2022, dated 16 February 2022, CESTAT Chennai]

Interest payable for delay in determining brand rate of drawback: The Madras High Court has held that interest is payable by the Revenue Department for the delay in determination of brand rate of drawback. Directing payment of interest @ 7.5%, the Court observed that as per the provisions of the Customs and Central Excise Duties Drawback Rules, 1995, application filed for fixation of brand rate duty drawback should be disposed of within a period of 60 days. The delay of around 8 years in determination of the brand rate was sought to be justified by the department contending that the issue relating to fixation of brand rate was kept in the call-book stage as the same was pending before various High Courts and was eventually settled by the Supreme Court in *Union of India* v. *Arviva Industries India Limited.* [*Lovely Offset Printers Pvt. Ltd.* v. *Director (DBK)* – 2022 TIOL 538 HC MAD CUS]

Central Excise, Service Tax and VAT

Ratio decidendi

Not allowing assessee to operate his bank account when dispute pending in second appeal, not correct: The Gujarat High Court has held that pending the second appeal before the Tribunal, the action on the part of the State Tax Officer, to direct the bank not to allow the writ-applicant/assessee to operate its current account under Section 44 of the Gujarat Value Added Tax Act, 2003, is not sustainable in law. The Court in this regard observed that there was no notice of demand as contemplated under Section 42 of the Act and it was within the knowledge of the authority that the writ-applicant was before the Tribunal in a second appeal. It noted that the second appeal was yet to be heard on merits. The Court also held that the impugned action was also not under Section 45 which talked about provisional attachment. It noted that in the case on hand, the writ-applicant had travelled much beyond the proceedings of assessment. [*Sahajanand Laser Technology Limited* v. *State of Gujarat* – 2022 VIL 232 GUJ]

Area based exemption – New industrial unit when majority shares held by proprietor of earlier manufacturer: The 3-Judge Bench of the Supreme Court has dismissed the appeal filed by the Revenue department against the decision of the CESTAT in the case of *Commissioner* v. *Super Cassettes Industries Ltd.* [Final Order No. 60438 of 2019, dated 4 April 2019]. The dispute involved denial of area-based exemption under Notification No. 50/2003-C.E. to a unit in a case where the previous manufacturer had stopped its production and surrendered its central excise registration while leasing out factory building and machinery to the respondent-assessee. Rejecting

the contention of the department that since the management of the two units were same and hence there was no establishment of a new unit, the Tribunal had observed that although 71% shares of the assessee were held by the proprietor of the earlier manufacturer, that does not mean the proprietor of said manufacturer and the assessee were one and same thing. It observed that the director and company are two separate legal entities. [*Commissioner* v. *Super Cassettes Industries Ltd.* – Order dated 6 April 2022 in Civil Appeal No. 6760 of 2021, Supreme Court]

Refund of amount paid under SVLDR Scheme when monetary limit of departmental appeal raised earlier: The Bombay High Court has directed the Revenue department to refund the amount paid by the assessee under the Sabka Vishwas Legacy Dispute Resolution Scheme in a case where the assessee had opted for the scheme and had paid the 50% amount as was unaware of the CBIC's earlier Instruction raising the monetary limit in respect of appeal before the Supreme Court and thus directing the department to withdraw the pending appeals. The High Court was of the view that by virtue of the CBIC Instructions, the pending appeal did not survive and therefore there was no question for availing benefit of the scheme. The Court observed that the Department cannot take disadvantage of the wrong impression or mistaken action of the assessee in bonafidely applying under the beneficial scheme. It also noted that the amount could not be termed as 'amount in arrears' and 'amount of duty' within the meaning of Sections 121(c) and 121(d) of the Finance (No.2) Act, 2019. [*Datamini Technologies India Ltd*. v. *Union of India* – 2022 TIOL 438 HC MUM CX]

DGCEI officers have no power to assess central excise duty or scrutinize self-assessment: The CESTAT New Delhi has held that officers of DGCEI have no power either to assess the central excise duty or to scrutinize the self-assessment made by the assessee. Allowing the appeal of the assessee in the case involving alleged overvaluation of goods cleared from the State of Sikkim under an area-based exemption notification and further exported by the buyer, the Tribunal also observed that there was no authority of law under which DGCEI had the power to decide at what price goods should be sold by any assessee and what is a reasonable profit margin. It noted that DGCEI officers have no jurisdiction to re-assess the Shipping Bills also. The Tribunal in this regard also noted that the exemption notification does not confer any power on the DGCEI to modify or reduce the Cenvat credit of the duty paid by the supplier in Sikkim. The Tribunal was of the view that the denial of Cenvat credit was contrary to not only the judicial precedents but also the CBIC's Circular. [*Commissioner* v. *Blue Whale (India) Pvt. Ltd.* – 2022 VIL 282 CESTAT DEL CE]

Refund of service tax on exports when shipping bill shows different exporter: The CESTAT Kolkata has allowed refund of service under Notification No. 41/2012-S.T. in a case where the shipping bill did not show assessee as exporter. Considering the facts of the case the Tribunal noted that it was a back-to-back contract and held that merely for the purpose of the restriction in the export policy (Manganese ore was allowed to be exported only through MMTC), the exports were made through MMTC but, for all practical reasons the assessee-appellant are the exporter. [*S.K. Saragwagi & Co. Pvt. Ltd.* v. *Commissioner* – 2022 VIL 275 CESTAT KOL ST]

Refund of pre-deposit when appeals disposed of as demands beyond a certain sum turned down by NCLAT in insolvency proceedings: In a case where the NCLAT had disposed of the demands raised by all corporate/operational creditors including the Rajasthan VAT Department, while accepting its claim only for a

smaller amount, the Rajasthan High Court has held that the assessee (successful Resolution Applicant) would be eligible for the refund of pre-deposit earlier made in respect of the VAT demand contested before the Tax Board. The Court was of the view that the applications were correctly moved by the assessee-petitioner for withdrawal of the pending appeals, which had virtually become infructuous with the liabilities of the unit towards the Department having been settled by the NCLAT. It held that once the tax liability raised by the Department was fixed by effect of acceptance of Resolution Plan, manifestly, the Department could not hold on to any payment made by the assessee in excess of what was approved. [*Ultratech Nathdwara Cement Limited* v. *Assistant Commissioner* – 2022 VIL 276 RAJ]

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