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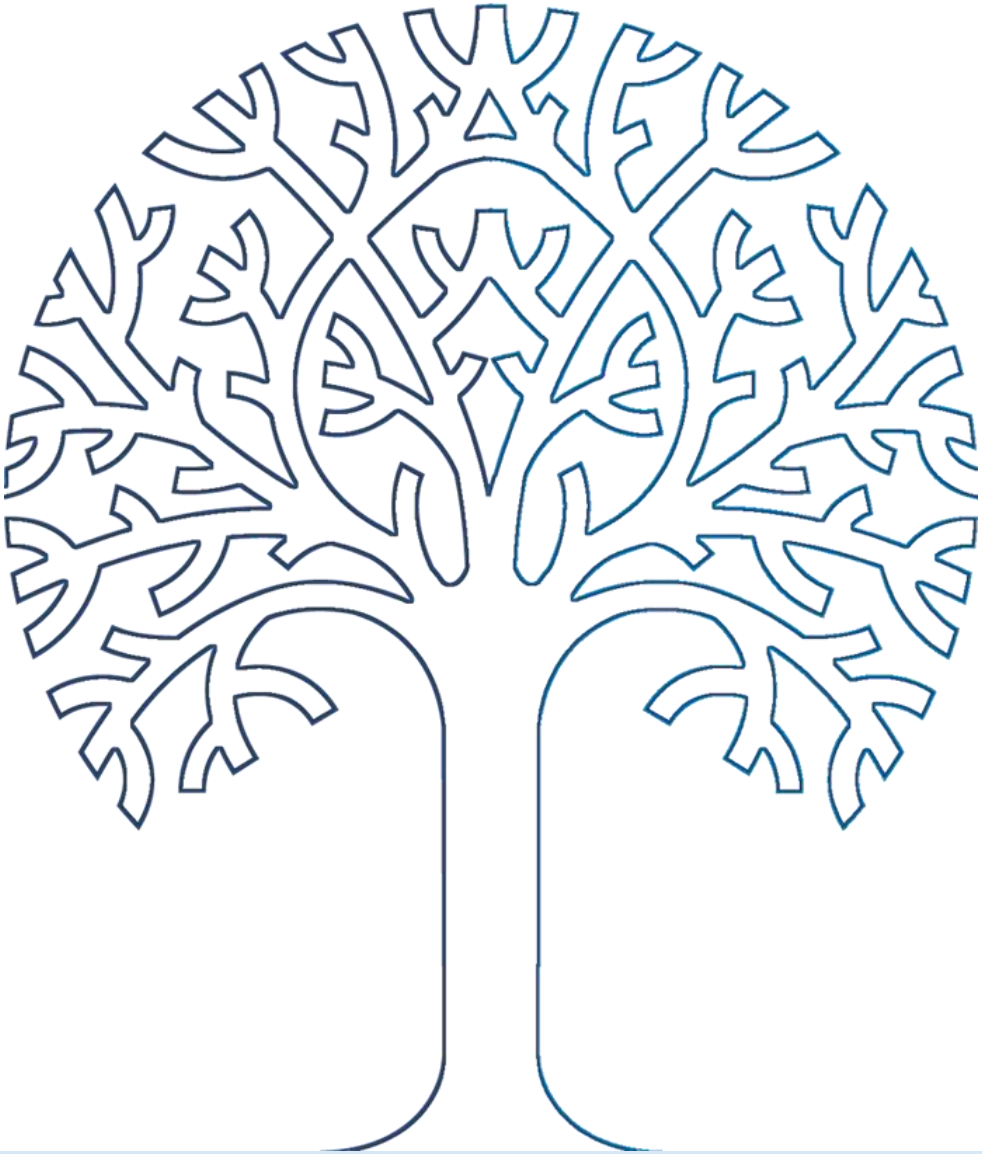

Article

Withholding Income Tax: Withholding the ambiguity in GST Valuation?

By Shiwani Kaushik

The article in this issue of Tax Amicus highlights the intricacies of TDS withholding, under the income tax provisions, which appear to impact the taxable value under GST in case of import of services. The moot question is whether the taxable value for discharging GST should be confined only to the contractual payment qua the foreign service provider or the amount of TDS, paid by the Indian service recipient as additional statutory obligation, should also be added. Analysing various Court and Tribunal decisions, the author points out that, indirectly, the service provider is financially benefitted, since TDS is not on account of service provider. Furthermore, the service provider may also claim Income Tax benefits of such TDS in the respective foreign country, under the Double Tax Avoidance Agreements, and thus, the contractual payment is not a 'sole consideration'. However, the author also points out that this interpretation can be challenged, as deposit of TDS by service recipient is merely to fulfill statutory obligation while there is no indirect favour. Further, the incidence of TDS upon the service recipient is a 'condition of contract' and not a 'consideration of contract'. The article concludes by stating that a suitable clarification from Government could be helpful to avoid triggering another litigation front.

Withholding Income Tax: Withholding the ambiguity in GST Valuation?

Introduction:

In the erstwhile Service Tax regime, on import of service, tax was levied in the hands of Indian service recipient. The shifting of tax liability on service recipient was for administrative convenience and hence, said concept has been borrowed in GST era. At the same time, it is incumbent upon such importer to withhold Income Tax TDS on payment made to foreign service provider.

In this article, the author highlights the intricacies of TDS withholding which appears to impact the taxable value under GST.

Issue:

Import of services from non-resident person ['foreign service provider'] attracts TDS under Section 195 of the Income Tax Act, 1961. TDS is withheld by the Indian service recipient on the amount payable to foreign service provider and deposited with the Government. To clarify the taxable value under service tax, the CBEC *vide* FAQ, 4th Edition, December 2008 stated that taxable value shall be the gross value including TDS.

However, the net receipt in the hands of foreign service provider is reduced to the extent of TDS. To overcome such reduction, it is agreed that foreign service provider would be rewarded with gross amount and applicable TDS shall be deposited by the Indian service recipient.

Such restructured transaction may be understood from the Indian service recipient's perspective as:

- **Contractual Obligation:** In line with the contractual obligation *qua* the foreign service provider, the Indian service recipient would pay the gross value to foreign service provider [say INR 100].
- **Statutory Obligation:** Additionally, as a statutory obligation under Income Tax laws, the Indian service recipient is mandated to deposit TDS with the Government [say INR 10].

Now the moot question is whether the taxable value for discharging tax should be confined only to the contractual payment [i.e. INR 100] or the amount of TDS should also be added [i.e. INR 10]?

Analysis:

This issue is not alien and has been a matter of dispute in past. In the case of *Magarpatta Township Dev. & Construction Co. Ltd.* [2016 (43) S.T.R 132 (Tri.-Mumbai)], the assessee engaged foreign architect for technical consultancy services. As per the agreement,

the asseesse paid gross amount to the service provider and deposited Income Tax TDS from its own pocket. The Hon'ble CESTAT held that service tax would be payable on the actual consideration charged for the services by foreign service provider and TDS would not be added in taxable value.

The above decision was followed in the case of *Hindustan Oil Exploration Co. Ltd.* [2019 (25) GSTL 252 (Tri. Chennai)] and *TVS Motor Company Ltd.* [2021 (55) GSTL 459 (Tri.- Chennai)].

The above decisions were premised on examination of the valuation provisions under Section 67 of the Finance Act, 1994. Section 67 has been discussed in the case of *Bhayana Builders (P) Ltd.* [2018 (10) GSTL 118 (SC)]. The issue before the Apex Court was whether the free of cost materials supplied by service recipient to the service provider for construction of property would be loaded to the taxable value. The Court observed that tax is payable on the 'gross amount charged' i.e., the amount agreed between service provider and service recipient.

The Court interpreted the term 'gross' to mean the total agreed amount and the word 'charged' was understood to mean the amount recovered by the service provider. The Apex Court held that any amount which is not charged by the service provider cannot be included.

Thus, it can be safely inferred that the contractually agreed amount between parties was considered as 'gross amount charged'.

At first blush, the ratio of above case law seems very attractive to be followed. Yet, due emphasis needs to be placed upon the valuation provisions in GST law, which is not similarly worded.

Section 15 of the CGST Act provides that taxable value shall be the 'transaction value' i.e., the price actually paid or payable, where supplier and recipient are not related, and price is the sole consideration.

A close look at the scope of 'transaction value' suggests that the similar valuation provisions were envisaged under the Central Excise and Customs law. Though the term 'consideration' is defined in GST law as any direct or indirect payment in relation to the supply; the term 'sole consideration' is not defined.

In this context, the decision of Hon'ble Supreme Court in the case of *Fiat India Pvt. Ltd.* [2012 (283) ELT 161 (SC)] may be referred. The assessee was manufacturing and supplying goods to its customer at a price which was lesser than the manufacturing cost.

The Court *inter alia* observed that where any additional benefit in the form of cash, kind, services, etc. is present, then price cannot be 'sole consideration'. The Court held that selling goods below manufacturing cost was with the intent of penetrating into market and would constitute an extra commercial consideration.

Furthermore, in case of *Nirulas Corner House Pvt. Ltd.* [2012 (286) ELT 46 (Tri.- Delhi)], the Tribunal held that where price is subject to condition that buyer would discharge some obligation having financial implication on behalf of the seller, there is no 'sole consideration'.

Needless to mention that the presence of 'sole consideration' would largely depend upon the facts and circumstances of each case. Thus, it needs to be examined whether the contractual

payment made to supplier can be equated with 'sole consideration', wherein TDS is borne by service recipient.

One school of thought would be that, indirectly, the service provider is financially benefitted, since TDS is not on account of service provider. Furthermore, the service provider may also claim Income Tax benefits of such TDS in the respective foreign country, under the Double Tax Avoidance Agreements. Thus, it appears that owing to such indirect benefits there is no 'sole consideration'.

The above interpretation could be challenged as deposit of TDS by service recipient is merely to fulfill statutory obligation and there is no indirect favour. Further, the incidence of TDS upon the service recipient is a '*condition of contract*' and not '*consideration of contract*'.

One should also ponder that the discharge of TDS by the service recipient, *albeit* from own pocket, is to avoid any non-compliance. Whether the statutory deposit is being made by Indian service recipient or not, it makes no difference to the foreign service provider.

Conclusion:

It needs to be appreciated that there are twin obligations namely, '*contractual obligation*' and '*statutory obligation*'. While on one hand, the TDS appears to be an indirect benefit; it also seems to be a tax compliance by service recipient for oneself.

Despite, there being various cases in service tax regime, the same cannot be blindly followed, due to slight difference in the valuation provisions.

Given the above complexity, the issue may witness another round of litigation. A practical approach could be to discharge GST on the TDS amount to avoid tax dispute. However, in cases where tax credit is not available, it would lead to tax cost and nullifies the approach to pay tax. Therefore, a suitable clarification from Government could be helpful to avoid triggering another litigation front.

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Goods & Services Tax (GST)

Notifications and Circulars

- Changes implementing recommendations of 49th GST Council Meeting
- Time limit for reporting invoices on the IRP Portal to be implemented

Ratio decidendi

- Intermediary services – IGST Sections 13(8)(b) and 8(2) are constitutionally valid – Provisions however not applicable for levy of tax on services under CGST Act – Bombay High Court
- Non-filing of certified copy of impugned order within stipulated time is a technical defect – Madras High Court
- Refund of unutilised ITC not deniable on mere allegation of issuance of fake invoices by supplier to assessee-exporter – Delhi High Court
- Input Tax Credit to be restored if liability is made good by supplier subsequently – Madras High Court
- No 'intermediary' even if service provided on behalf of somebody else – Delhi High Court
- Cash not forming part of stock in trade of business cannot be seized during investigation aimed at detecting GST evasion – Kerala High Court
- Refund of unutilised ITC on exports – CGST Rule 89(4)(C) as amended by Notification No. 16/2020-Central Tax, to restrict value of goods exported, quashed – Karnataka High Court
- Attachment of bank accounts of person, other than taxable person and those specified under Section 122(1A), assuming that funds owned by a taxable person, is not permissible – Delhi High Court
- Invoice to be carried in physical form by person-in-charge of conveyance – Calcutta High Court
- Non-sale of perishable goods by authorities within specified days of seizure will not convert them into non-perishable goods – Allahabad High Court
- Refund application does not become non est merely because deficiency memo is issued by Revenue – Delhi High Court
- Packaging at behest and under specific instruction of a specific buyer is not 'pre-packaged' – Andhra Pradesh AAR
- Lease or sale of commercial unit – Quantum of time has no relation in determination of lease or sale – Gujarat AAR
- Construction of residential projects – Services naturally bundled and those not inextricably linked – Maharashtra Appellate AAR
- Renting of immovable property, used by lessee for trading in fruits and vegetables, is not covered under 'warehousing of agriculture produce' – Tamil Nadu AAR
- Manpower supply for housekeeping, etc., to Government offices is not covered under Sl. No. 3 of Notification No. 12/2017-Central Tax (Rate) – Gujarat Appellate AAR
- Plantation association – Subscription fees received natural persons, i.e., farmers, is exempt – Tamil Nadu AAR

Notifications and Circulars

Changes implementing recommendations of 49th GST Council Meeting

Various notifications have been notified and previous notifications amended pursuant to the recommendations made by the 49th GST Council Meeting. Few of the important changes made by Notifications Nos. 2 to 9/2023-Central Tax, all dated 31 March 2023 are as follows. Detailed coverage of all the changes, along with LKS comments is available here.

- Conditional waiver of late fee on failure to furnish GSTR-4 – Notification 73/2017-Central Tax amended
- Special procedure for revocation of cancellation of registration introduced – Refer Notification No. 3/2023-Central Tax
- Central Goods and Services Tax Rules, 2017 amended w.e.f. 26 December 2022 for the requirement of undergoing authentication of Aadhaar Number by persons who have opted for the same
- Amnesty scheme for deemed withdrawal of assessment orders in case of non-filers of returns. Registered persons who failed to furnish a valid return within a period of 30 days from service of assessment order issued on or before 28 February 2023 under Section 62(1), given time to furnish returns by 30 June 2023, along with payment of interest and fee.
- Amnesty Scheme for failure to furnish Annual Return – Refer Notification No. 7/2023-Central Tax
- Amnesty to GSTR-10 non-filers – Conditional waiver of late fee – Refer Notification No. 8/2023-Central Tax
- Time limit to issue order under Section 73(10) extended – Refer Notification No. 9/2023-Central Tax

Time limit for reporting invoices on the IRP Portal to be implemented

With effect from 1 May 2023, time limit will be imposed on reporting old invoices on the e-invoice IRP portals for taxpayers with Aggregate Annual Turnover (AATO) greater than or equal to INR 100 crore. As per Advisory dated 17 April 2023 of the e-invoice system portal, taxpayers in this category will not be allowed to report invoices older than 7 days on the date of reporting. It may be noted that this restriction will apply to the all document types for which IRN is to be generated. Thus, once issued, the credit / debit note will also have to be reported within 7 days of issue. The Advisory also states that there will be no such reporting restriction on taxpayers with AATO less than INR 100 crore, as of now.

Ratio Decidendi

Intermediary services – IGST Sections 13(8)(b) and 8(2) are constitutionally valid – Provisions however not applicable for levy of tax on services under CGST Act

In a dispute where earlier the 2 Judges of the Division Bench of the Bombay High Court had expressed conflicting opinions regarding the constitutional validity of Section 13(8)(b) of the Integrated Goods and Services Tax Act, 2017, the referral Bench has held that the provisions of Section 13(8)(b) and Section 8(2) of the IGST Act are legal, valid and constitutional. The Hon'ble Bench was however of the view that the provisions of Section 13(8)(b) and Section 8(2) are to be confined in their operation to the provisions of IGST Act only and the same cannot be made applicable for levy of tax on services under the Central GST and Maharashtra GST Acts. According to the Court, transactions which are intra-State transactions and those which are inter- State transactions (trade or commerce) are required to be compartmentalized, so as to be recognized under the separate regimes and without creation of any fictional incongruity in regard to the regimes, they need to be taxed.

In a case where the petitioner-assessee was involved in procuring orders for its foreign principal, from Indian companies/importers, the Court observed that there is no basis or any hypothesis to conclude that the beneficiary of the services provided by the intermediary, becomes an Indian party so as to apply the destination principle and that too at the hands of the exporter of service. The Court found it difficult to accept the Department's contention that the factual character of the transaction, which was of export of service, would stand altered to that of a local/intra-State transaction, merely because the foreign principal is entering into an independent transaction with an Indian party, when such foreign party sales its goods to an Indian party, under such independent transaction. [*Dharmendra M Jani* v. *Union of India* – 2023 TIOL 452 HC MUM GST]

Non-filing of certified copy of impugned order within stipulated time is a technical defect

The Madras High Court has held that the requirement to furnish certified copy of the impugned order within seven days of filing of appeal, as stipulated under Rule 108(3) of the Central Goods and Services Tax Rules, 2017, is only a procedural requirement. The Court relied upon an earlier Orissa High Court decision in the case of *Atlas PVC Pipes Limited* v. *State of Odisha* which had noted that Rule 108(3) does not prescribe for condonation of delay in the event where the petitioner fails to submit the certified copy of the order impugned in the appeal, and nor is there any provision restricting application of Section 5 of the Limitation Act, 1963, in the context of supply of certified copy within the stipulated period. The Madras High Court was also of the view that the merit of the matters in the Appeal should not be sacrificed for non-compliance of a procedural requirement which is only a technical defect. [*PKV Agencies* v. *Appellate Deputy Commissioner (GST) (Appeals)* – 2023 VIL 175 MAD]

Refund of unutilised ITC not deniable on mere allegation of issuance of fake invoices by supplier to assessee-exporter

The Delhi High Court has held that the allegations of any fake credit availed by the supplier cannot be a ground for rejecting the petitioner-assessee's refund applications (for refund of unutilised ITC due to exports), unless it is established that the assessee had not received the goods or paid for them. Assessee's refund applications were rejected by the department alleging that the assessee was part of a supply chain involving fake Input Tax Credit. The Court observed that there was no conclusive finding on the basis of any cogent material that the invoices issued by supplier to the assessee were fake invoices. According to the Court, when there is no dispute that goods have been exported; the invoices in respect of which the assessee claims the ITC were raised by a registered dealer; and there is no allegation that the assessee has not paid the invoices, including taxes, then the applications for refund cannot be denied. [*Balaji Exim* v. *Commissioner* – 2023 VIL 181 DEL]

Input Tax Credit to be restored if liability is made good by supplier subsequently

The Madras High Court has held that where the tax liability has been met by way of reversal of ITC by the purchaser and similarly recovery is affected from the supplier as well, it would amount to a double benefit to the Revenue. Noting that the substantive liability falls on the supplier and the protective liability upon the purchaser, the High Court held that while the Department may reverse credit in the hands of the purchaser, this has to be a protective move, to be reversed and credit restored if the liability is made good by the supplier. The High Court directed that a mechanism must be put in place to address this situation. It may however be noted that the High Court also stated that the provisions of Section 16 of the Central Goods and Services Tax Act, 2017 are to be observed strictly, such that, there is no jeopardy to the interests of the revenue. [*Pinstar Automotive India Pvt. Ltd.* v. *Additional Commissioner* – 2023 VIL 188 MAD]

No 'intermediary' even if service provided on behalf of somebody else

The Delhi High Court has held that a person who provides services, as opposed to arranging or facilitating of goods from another supplier, is not an intermediary within the definition as provided under Section 2(13) of the IGST Act, 2017. Looking into the facts of the case involving provision of professional services to overseas entities, the High Court was of the view that even if it is accepted that the assessee-petitioner (E & Y, India) had rendered services on behalf of a third party, the same would not result in the assessee falling within the definition of 'intermediary', as it was the actual supplier of the professional services and had not arranged or facilitated the supply from any third party. The Adjudicating Authority had in this case earlier held that the assessee provided services on behalf of E & Y Ltd., UK in India to its (E & Y Ltd., UK) overseas client, and hence was an intermediary. The Court however found the reasoning that since the assessee-petitioner provided services on behalf of its head office, it was an intermediary, as fundamentally flawed. [*Ernst and Young Limited* v. *Additional Commissioner* – 2023 VIL 190 DEL]

Cash not forming part of stock in trade of business cannot be seized during investigation aimed at detecting GST evasion

The Kerala High Court has held that in an investigation aimed at detecting tax evasion under the provisions of the GST, cash cannot be seized especially when it is the admitted case that the cash did not form part of the stock in trade of the assessee's business. The Court observed that the findings recorded by the Intelligence Officer (relying on Section 67(2) of the CGST Act, 2017 which authorises seizure of things), that '*it is suspicious that this much amount of money kept in the house as idle and not deposited at bank*', were wholly irrelevant. According to the High Court, the findings could have only been justified had the officer been an officer attached to the Income Tax department. The Court directed the Revenue department to release the cash, further observing that the department had retained the seized cash for more than six months and was yet to issue a show cause notice to the assessee in connection with the investigation. [*Shabu George* v. *State Tax Officer* – 2023 TIOL 382 HC KERALA GST]

Refund of unutilised ITC on exports – CGST Rule 89(4)(C) as amended by Notification No. 16/2020-Central Tax, to restrict value of goods exported, quashed

The Karnataka High Court has declared that the words, '*or the value which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed supplier*', appearing in Rule 89(4)(C) of the CGST Rules, 2017, as amended *vide* Notification No. 16/2020-Central Tax, dated 23 March 2020, are *ultra vires* to the provisions of the Central GST Act, 2017 and the Integrated GST Act, 2017 as also violative of Articles 14 and 19 of the Constitution of India. Quashing the amended Rule, the Court observed that Rule 89(4)(C) of the CGST Rules, as amended on 23 March 2020, is arbitrary and unreasonable, in as much as the possibility of taking undue benefit by inflating the value of the zero-rated supply of goods, cannot be a ground to amend the Rule. The High Court also observed that the Rule cannot override the parent legislation which makes entire supply chain of exports tax free. The Court was also of the view that the Rule also suffers from the vice of vagueness as the words 'like goods' and 'similarly placed supplier' are completely open-ended and are not defined anywhere in the CGST Act/Rules or the IGST Act/Rules. The amended Rule 89(4)(C), for the purpose of computation of refund of accumulated ITC, restricted the value of goods exported to 1.5 times the value of like goods domestically supplied. [*Tonbo Imaging India Pvt. Ltd.* v. *Union of India* – 2023 VIL 198 KAR]

Attachment of bank accounts of person, other than taxable person and those specified under Section 122(1A), assuming that funds owned by a taxable person, is not permissible

The Delhi High Court has held that the power under Section 83 of the CGST Act, to provisionally attach assets or bank accounts,

is limited to attaching the bank accounts and assets of 'taxable persons' and persons specified under Section 122(1A) of the CGST Act. According to the Court, it is not open for the department to attach the bank accounts of other persons on a mere assumption that the funds therein are owned by any taxable person. Noting that the petitioners were not taxable persons or persons as specified in Section 122(1A), the Court also observed that attachment of bank accounts is a draconian step and such action can only be taken in case conditions specified in Section 83 are fully satisfied. [*Sakshi Bahl* v. *Principal Additional Director General* – 2023 VIL 201 DEL]

Invoice to be carried in physical form by person-in-charge of conveyance

The Calcutta High Court has held that when Rule 138A of the Central Goods and Services Tax Rules, 2017 specifically provide that documents and devices are to be carried by the person-in-charge of a conveyance, it means that the invoice must be carried in physical form and if required shall be produced in its physical form. The Court in this regard noted that the provision in a taxing statute must be construed strictly and no benevolent interpretation is available while construing the same. Disposing off the writ petition, the Court however stated that an opportunity is to be given to the petitioner-assessee to produce the relevant invoice/invoices before the statutory appellate authority. [*J. K. Jain Buildtech India Pvt. Ltd.* v. *Assistant Commissioner* – 2023 VIL 213 CAL]

Non-sale of perishable goods by authorities within specified days of seizure will not convert them into non-perishable goods

The Allahabad High Court has held that the goods which are treated as perishable would not be converted into non-perishable goods only because the authorities had not acted in terms of Rule 141(2) of the CGST Rules, 2017 in selling the same within 15 days of seizure. According to the Court, the determination of the goods being perishable, or non-perishable would be in accordance with the applicable rules and the notifications and not upon any fortuitous circumstance whether the goods have been actually sold within specified days or not. The Petitioner-assessee, a dealer of tobacco, had not complied with the requirement of deposit for release of perishable goods. The Court however stated that if the petitioner now complies with the requirement, such claim would be dealt in accordance with law. [*Adarsh Tobacco Co.* v. *State of U.P.* – 2023 VIL 226 ALH]

Refund application does not become non est merely because deficiency memo is issued by Revenue

In a case where the Adjudicating Authority had, relying upon Rule 90(3) of the CGST Rules, 2017, proceeded on the basis that the date for filing the fresh refund application was required to be considered for the purpose of limitation, the Delhi High Court has

held that merely because certain other documents or clarifications are sought by the department by way of issuing a Deficiency Memo, the same will not render the refund application filed by a taxpayer as *non est*. According to the High Court, it is erroneous to assume that the refund application, which is accompanied by the documents as specified under Rule 89(2) of the CGST Rules, is required to be treated as complete only after the taxpayer furnishes the clarification of further documents as may be required by the proper officer and that too from the date such clarification is issued. [*Bharat Sanchar Nigam Limited* v. *Union of India* – 2023 VIL 229 DEL]

Packaging at behest and under specific instruction of a specific buyer is not 'pre-packaged'

In a case where the applicant was packing the commodity at the behest and at the specific instructions of the buyer, the Andhra Pradesh AAR has held that the first and foremost condition of taxability that the commodity should be a pre-packed commodity, meaning that the same should not be packed for any specific known buyer, was not satisfied. The AAR noted that according to the definition of 'pre-packaged commodity' in the Legal Metrology Act, 2009, there should be cumulative satisfaction of conditions, namely, without the purchaser being present; commodity is placed in a package; and product contained should have a pre-determined quantity. It held that any packaging made as per the specific request and at the behest of a specific buyer is not a 'pre-packaged commodity' but is only packaged. According to the Authority, the attribute 'pre' has a specific connotation which means that is packaged not for any specific buyer but is packed in general for any buyer who may purchase it later. [In RE: *Seetharamnjaneya Dal and Fried Gram Mill* – 2023 VIL 66 AAR]

Lease or sale of commercial unit – Quantum of time has no relation in determination of lease or sale

The Gujarat AAR has held that the activity of long term lease (90 years lease) of commercial units on payment of one time lease premium and annual premium is a 'supply' falling within the ambit of Section 7(1) of the Central Goods and Services Tax Act, 2017. Observing that quantum of time has no relation in determination of lease or sale, as lease could be for perpetuity (as per definition of lease in Transfer of Property Act, 1882), the Authority held that the agreement made between the applicant and the lessee for 90 years cannot be termed as a sale of land, but in fact is a lease which will not fall within the ambit of clause 5 of Schedule III of CGST Act, 2017. [In RE: *Kedaram Trade Centre* – 2023 VIL 69 AAR]

Construction of residential projects – Services naturally bundled and those not inextricably linked

The Maharashtra Appellate AAR has held that water connection charges; electric meter installation and deposit for meter; development charges; and legal fees for transaction of sale of residential apartments, can reasonably be expected to be

supplied by the builder/ developer/ promoter of a residential project, as they are inextricably linked to a residential apartment or dwelling. According to the AAAR, without these aspects, the property may not be used, and hence these services are to be considered as naturally bundled services and taxable as per the rate of construction services. The AAAR, however, was of the view that charges for club house maintenance; advance maintenance; share of Municipal Taxes (pertaining to period after occupancy); formation and registration of the organization and legal charges in connection there with; share money, application & entrance fee of the organization; and infrastructure charges, are determinable as independent supplies. According to the Appellate AAR, these latter charges are not expected from every customer and are not inextricably linked to the construction services in respect of residential projects. [In RE: *Puranik Builders Limited* – 2023 (4) TMI 155]

Renting of immovable property, used by lessee for trading in fruits and vegetables, is not covered under 'warehousing of agriculture produce'

In a case where the applicant wanted to rent a immovable property to the Lessee and the Lessee in turn was to use the said property for trading activity in fruits and vegetables, the Tamil Nadu AAR has held that renting warehouse to store agricultural produce is to be considered as supply of service, and the same is not classifiable as 'loading, unloading packing, storage or warehousing of agricultural produce, with 'Nil' GST Rate under Sl. No. 54(e) of SAC 9985 of the Notification-12/2017- C.T. (Rate) dated 28 June 2017. According to the AAR, the applicant-assessee was rendering service of 'Rental or leasing services involving own or leased non-residential propert' classifiable under SAC 997212 and attracting GST @ 18% *vide* Entry Sl.No. 16(iii) of Notification No. 11/2017 C.T (Rate). The AAR in this regard noted that the leasing of the warehouse was an input service for the trading activity of the lessee. [In RE: *Samco Logistics LLP*. – 2023 (4) TMI 583]

Manpower supply for housekeeping, etc., to Government offices is not covered under Sl. No. 3 of Notification No. 12/2017-Central Tax (Rate)

The Gujarat Appellate AAR has held that manpower supply services provided for housekeeping, cleaning, security, data entry operators etc. to several governmental authorities/entities is not eligible to claim exemption benefit under Sl. No. 3 of Notification No. 12/2017-Central Tax (Rate) which is for pure services provided to Central Government, State Government, Local authorities, Government entities. It noted that even though the appellant was providing services to the Government offices concerned, they were in no way related to the function entrusted to a Panchayat under Article 243G of the Constitution of India or function entrusted to a Municipality under Article 243W of the Constitution of India, which is carried out by the Government concerned. The Appellate AAR was of the view that the applicant was wrong in assuming that the Entry No. 3 covers all services provided to Government offices. [In RE: *Sankalp Facilities and Management Services Pvt Ltd.* – 2023 (4) TMI 303]

Plantation association – Subscription fees received natural persons, i.e., farmers, is exempt

The Tamil Nadu AAR has held that the benefit of Notification No. 14/2018-Central Tax (Serial No. 77A), as the non-profit association registered under any law engaged for the welfare of farmers, is available to an association in respect of subscription fees which the Association-Applicant receives from natural persons who are farmers simpliciter. The AAR noted that the annual subscription charged by the Applicant was up to INR 1000/- and therefore it held that the Applicant was eligible to claim exemption only in respect of such subscription fees. The Authority however held that the applicant being a registered society, providing services to their other members, who are distinct from the applicant and registered as member on payment of any amount towards subscription/contribution, is a supply of service and is accordingly taxable. The applicant was a mutual benefit association with the object to conduct research and analysis for the benefit of members to achieve maximum productivity and quality in their plantation activities and to represent before various authorities for the welfare of members and such other welfare activities (training, meeting etc.,) collectively for the benefit of the association. [In RE: *United Planters Association of Southern India* – 2023 (4) TMI 582]

Customs

Notifications and Circulars

- New Foreign Trade Policy 2023 announced – Highlights

Ratio decidendi

- Non-generation of DIN is fatal to the communication itself – Madras High Court
- Classification of goods – 'Pull in' Note to be narrowly construed when goods excluded by different Note from particular Chapter – Supreme Court
- Tariff Rate Quota licence – DGFT Public Notice No. 15/2015-20, dated 14 June 2022 is contrary to Foreign Trade Policy – Karnataka High Court
- Valuation – LME prices cannot be a benchmark when manufacturer certifies that goods produced from scrap – CESTAT Kolkata
- Classification of parts/accessories of Dredgers – Test whether parts essential for purpose of dredging – Independent use for other purpose is immaterial – Supreme Court
- Probiotics are classifiable under Tariff Item 3002 90 30 – CESTAT Mumbai

Notifications and Circulars

New Foreign Trade Policy 2023 announced

With the new approach of tax remission instead of incentives; greater trade facilitation through technology, automation, and continuous process re-engineering; export promotion through collaboration; and focus on emerging areas like e-commerce exports, developing districts as export hubs, streamlining SCOMET policy, etc., the Indian Ministry of Commerce and Industry, has on 31 March 2023 unveiled Foreign Trade Policy 2023. Certain highlights of the new Policy which is effective from 1 April 2023 are provided below.

- The new Policy will continue till its withdrawn. That is, the new Policy has no usual sunset clause of 5 years, as was being provided till now.
- All authorisation redemption applications will be paperless.
- Export performance threshold for recognition of exporters as Status Holders has been rationalized, thus enabling more exporters to achieve higher status.
- Four new towns of export excellence declared – Faridabad for apparel, Moradabad for handicrafts, Mirzapur for handmade carpet and dari, and Varanasi for handloom and handicraft.
- Districts as export hubs initiative has been introduced with the aim to boost India's foreign trade by decentralizing export promotion. The initiative involves identification of products/services in all the districts, and creation of institutional mechanisms at the State and District level to strategize exports.
- All FTP benefits to be extended to e-Commerce exports.
- Value limit for exports through courier has been increased to INR 10,00,000 per consignment.
- Processing time to be reduced to one day for approval of applications under automatic route for exporters, for advance authorisation, EPCG issuance, and for revalidation of authorisations and extension of export obligation period.
- Application fee is to be reduced for advance authorization and EPCG schemes, for MSMEs.
- Dairy sector has been exempted from maintaining average Export Obligation under EPCG scheme.
- ***Amnesty scheme for one time settlement of default in export obligation by Advance and EPCG authorisation holders,*** has been introduced. The scheme will be available for a limited period, up to 30 September 2023. It may be noted that only authorisations issued under FTP 2009-14 till 31 March 2015, and those issued under FTP 2004-2009 or before where the export obligation period was valid beyond 12 August 2013, will be eligible for the scheme. According

to Public Notice No. 2/2023, dated 1 April 2023, all defaults can be regularised by payment of all customs duties and interest capped at 100% of such duties. No interest is however payable on the portion of Additional Customs duty and Special Additional Customs duty. An online procedure for applying for the scheme has also been prescribed by Policy Circular No. 1/2023-24, dated 17 April 2023.

- Policy for export of dual use items under SCOMET has been consolidated at one place for ease of understanding and compliance by the industry.
- Notifications have also been issued by the Ministry of Finance in respect of various export promotion schemes under the new FTP. Changes have also been made in various Customs notifications to bring into effect the new FTP with effect from 1 April 2023.

Ratio Decidendi

Non-generation of DIN is fatal to the communication itself

The Madras High Court has held that non-generation of the Document Identification Number (DIN) is fatal to the communication itself. Department's contention that CBIC Circulars Nos. 37/2019, dated 5 November 2019 and 43/2019, dated 23 December 2019, prescribing DIN, were not binding on the Court, was rejected by the Court while it observed that as far as administrative duties are concerned the Board (CBIC) has the final word to prescribe guidelines that are mandatory *qua* the officers. The Court was of the view that the Circulars invested the officers of the Department with responsibility *qua* the issuance of official proceedings/communications. The High Court further in this regard, also rejected the Department's argument that a lenient view should be taken as the impugned communication was issued during corona pandemic. Setting aside the impugned communication, the Court noted that the move for DIN is a progressive one backed by avowed objects of transparency and accountability, which is the crying need of the day. [*Ericsson India Pvt. Ltd.* v. *Deputy Commissioner of Customs* – 2023 VIL 207 MAD CU]

Classification of goods – 'Pull in' Note to be narrowly construed when goods excluded by different Note from particular Chapter

The Supreme Court of India has observed that when goods are excluded from a particular chapter, the 'pull in' through a note has to be narrowly construed, as otherwise, the basis of exclusion would be defeated, and the earlier note (of exclusion) rendered redundant. In the dispute involving classification of LCD panels, the Court upheld the CESTAT decisions classifying the goods under more specific Tariff Item 9013 80 10 of the Customs Tariff Act, 1975. Department's view of classification under Heading 8529 as parts of goods falling under Heading 8528 [Televisions] and under Heading 8519 or 8555 in case of car audio or video players, was thus rejected by the Apex Court while it relied upon Note 1(m) of Chapter 85 [exclusion note] along with General Note 3(a) of the General Rules of Interpretation. The Court noted that Revenue's contention that by virtue of Note 2(b) to Chapter 85, the goods are to be classified based on their principal or sole use, was insubstantial, because of the clear mandate of Note 1(m), which excludes Chapter 90 goods. [*Commissioner* v. *Videocon Industries Ltd.* – Judgement dated 29 March 2023 in Civil Appeal Nos. 5622 of 2009 and 8026 of 2022, Supreme Court]

Tariff Rate Quota licence – DGFT Public Notice No. 15/2015-20, dated 14 June 2022 is contrary to Foreign Trade Policy

The Karnataka High Court has quashed the 'condition x' mentioned in Para 2 of the Public Notice No.15/2015-20 dated 14 June 2022 issued by the Director General of Foreign Trade (DGFT). According to the condition, import consignments landing at Indian Ports after the date of issuance of Tariff Rate Quota (TRQ) license shall only be considered for clearance under TRQ, and any quantities lying at the Indian ports (under warehousing etc.) before the date of issuance of the TRQ license were not to be considered for import clearance under TRQ. The High Court in this regard noted that the impugned condition was diametrically opposite, violative and contrary to the provisions of Para 2.13 of the Foreign Trade Policy (FTP) which permits clearance of goods shipped/imported prior to issuance of TRQ licence. The Court also observed that the DGFT does not have jurisdiction or authority of law to stipulate any condition contrary to the FTP and which has the effect of amending, modifying or altering the FTP. [*Patanjali Foods Limited* v. *Union of India* – Order dated 16 February 2023 in Writ Petition No.14963 of 2022 (T- CUS)]

Valuation – LME prices cannot be a benchmark when manufacturer certifies that goods produced from scrap

The CESTAT Kolkata has held that the Department's contention of taking London Metal Exchange (LME) prices as the benchmark price is not on a sound footing when the foreign manufacturers had given a certification that the import goods were produced out of scrap. The Tribunal held that in view of the manufacturers certification provided at the time of import and with no claim to doubt the veracity of the said contention, the test results as offered by the CRCL and the Sriram Institute for Industrial Research, New Delhi, the Department's claim of disputing the description and valuation of the import goods was bereft of any merit. [*Karan International* v. *Commissioner* – 2023 VIL 286 CESTAT KOL CU]

Classification of parts/accessories of Dredgers – Test whether parts essential for purpose of dredging – Independent use for other purpose is immaterial

In a case of import of 'Cutter Suction Dredger' along with other accessories and equipment including pipes, anchor boats, multicats, dredging pumping units, engines and other spares and accessories, the Supreme Court has rejected the contention of the Department that multicats, M.S. pipes, imported dredging pumping units and other goods were classifiable under different tariff headings and hence were not entitled to exemption under Notification No. 21/2002-Cus., as 'DREDGERS'. The Apex Court was of the view that the test is not whether multiple uses are possible but whether these parts are essential for the purpose of dredging in a Cutter Dredger. Revenue's reliance on Note 2 to Section XVII of the Customs Tariff Act, 1975 was held as insubstantial by the Court while it observed that all the goods were integral parts of the Cutter Dredger, even though they might independently be utilized, for other purposes. [*Dharti Dredging and Infrastructure Ltd.* v. *Commissioner* – 2023 VIL 25 SC CU]

Probiotics are classifiable under Tariff Item 3002 90 30

The CESTAT Mumbai has held that no amount of argument or depth of research can move 'probiotics' or, for that matter, 'cultures of micro-organisms (excluding yeast)' to Chapter 21 of the Customs Tariff Act, 1975, as proposed by the Department. The Tribunal in this regard noted that there was no allegation in the show cause notices that the impugned goods were not 'probiotic cultures' as claimed in the bills of entry. It also noted that though the adjudication orders suggested that the imported goods were not the final product for human consumption and, yet, as intermediary for manufacture of food supplements to be treated as food preparations, there is no finding that the goods were not 'probiotic cultures' or that, being 'cultures' and not 'probiotics' *per se*. The assessee had classified the goods under Tariff Item 3002 9030 while the Department was of the view that goods are to be covered under Tariff Item 2106 9099 of the Customs Tariff. [*Danisco (India) Pvt. Ltd.* v. *Commissioner* – 2023 VIL 268 CESTAT MUM CU]

Central Excise, Service Tax and VAT

Ratio decidendi

- Service Tax VCES is not beyond scope of Sabka Vishwas (LDR) Scheme – Bombay High Court
- Cenvat credit on imported inputs directly sent to job worker available even when credit also taken of duty paid by job worker while sending intermediate goods to assessee – Punjab & Haryana High Court
- SEZ – Time limit for filing refund claim under Notification No. 12/2013-S.T. is only a procedural requirement – CESTAT New Delhi
- Renting of vacant land, even if surrounded by a boundary wall, is not liable to service tax – CESTAT Ahmedabad
- TN VAT – Sale to dealer in SEZ – No condition of export of goods purchased by SEZ, for zero-rated sale under Section 18(1)(ii) – Madras High Court
- Cenvat credit admissible on re-insurance services in respect of motor vehicles, during 1 April 2011 till 20 July 2012 – Delhi High Court
- Demand – Non-disclosure in returns when is not suppression of facts to evade – Delhi High Court

Ratio decidendi

Service Tax VCES is not beyond scope of Sabka Vishwas (LDR) Scheme

The Bombay High Court has held that order passed with reference to Service Tax Voluntary Compliance Encouragement Scheme, 2013 ('**VCES**') is not beyond the scope of the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019. Observing that VCES is part and parcel of Finance Act, 1994, the Court rejected the contention of the Revenue that VCES does not find mention as an enactment under Section 122 of the Finance (No. 2) Act, 2019, and hence would not be covered under the SVLDR Scheme. The Court noted that the liability of the Petitioner-assessee had arisen under the Finance Act, 1994 which enactment finds mention under Section 122 of the said Act. The High Court further observed that just because the Petitioner had paid the principal amount, it cannot be said that when a show cause notice has been issued for interest on the said amount, that the Petitioner is not entitled to make a declaration under SVLDRS. [*Deelight Fortune Private Limited* v. *Union of India* – 2023 VIL 178 BOM ST]

Cenvat credit on imported inputs directly sent to job worker available even when credit also taken of duty paid by job worker while sending intermediate goods to assessee

In a case where the assessee took credit on duty paid on imported raw material which was sent directly to the job worker and was used by the job worker in the manufacture/processing of goods, and, also on duty paid by the job worker on the goods manufactured by them, the Punjab & Haryana High Court has rejected the Revenue's plea that credit of duty paid on imported raw material was not available to the assessee. The High Court in this regard relied upon a Gujarat High Court decision in the case of *Commissioner* v. *Rohan Dyes & Intermediated Ltd.* The Court was of the view that when payment of duty twice was not disputed, it would be unfair and against the scheme of CENVAT to deny credit of said duty. [*Principal Commissioner* v. *Mitsubish Electric Automotive India Pvt. Ltd.* – 2023 VIL 191 P&H CE]

SEZ – Time limit for filing refund claim under Notification No. 12/2013-S.T. is only a procedural requirement

The CESTAT, New Delhi has held that once a SEZ unit is found to be eligible to claim refund of service tax on input services, and the substantive conditions are complied with, the condition of time limit for making the refund claim under Notification No. 12/2013-S.T. being only a procedural requirement, needs to be construed liberally. The Tribunal was of the view that considering the beneficial object of establishing the SEZ tax free, without any burden of duties, the procedural lapse, if any, cannot be the basis to deny refund to the assessee-SEZ unit. Relying upon Supreme Court decision in the case of *Mother Superior Adoration Convent*, the CESTAT noted that the SEZ Act and the Rules read with the notification are intended to be a beneficial policy for the SEZ and therefore have to be construed liberally. Allowing assessee's appeal, the Tribunal noted that the delay was neither exorbitant nor unreasonable, and that the adjudicating authority should have considered the issue of condonation of delay taking a wider and liberal approach. [*Lupin Ltd.* v. *Commissioner* – 2023 VIL 283 CESTAT DEL CE]

Renting of vacant land, even if surrounded by a boundary wall, is not liable to service tax

The CESTAT Ahmedabad has held that even land surrounded by a boundary wall would fall under the term 'vacant land' provided for in the definition of 'immovable property' for the purpose of exclusion from service tax liability. According to the Tribunal, the boundary wall can be categorised as a facility incidental to use of such vacant land, and therefore renting of the specified land is excluded for the purpose of imposition of service tax. The refund of service tax paid under the head of renting of immovable property was however denied on limitation and unjust enrichment. [*Shree Textile Prints* v. *Commissioner* – 2023 VIL 257 CESTAT AHM ST]

TN VAT – Sale to dealer in SEZ – No condition of export of goods purchased by SEZ, for zero-rated sale under Section 18(1)(ii)

The Division Bench of the Madras High Court has set aside the Circular No. 9/2013, dated 24 July 2013 issued by the Commissioner of Commercial Taxes, Tamil Nadu, clarifying that sales of goods to a dealer located in Special Economic Zone in the State would not qualify as a 'zero-rated sale' in terms of Section 2(44) read with Section 18(1)(ii) of the Tamil Nadu VAT Act, unless the goods purchased by the dealer in SEZ are exported as such or consumed or used in the manufacture of other goods that are exported. Noting that such conditions were present only under Section 18(2) of the TN VAT Act, the Court was of the view that importing the conditions in respect of all categories of sales covered by Section 18(1) was impermissible. The assessee was involved in provision of works contract, while the Revenue was of the view that expression 'sale' in Section 18 of the TN VAT, while conferring the benefit of zero rate, would not take within its folds works contract. [*Consolidated Construction Consortium Ltd.* v. *Assistant Commissioner* – 2023 VIL 195 MAD]

Cenvat credit admissible on re-insurance services in respect of motor vehicles, during 1 April 2011 till 20 July 2012

The Delhi High Court has held that Cenvat credit on re-insurance services in respect of motor vehicles was admissible during the period from 1 April 2011 till 30 June 2012. Revenue's appeal against the CESTAT decision which had held that insurance services, which were in relation to 'a motor vehicle', were the only services excluded from the definition of 'input services', during the abovementioned period, and the same did not cover re-insurance services availed, was thus dismissed. The High Court in this regard found merit in the contention that the insurance company that reinsures another insurance company covers the business risks of that insurance company, and it does not cover the risk to the asset or other risks, covered by that insurance company. [*Commissioner* v. *Oriental Insurance Company Ltd.* – 2023 TIOL 379 HC DEL ST]

Demand – Non-disclosure in returns when is not suppression of facts to evade

The Delhi High Court has held that mere non-disclosure of a receipt, which a party believes is not chargeable to service tax, in the service tax returns, would not constitute suppression of facts within the proviso to Section 73(1) of the Finance Act, 1994, unless it is ex facie clear that the receipt is on account of taxable services or it is unreasonable for any assessee to believe that the receipt does not fall in the net of service tax. The Court in this regard observed that in cases where there is substantial dispute as to whether receipt of any amount is on account of taxable service, the non-disclosure of the same in the return cannot, absent anything more, lead to the conclusion that the assessee is guilty of suppression of facts to evade tax. [*Mahanagar Telephone Nigam Ltd.* v. *Union of India* – 2023 VIL 216 DEL ST]

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