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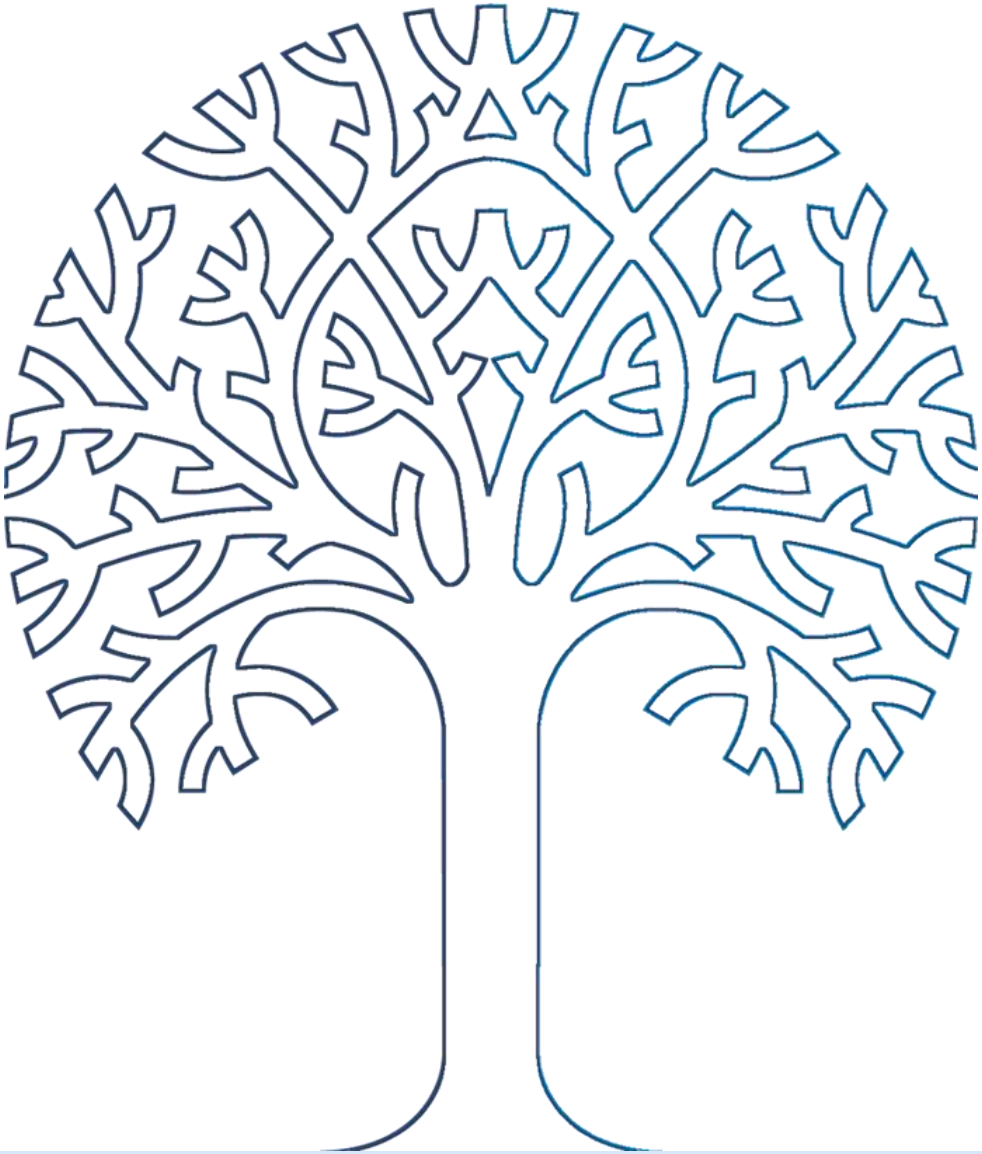

Article

‘Value addition’ in Value Addition Tax: Extension of limitation period

By Rinku Panbude

Post introduction of GST, the State Governments of Kerala, Gujarat and Telangana have amended their VAT laws with the objective of enhancing the limitation period in different forms. The said extension of limitation period needs to be tested on the touchstone of the Indian Constitution i.e., whether the States continued to possess ‘power’ under the Constitution to levy and administer VAT with the advent of GST law. The author notes that though the Gujarat, Telangana and Kerala High Courts have held in favour of the assessee, the Bombay High Court has ruled to the contrary and held that the amendments in Maharashtra VAT laws were very well within the ambit of Article 246A of the Constitution. According to him, an argument is possible that the power to levy and administer VAT flows from Entry 54 only and not from Article 246A. However, the said interpretation coupled with the divergent Court rulings may require to be tested before the Supreme Court to attain finality.

'Value addition' in Value Addition Tax: Extension of limitation period

Introduction:

While the legislature has authority to create law in accordance with the Indian Constitution, it is equally empowered to rescind or amend the law. However, the authority to amend law for the past period depends upon its present power and not the power, it possessed when it was enacted, as was held by the Constitution Bench of Supreme Court in the case of *A. Hajee Abdul Shukoor and Co*[1]. In simple terms, the 'power' available as on the current date is relevant.

Post introduction of GST, the State Governments of Kerala, Gujarat and Telangana have amended the VAT laws with the objective of enhancing the limitation period in different forms. The power available with the States for amending VAT laws to enhance the limitation period needs attention in the above context i.e., whether the States had the power to amend VAT laws at the time such amendments were made?

Co-existence of GST and VAT:

At the outset, we must note that to have a full-fledged GST wherein both Centre and State Governments would have parallel taxing power, a mere amendment in State and national tax statutes was not sufficient and it required suitable amendments in the Constitution itself. This led to the introduction of 122nd Constitutional Amendment Bill in 2014 which paved way for the historical Indian GST. The Constitutional Amendment Bill was passed and was notified as the 101st Constitutional Amendment Act ['**CAA**'] to be effective from 16 September 2016.

GST: Article 246A of the Constitution, one of the key provisions, was envisaged to provide simultaneous power to both Centre and State Governments for levying GST. With this Constitutional amendment, all goods were to be brought within the GST net, wherein both Centre and State would parallelly impose tax on same supply of goods. Nonetheless, certain petroleum-based products were consciously kept outside the scope of GST.

VAT: Entry 54 in State List of the Constitution which earlier allowed States to impose VAT on sale of goods was amended *vide* CAA for confining the power of States to levy VAT only in respect of 5 petroleum-based goods and alcoholic liquor for human consumption. In other words, the States retained exclusive

[1] 1964-VIL-12-SC

powers to levy VAT only on the sale of 6 goods. Barring these goods, the State lost its authority to tax 'sale' of goods. Further, as VAT levy was to continue for 6 selected goods, the VAT laws were not completely repealed and were merely amended to restrict the tax levy and administration in respect of 6 listed goods.

In light of this backdrop, the present GST and VAT laws co-exist.

Limitation: It is pivotal to note that generally all taxing statues provide for a period of limitation for initiating recovery proceedings or completing assessment proceedings. It is well settled that no recovery/ assessment proceeding can be done once the statutory limitation period is over, irrespective of whether tax demand is tenable on merits, existence of fraud, suppression, etc. The fundamental reason of stipulating limitation period is to provide certainty and clarity for the past period and to curtail disputes for an indefinite period.

'Power' to amend VAT laws:

As stated above, various State Governments have amended the VAT laws to increase the limitation period. The said extension of limitation period needs to be tested on the touchstone of the Indian Constitution i.e., whether the States continued to possess '**power**' under the Constitution to levy and administer VAT with the advent of GST law which is examined hereunder.

Post GST, the Constitutional right to levy VAT was confined for selected petroleum products and what got saved for tax assessment were the transactions already effected in VAT regime.

Further, to align the State VAT laws in harmony with the GST law, Section 19 of the CAA with overriding effect provided that all existing State VAT laws were expected to be repealed or amended in order to be aligned with the CAA within a maximum period of 1 year.

In other words, the State Governments were provided a window of maximum 1 year from the CAA i.e., till 16 September 2017 for aligning the State VAT laws, as per amended Constitution. Since, the State Governments had the power till 16 September 2017, it was well within their power to make suitable amendments which may also include the extension of limitation period.

Accordingly, the State VAT laws were amended to impose tax only on 6 products and other goods were not liable to VAT post July 2017. However, in certain VAT laws, the limitation period has been amended even after expiry of time permitted under Section 19 of the CAA i.e., post 16 September 2017.

It appears that Entry 54 denuded the States with their power to levy and administer VAT except for the listed petroleum-based products and liquor.

The said proposition was upheld by the Division bench of Gujarat High Court in the case of *Reliance Industries Ltd.*[2] The

[2] 2020-VIL-182-GUJ

assessee challenged the provisions of Section 84A of the Gujarat VAT Act which was introduced by VAT Amendment Act, 2018 much later than 16 September 2017. As per the said provision, the time lapsed during litigation in Courts were sought to be excluded from computing limitation period and indirectly extended the limitation period.

The High Court observed that Section 19 of CAA allows the States to amend VAT laws only within the stipulated 1 year time frame. It was also held that with the introduction of CAA, the States lost its power for VAT under Entry 54 in List II and States gained the power under Article 246A of the Constitution only for levying GST. Any amendment in VAT laws therefore could not be made in exercise of powers of Article 246A and hence, the extension in limitation period was held to be beyond the powers of State.

A similar issue was decided by the Division Bench of Telangana High Court in the case of *Sri Sri Engineering Work and Others*[3]. The limitation period under Telangana VAT laws was increased from previous period of three/ four years to six years. The Court held that the competence of States for levying VAT was truncated with introduction of CAA. The amendment in VAT laws post CAA was beyond legislative power under Entry 54 and also could not be traced to Article 246A. The Court also observed that Article 19 of CAA cannot be construed to mean that States are granted power thereunder for amending VAT laws and only allows existing VAT laws to continue for 1 year time as a transitional provision.

A division Bench of Kerala High Court in the case of *Baiju A.A.*[4] also followed the above decisions and held that the power of States to amend the VAT laws was abrogated post deletion of Entry 54 and legislative power to amend VAT law does not flow under Article 246A.

Although there were above decisions which were in favour of the assessees, the Bombay High Court in the case of *Mahyco Monsanto Biotech Pvt. Ltd.*[5] ruled differently. The Maharashtra VAT laws were amended w.e.f. 15 April 2017 to provide a mandatory pre-deposit for filing appeal. The Nagpur Bench of Bombay High Court in the case of *Anshul Impex Pvt. Ltd.*[6] held that the said requirement of pre-deposit would not be applicable for appeals where disputed period is prior to the amendment. To overcome this ratio, the provision was amended again *vide* introduction of Explanation in 2019 in order to make pre-deposit mandatory for every appeal, irrespective of the disputed period.

The above matter was referred before the Larger Bench in *Mahco Monsanto* [*supra*] to *inter-alia* examine the question whether State was having legislative competence for said amendments post CAA. The assessee argued that the second amendment made in 2019 was not in accordance with Article 246A.

[3] 2022-VIL-461-TEL
[4] 2022-VIL-595-KER
[5] 2022-VIL-477-BOM
[6] 2018-VIL-520-BOM

The Bombay Court observed that post GST regime, the Centre had the power to levy tax on inter-state 'sale' of goods and the States had the power to levy intra-state 'sale' of goods. In view of this finding, the Court held that the said amendments in Maharashtra VAT laws were very well within the ambit of Article 246A.

Hence, it could be fairly stated that there are divergent rulings on the 'power' of States to administer VAT post introduction of CAA.

Conclusion:

Given the Constitutional provisions and the observations of Courts, it may be noted that Article 246A was introduced to pave way for implementing GST and at the same time, Entry 54 of List II was amended to levy VAT only for 5 petroleum-based products and alcoholic liquor for human consumption. Post CAA, both the provisions co-exist in harmony. Had the power to levy VAT on sale of goods continued under Article 246A, there was no sound reason to retain Entry 54, specifically for 6 specified products. The Entry 54 could have been deleted in *toto* instead of being amended. This was also observed by the Gujarat High Court in the case of *Reliance Industries* [*supra*]. Additionally, the Courts have time and again observed that provisions of the Constitution must be interpreted in a purposive manner to achieve its desired objective. Therefore, the fundamentals of co-existence of GST and VAT should be appreciated to find the right answer to the issue in hand.

At this juncture, Section 19 of CAA also demands attention which provided that the States are obliged to align the VAT laws in accordance with GST laws. The maximum time limit allowed to the States in this regard was till 16 September 2017 or introduction of GST whichever is earlier. Therefore 30 June 2017. The State GST laws were implemented on 1 July 2017 itself.

This *prima facie* suggests that even after introduction of CAA, the States power to levy and administer VAT could continue; however, it could continue only till 30 June 2017. Thus, an argument is possible that the power to levy and administer VAT flows from Entry 54 only and not from Article 246A. However, the said interpretation coupled with the divergent Court rulings may require to be tested before the Supreme Court to attain finality.

[The author is a Principal Associate in the Indirect Tax Advisory practice at Lakshmikumaran & Sridharan Attorneys, Pune

Goods & Services Tax (GST)

Notifications and Circulars

- Classification and GST rate for certain goods and services clarified

Ratio decidendi

- Mismatch between GSTR-2A and GSTR-3B – CBIC Circular No.183/15/2022-GST applicable for 2019-20 also even though refers to 2017-18 and 2018-19 only – Karnataka High Court
- Show cause notice for cancellation of registration under Form GST REG 31 and not in GST REG 17, is wrong – Kerala High Court
- Condonable period falling on Sunday – Principle of availability of next working day not applicable – Madras High Court
- Refund claim – Transaction of all units having same GSTIN to be clubbed in one single refund claim – Orissa High Court
- Attachment order to be revoked after filing of appeal by assessee – Himachal Pradesh High Court
- Appeal filed offline to be entertained when due to some technical glitch online appeal not reflected on portal – Allahabad High Court
- Transitional credit of TDS of VAT is available in GST regime – Jharkhand High Court
- Extension of time limit for issuance of show cause notice when time limit for issuance of order is extended – Kerala High Court
- Project Implementing Agency, a government undertaking, getting work done through contractors, is liable to issue tax invoice to concerned department of government – AAR West Bengal
- Healthcare services are not exempt if not provided by clinical establishment, authorised medical practitioner or paramedics – AAR West Bengal
- Activity not done for commercial benefit but for social and economic benefit of marginalised people is covered under 'charitable activity' – AAR Gujarat
- Students' hostel is not a 'residential dwelling' for purpose of GST exemption on lease thereof – Appellate AAR Andhra Pradesh

Notifications and Circulars

Classification and GST rate for certain goods and services clarified

Consequent to the last GST Council Meeting held last month, the Central Board of Indirect Taxes and Customs (CBIC) has issued elaborate clarifications on classification and GST rate for certain goods and services. Circulars Nos. 189/1/2023-GST and 190/2/2023-GST, both dated 13 January 2023 issued for this purpose clarify that,

- 'Rab', massecuite prepared by concentrating sugarcane juice on open pan furnaces, is classifiable under Heading 1702 and not under Headings 1701 and 1703 of the Customs Tariff Act, 1975. It attracts GST of 18%.
- By-products of milling of Dal/Pulses such as chilka, khanda and churi/chuni is exempt w.e.f. 1 January 2023. Matters that arose during 3 August 2022 and 1 January 2023 will be regularized on 'as is' basis.
- Carbonated beverages of fruit drink or carbonated beverages with fruit juice' is covered under sub-heading 2202 99. The goods attract GST at the rate of 28% and Compensation Cess at the rate of 12%.
- Snack pellets (such as 'fryums'), which are manufactured through the process of extrusion, are classifiable under Tariff Item 1905 90 30 and attract GST @ 18%.
- Compensation Cess @ 22% is applicable on motor vehicles, falling under Heading 8703, which satisfy all four specifications, namely: these are popularly known as Sports Utility Vehicles (SUVs); the engine capacity exceeds 1,500 cc; the length exceeds 4,000 mm; and the ground clearance is 170 mm and above.
- Goods for specified purpose like petroleum operations/coal bed methane operations, as specified in Notification No. 3/2017-Integrated Tax (Rate) can avail still lower rate of tax if eligible under any other IGST rate notification.
- Accommodation services provided by Air Force Mess and other similar messes, such as, Army mess, Navy mess, Paramilitary and Police forces mess to their personnel or any person other than a business entity are covered by Sl. No. 6 of Notification No. 12/2017-Central Tax (Rate), subject to conditions.
- Incentives paid by MeitY to acquiring banks under the Incentive scheme for promotion of RuPay Debit Cards and low value BHIM-UPI transactions are in the nature of subsidy and thus not taxable.

Ratio Decidendi

Mismatch between GSTR-2A and GSTR-3B – CBIC Circular No.183/15/2022-GST applicable for 2019-20 also even though refers to 2017-18 and 2018-19 only

The Karnataka High Court has held that Circular No.183/15/2022-GST dated 27 December 2022, relating to rectification of earlier filed Forms GSTR-1, is applicable to year 2019-20 also even when it refers only to the years 2017-18 and 2018-19. The Court observed that the error in showing the wrong GSTIN number in the invoices which was carried forward in the relevant Forms as that of ABB India Limited instead of ABB Global Industries and Services Private Limited, was a *bonafide* error which had occurred due to unavoidable circumstances and consequently, the Circular would be applicable. It was of the view that since there were identical errors committed not only in respect of the AY 2017-18 and 2018-19 but also in relation to AY 2019-20, the assessee would be entitled to the benefit of the Circular for the year 2019-20 also, by adopting a justice-oriented approach. [*Wipro Limited India* v. *Assistant Commissioner* – 2023 VIL 22 KAR]

Show cause notice for cancellation of registration under Form GST REG 31 and not in GST REG 17, is wrong

The Kerala High Court has allowed the writ petition of the assessee in a case where the Revenue department had issued a show cause notice for cancellation of registration in Form GST REG 31 instead of in Form GST REG 17. The Court noted that Form GST REG-31 is one relatable to proceedings for suspension of registration and cannot be treated as a show cause notice under Rule 21 of the Central Goods and Services Tax Rules, 2017 which requires the issuance of notice in Form GST REG 17. It also noted that where a law requires a thing to be done in a particular manner, it must be done in that manner alone. Allowing the petition, the Court also observed that apart from the fact that the SCN was issued in wrong form, it was also bad for complete absence of any detail. Gujarat High Court decision in the case of Aggarwal Dyeing and Printing was relied by the Court here while it distinguished judgements of the Karnataka and Madhya Pradesh High Courts as relied by the Revenue department. [*Pankaj Cottage* v. *Goods and Services Tax Officer* – 2022 VIL 859 KER]. Following this judgement, the Kerala High Court in its another later decision found it difficult to understand how a combined notice could be issued under Form GST Reg 17 and Form GST Reg 31 as no such procedure is contemplated by the Rules. [*Golden Key Construction* v. *Superintendent* – 2023 VIL 06 KER]

Condonable period falling on Sunday – Principle of availability of next working day not applicable

The Madras High Court has reiterated that when the last day of the prescribed period falls on a public holiday, the act can be done on the next day but when the condonable period falls on a public holiday, the same principle of availability of next working day will not apply. The appeal in the case was filed on 30 May

2022, i.e., beyond the 90 days period (as granted by the Supreme Court in the case In RE: *Cognizance for Extension of Limitation*, from 1 March 2022). The Revenue department had submitted that though the 90 days from 1 March 2022 falls on 29 May 2022 which was a Sunday, filing on the next working day will not save the appeal as the 90-day period was akin to condonable period and not the prescribed period. [*Golcha Garments* v. *Joint Commissioner* – 2022 VIL 861 MAD]

Refund claim – Transaction of all units having same GSTIN to be clubbed in one single refund claim

In a case where one GSTIN was assigned to the assessee's 3 units, the Orissa High Court has held that for the purpose of making claims under the GST provisions, all the three units are to be treated as one individual. The Court observed that assessee's first application for refund of Input Tax Credit in respect of supplies to SEZ unit, by clubbing transactions of all the three units together was correct and that its subsequent supplementary claim by computing the amount of refund, taking into account transactions of individual units, was wrong. Deliberating on the meaning of the word 'any' as it appears in Section 54(1) of the CGST Act, 2017, the Court ruled that said provision admits that units of the assessee having common GSTIN are to be treated as one person in terms of Section 25 read with clauses (84) and (94) of Section 2 of the CGST Act, 2017. Dismissing the writ petition, the Court also observed that the authority concerned, having adjudicated the application for refund based on transactions taken together, had no scope to entertain further claim made on same transactions, more so when the returns were furnished by disclosing consolidated figures. The High Court also rejected the argument of the assessee that substantive right to claim refund of input tax credit could not be curtailed by procedural law. [*Vedanta Ltd.* v. *Union of India* – 2023 VIL 12 ORI]

Attachment order to be revoked after filing of appeal by assessee

The Himachal Pradesh High Court has held that the provisional attachment order of the property and that of debtors of the assessee-petitioner passed under Sections 79 and 83 of the CGST Act, 2017 cannot continue after filing of the statutory appeals in terms of Section 107 of the CGST Act. Noting that the requisite amount as per Section 107(6), relating to pre-deposit while filing appeal, has already been deposited with the Department, the Court observed that as per the provisions, the recovery proceedings for the balance amount shall remain stayed. [*Skylight Man Power and Hospitality Services* v. *Commissioner* – 2023 VIL 25 HP]

Appeal filed offline to be entertained when due to some technical glitch online appeal not reflected on portal

The Allahabad High Court has held that when due to the mistake of the department or the technical glitch in software an appeal of an assessee is not reflected on the portal, the authorities cannot deny entertaining, on technical grounds, the appeal filed offline. Rule 108 of the CGST Rules envisages situation where the appeal has to be filed electronically i.e. online. It further provides that appeal can also be filed otherwise as may be notified by the

Commissioner. The Court in this regard was of the view that since no such notification has been issued, it would be presumed that other mode of filing the appeal would be offline. The Court also stated that taxing authorities cannot stop any assessee from claiming his statutory right, as provided under the GST provisions, in the garb of technicality. [*Yash Kothari Public Charitable Trust* v. *State of U.P.* – 2023 VIL 28 ALH]

Transitional credit of TDS of VAT is available in GST regime

The Jharkhand High Court has held that the legislature, by using the words 'credit of amount of value added tax' in Section 140(1) of the Jharkhand GST Act, 2017, intended to allow migration of TDS amount [under Section 44 of the Jharkhand VAT Act] in the GST Regime. The Court observed that the intention of the legislature while enacting the transitional provision was to ensure that migration of unadjusted tax paid under repealed enactments are allowed to be carried forward for adjustment against the output tax liability in the GST Regime. According to the Court, the restrictive interpretation, as sought to be given by the Revenue department to the proviso to Section 140(1) of the JGST Act, was beyond the scheme of transitional provision. The High Court observed that the Proviso to Section 140(1) only restricts migration of such amount of credit where there is an express prohibition in respect of such transaction of claiming input tax credit under Section 17(5). It also noted that if contentions of the Revenue department were approved, the use of words 'entry tax' in Section 140(1) would also be rendered nugatory. [*Subhash Singh Chaudhary* v. *State of Jharkhand* – 2023 VIL 36 JHR]

Extension of time limit for issuance of show cause notice when time limit for issuance of order is extended

The Kerala High Court has held that when the time limit for issuance of order under Section 73(10) of the CGST Act, 2017, for the financial year 2017-18 has been extended up to 30 September 2023, considering the provisions of the Section 73(2), the show cause notice can also be issued with reference to the said date, i.e. 30 September 2023 and not with reference to any other date. In terms of Section 73(2), show cause notice is to be issued at least three months prior to the time limit specified in sub-section (10) for issuance of order. The Court hence rejected the plea that since the notification only extends the time limit for issuance of the order and does not specify that the time limit for issuance of show cause notice has also been extended, it must be held that the time limit for issuance of show cause notice was not extended. [*Pappachan Chakkiath* v. *Assistant Commissioner* – 2023 VIL 40 KER]

Project Implementing Agency, a government undertaking, getting work done through contractors, is liable to issue tax invoice to concerned department of government

In a case where applicant, a Government Undertaking under the control of Water Resources Investigation & Development Department of West Bengal, was undertaking civil works in the development of rural infrastructure through contractors for

various administrative departments of Government of West Bengal, the West Bengal AAR has held that the applicant was required to issue tax invoice to the State Government Departments on the contract value. Observing that the applicant was working as an 'project implementing agency', the AAR noted that the applicant was recipient of service [under Section 2(93) of CGST Act] and that the supply by the contractors was not made to directly to the concerned department. The Authority also held that there were two different supplies in spite of the fact that there was no value addition in respect of the second supply - first, supply by the contractor to the applicant and second supply by the applicant to the department concerned. [In RE: *West Bengal Agro Industries Corporation Limited* – 2023 (1) TMI 77]

Healthcare services are not exempt if not provided by clinical establishment, authorised medical practitioner or paramedics

The West Bengal AAR has held that eldercare services for senior citizens who live alone without any family members comprising of care manager visit for medical check-up, general physician home visit, home delivery of medicine, services by general physicians, nurses and care managers, are not covered under Sl. No. 74 of Notification No. 12/2017-CT(Rate) exempting services by way of healthcare services by clinical establishment, etc. The Authority held that supply by way of healthcare services qualifies for exemption only if the same is provided by a clinical establishment, an authorised medical practitioner or paramedics, even if the services may be 'healthcare service' as per definition. It was held that the applicant did not fall under any of the aforesaid categories of suppliers and the services provided therefore failed to qualify as exempted service as per the notification. The Authority further held that the said services were to be classified as 'human health and social care services' leviable to GST at the rate of 18% as per Sl. No. 31 of Notification No. 11/2017-CT(Rate). [In RE: *Snehador Social & Health Care Support LLP* - 2023 (1) TMI 80]

Activity not done for commercial benefit but for social and economic benefit of marginalised people is covered under 'charitable activity'

The Gujarat AAR has held that the activities of plantation of mangroves carried out by the applicant were covered under clause 2(iv) of Notification No. 12/2017-CT(Rate) as a charitable activity. It was held that since the said activity was not done for the commercial benefit but was being carried out for social and economic benefit of the marginalized people and environment, the same cannot be considered as a 'business' activity, and therefore the activity of applicant did not fall under scope of 'supply' as defined under Section 7 of the CGST Act, 2017. It was hence held that service of plantation of mangroves by the applicant was eligible for exemption from the payment of GST. The Authority in this regard discussed the benefits of plantation of mangroves along the coastal area and looked into the impact of such plantation on environment and the social and economic benefits thereof. [In RE: *Vikas Centre for Development* - 2023 (1) TMI 83]

Students' hostel is not a 'residential dwelling' for purpose of GST exemption on lease thereof

The Andhra Pradesh Appellate AAR has held that the amount received for leasing residential hostel rooms is not exempt under Sl.No.14 (Heading 9963) of Notification No.12/2017-Central Tax (Rate) as 'students' hostel' cannot be equated to a 'residential dwelling'. The Appellate AAR in this regard noted that the appellant had right from the construction of the building categorized it as hostel building as evidenced from records (declarations to Municipal Corporation, plan permit, electricity connection, etc.), and that the use to which the premises was put was more akin to a hotel/guest house/inn, etc. Upholding the AAR decision, the AAAR also noted that the exemption was specific and particular about the housing residence sector and not commercial spaces which are rented out. [In RE: *Aluri Krishna Prasad* – 2023 VIL 03 AAAR]

Customs

Notifications and Circulars

- Customs (Assistance in Value Declaration of Identified Imported Goods) Rules, 2023 notified
- EPCG scheme – One time relaxation from maintaining average EO and extension in EO period, due to Covid-19
- Advance authorisations – Composition fee for extension of EO period delinked from unfulfilled FOB value
- E-waste (Management) Rules, 2022 with modified extended producer responsibility to be effective from 1 April 2023
- Covid-19 vaccine exempted from BCD till 31 March 2023

Ratio decidendi

- All-in-one integrated desktop computer is not portable – Classifiable under TI 8471 50 00 – Supreme Court
- Chemical composition does not indicate whether goods 'off grade' or 'prime' – CESTAT Ahmedabad
- Advance Rulings – Question when not to be considered as pending before officer of customs – Delhi High Court
- Concessional rate of duty on motor vehicles imported in CKD condition – Benefit available even if different parts imported due to technological advancement – Customs AAR

Notifications and Circulars

Customs (Assistance in Value Declaration of Identified Imported Goods) Rules, 2023 notified

The Ministry of Finance has notified the Customs (Assistance in Value Declaration of Identified Imported Goods) Rules, 2023 to specify the procedures for an importer of identified goods. These include declaring certain aspects while filing the bill of entry and if required by the Customs Automated System, such importer shall also fulfil the specified additional obligations, and specified checks so as to enable and assist the importer to demonstrate the truthfulness and accuracy of the declared value. The new rules also provide that where the proper officer still has reasonable doubt about the truth or accuracy of the value declared in relation to the identified goods, the further proceedings shall be in accordance with Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 only. It may be noted that the Rules have been notified based on a recent amendment in Section 14(1) of the Customs Act, 1962 as made by Finance Act, 2022. Notification No. 3/2023-Cus. (N.T.) and Circular No. 1/2023-Cus., both dated 11 January 2023 have been issued for the purpose.

EPCG scheme – One time relaxation from maintaining average EO and extension in EO period, due to Covid-19

Considering the effect of Covid-19 on the exports from India, including the adverse effect on the hotel, healthcare and education sectors, the Directorate General of Foreign Trade (DGFT) in the Ministry of Commerce and Industry has relaxed the provisions of EPCG scheme for the years 2020-21 and 2021-22. Consequently, no Average Export Obligation is required to be maintained for the said years, for EPCG authorisations issued to hotel, healthcare and education sectors. Further, for these sectors, the EO period may be extended without payment of composition fee, from the date of expiry for the duration equivalent to the number of days the EO period falls within 1 February 2020 and 31 March 2022. In case of EPCG authorisations for sectors other than hotels, healthcare and education, the EO period may be extended without payment of composition fee, from the date of expiry for the number of days the EO period falls within 1 February 2020 and 31 July 2021. It may however be noted that for these sectors (other than hotels, healthcare and education), the extension of EO period is subject to 5% additional EO in value terms on the balance EO as on 31 March 2022.

It may also be noted that in both the cases (specified sectors and others), refund of earlier paid composition fees is not available in case the authorisation holder has already obtained extension on payment of such fees. Additionally, any penalties, duties and taxes already paid would also not be refunded. Further, the benefit of these extensions is not available in case extension is availed in terms of policy relaxations under Para 2.58 of the Foreign Trade Policy. DGFT Public Notice No. 53/2015-20, dated 20 January 2023 amends Paras 5.13 and 5.17 of the Handbook of Procedures for this purpose.

Advance authorisations – Composition fee for extension of EO period delinked from unfulfilled FOB value

The DGFT has simplified the levy of composition fees in case of extension of Export Obligation (EO) period under Advance authorisations. Thus, instead of being levied as percentage of shortfall in EO or unfulfilled FOB value of EO, the composition fees would be levied based on the CIF value of the advance authorisation. In case of first extension, including extensions under Appendix 4J, a composition fees of INR 5000 is to be levied in case the CIF value of advance authorisation issued is up to INR 2 crore. For CIF values between INR 2 crore to 10 crore the composition fees will be INR 10,000, while for CIF values of advance authorisations above INR 10 crore, the composition fees would be INR 15000 only. In case of further extension (second extension), the composition fees will be double of the amount above mentioned. It may be noted that the revised composition fees will only be applicable for the requests made on or after 19 January 2023 only. Amendments have been made in this regard in Para 4.42 of the Handbook of Procedures by DGFT Public Notice No. 52/2015-20, dated 18 January 2023.

E-waste (Management) Rules, 2022 with modified extended producer responsibility to be effective from 1 April 2023

The E-waste (Management) Rules, 2022 will supersede the E-waste (Management) Rules, 2016 with effect from 1 April 2023. The new Rules will introduce a concept of modified Extended Producer Responsibility (EPR) and will focus completely on a market based model and for procedures to be online and seamless. A detailed analysis of the new Rules in comparison to the present Rules is available here. CBIC Instruction No. 1/2023-Cus., dated 7 January 2023 has been issued for the purpose.

Covid-19 vaccine exempted from BCD till 31 March 2023

Vaccine for Covid-19, classifiable under Chapter 30 of the Customs Tariff Act has been exempted from the Basic Customs Duty for the period from 14 January 2023 till 31 March 2023. Notification No. 1/2023-Cus., dated 13 January 2023 has been issued for the purpose.

Ratio Decidendi

All-in-one integrated desktop computer is not portable – Classifiable under TI 8471 50 00

The Supreme Court has held that Automatic Data Processing Machines ('**ADP**') which are popularly known as 'All-in-One Integrated Desktop Computer' are to be classified under Tariff Item 8471 50 00 of the Customs Tariff Act, 1975 and not under Tariff Item 8471 30 10 *ibid*. The Apex Court in this regard rejected the Revenue department's contention that the goods were 'portable' (as weighed less than 10 kgs) and hence were to be classified under TI 8471 30 10. Allowing assessee's appeal, the Court approved the plea that though the word 'portable' was not defined in the statute, it should have been defined in reference to the ADPs instead of relying on the dictionary meaning which contains all kinds of hues of associated meanings. It also perused relevant technical and commercial literature and summarised that weight cannot be the sole factor to determine the factum of portability.

The Apex Court further laid down essential ingredients to logically establish whether an ADP is 'portable'. According to it the first ingredient is their ability to be carried around easily which includes all aspects such as weight and their dimensions. The second ingredient is that the ADP must be suitable for daily transit of a consumer and would include aspects such as durability to withstand frequent commute and damage protection. Relying on precedent, the Court also sounded a note of caution against using online sources such as Wikipedia for legal dispute resolution. [*Hewlett Packard India Sales Pvt. Ltd.* v. *Commissioner* – Judgement dated 17 January 2023 in Civil Appeal Nos. 5373 and 6715 of 2019, Supreme Court]

Chemical composition does not indicate whether goods 'off grade' or 'prime'

In a case where the test report had simply given an opinion on composition of goods, the CESTAT Ahmedabad has held that even if chemical composition is same of both quality of goods, off grade material cannot be construed as prime material. Allowing assessee's appeal, the Tribunal held that in such circumstances, it is not correct to allege mis-declaration of goods in question on part of the assessee. In this case where the test report was the only evidence to say that the goods were of prime grade, the Tribunal also noted that the assessee had objected to said test reports right from investigation on various grounds and that the assessee was not granted opportunity to cross examine the Chemical Examiner. [*Surya Exim Ltd.* v. *Commissioner* – 2023 VIL 06 CESTAT AHM CU]

Advance Rulings – Question when not to be considered as pending before officer of customs

The Delhi High Court has held that in relation to Advance Rulings, for a question to be considered as pending before any officer of customs, it would be necessary for the question to be raised in any notice enabling the assessee to respond to the said issue. According to the Court, merely because an officer of customs contemplates that a question may arise, does not mean that the

question is pending consideration. It was held that any preliminary exercise done by an officer of customs, to consider whether any question for consideration arises, would not preclude the Customs Authority for Advance Rulings from giving its advance ruling on that question. The Department had alleged that the assessee had not disclosed that the investigation in respect of the import of goods made by the assessee was being conducted by the DRI. [*DRI* v. *Spraytec India Ltd.* – 2023 VIL 37 DEL CU]

Concessional rate of duty on motor vehicles imported in CKD condition – Benefit available even if different parts imported due to technological advancement

The Customs Authority for Advance Rulings has held that it is not mandatory to import gearbox and transmission system, in view of technological advancement leading to replacement of these parts by parts based on different technology, to qualify for the concessional rate of duty provided under Sl. No. 524(1)(b) of Notification No. 50/2017-Cus., as long as the essential items are imported. Question before the Authority was whether concessional rate of basic customs duty at 25% on import of dump trucks designed for off-highway use, in CKD form, with the engine and alternator, control cabinet and wheel motor (i.e., alternate technology used in place of gearbox and transmission system) in pre-assembled condition on not mounted on chassis in CKD form under the abovementioned Sl. No. of the notification. [In RE: *Tata Hitachi Construction Machinery Company Pvt. Ltd.* – 2023 VIL 01 AAR CU]

Central Excise, Service Tax and VAT

Ratio decidendi

- Sabka Vishwas (LDR) Scheme – Non-payment of settlement amount before stipulated date due to IBC moratorium is not fatal – Supreme Court
- Sabka Vishwas (LDR) Scheme benefit under arrears category not deniable even if department decides to file appeal against relevant decision – Jharkhand High Court
- Sabka Vishwas (LDR) Scheme benefit available in respect of goods falling under Fourth Schedule to Central Excise Act, if no excise duty is leviable – Orissa High Court
- 'Diversification' under U.P. Trade Tax Act is production of goods of different nature – Supreme Court
- Captive consumption exemption available to machines transferred to assessee's additional premises – CESTAT Ahmedabad
- Declaration under Service Tax Voluntary Compliance Encouragement Scheme not barred when 'true' liability not disclosed earlier – CESTAT Delhi
- UP VAT – ITC of tax paid on purchase of import license available even if only imported goods and not licence itself further traded – Allahabad High Court

Ratio decidendi

Sabka Vishwas (LDR) Scheme – Non-payment of settlement amount before stipulated date due to IBC moratorium is not fatal

The Supreme Court of India has allowed assessee's appeal against the High Court decision wherein the High Court had declined to interfere in the case where the settlement amount under the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 could not be paid by the assessee before 30 June 2020 (last date for such payment) due to the legal moratorium imposed upon the company under the provisions of the Insolvency and Bankruptcy Code, 2016 ('**IBC**'). The Apex Court in this regard observed that it was not disputed that the assessee was entitled to the benefit of the settlement under the Scheme and that there was statutory disability on the part of the appellant in making the payment during the moratorium. The Court also noted that if the assessee had made any payment during the period of moratorium, it would have committed breach of the provisions of the IBC. The Supreme Court also noted that according to various precedents, no party shall be left remediless, and no law would compel a person to do the impossible. It also observed that it is not a case of extension of the Scheme but a case of taking remedial measures. Ground that the Designated Committees are not in existence after the stipulated date, was also rejected by the Supreme Court. [*Shekhar Resorts Limited* v. *Union of India* – Judgement dated 5 January 2023 in Civil Appeal No. 8957 of 2022, Supreme Court]

Sabka Vishwas (LDR) Scheme benefit under arrears category not deniable even if department decides to file appeal against relevant decision

The Jharkhand High Court has held that the Designated Committee under the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 is not vested with any jurisdiction to deny the benefit of the Scheme to a declarant on the sole ground that department has decided to file an appeal against the Order-in-Original. Contention of the Revenue department that [contemplation of] filing of the appeal has led to change in the category of petitioner from 'arrear category' to 'litigation category', was held by the High Court as beyond the letter and spirit of the scheme. The Court noted that as on the date of filing of the declaration form by the assessee-Petitioner, no appeal was filed and/or pending before the Appellate Forum. [*Om Prakash Kashyap* v. *Union of India* – 2023 VIL 31 JHR ST]

Sabka Vishwas (LDR) Scheme benefit available in respect of goods falling under Fourth Schedule to Central Excise Act, if no excise duty is leviable

The Orissa High Court has rejected the Revenue department's contention that benefit of Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 is not available in the case of assessee where its product 'Process Oil' is covered under the Fourth Schedule to the Central Excise Act, 1944. The Court noted that though, the Petitioner's product fell under the Fourth Schedule to the CE Act but as far as the rate of duty is concerned, '.....' was placed in the column, which was defined as indicating that excise duty is not leviable at all. According to the Court, the expression 'excisable goods' occurring in Section 125(1)(h) of the Finance (No.2) Act, 2019, providing restrictions on availability of the Scheme, can only mean goods on which excise duty is payable. CBIC Circular dated 27 August 2019 was also referred for the purpose. [*UITC India Pvt. Ltd.* v. *Union of India* – 2023 VIL 24 ORI CE]

'Diversification' under U.P. Trade Tax Act is production of goods of different nature

Observing that 'diversification' can be considered only in a case where 'goods of different nature' are produced, the Supreme Court has dismissed the assessee's appeal contending that goods manufactured on use of advance and/or modern technology, are to be said to be a different commercial activity. The Apex Court in this regard noted that the goods manufactured on 'diversification' must be a 'different', 'distinct' and a 'separate' goods in nature and that manufacture of Double Lip Dry Blend Crowns with new machines instead of Spun Line Crown Cork, as earlier, was not diversification. The Court noted that both the products were used for sealing glass bottles and therefore the same cannot be said to be manufacturing of goods different from being manufactured before such diversification. Exemption under Section 4A (5) of the U.P. Trade Tax Act, was hence denied. [*AMD Industries Limited* v. *Commissioner* – 2023 VIL 02 SC]

Captive consumption exemption available to machines transferred to assessee's additional premises

The CESTAT Ahmedabad has extended the benefit of Notification No.67/95-C.E. to machines manufactured and transferred to assessee's additional premise situated about 500 m away from its registered factory premise. Observing that both the premises were owned and controlled by the assessee, and the use of capital goods so transferred was exclusive and in or in relation to manufacturing of final products cleared by the assessee at its registered factory on payment of duty, the Tribunal held that additional premise of the assessee was to be treated as extension of assessee's factory in view of definition of 'Factory' under Section 2(e) of the Central Excise Act, 1944. According to the Court, word 'precincts', in the definition of 'factory', has to be given a broader meaning and the distance between such premises carrying out manufacturing process connected with the production of excisable goods, is not material to deny benefit of exemption notification. [*Jyoti CNC Automation Pvt. Ltd.* v. *Commissioner* – 2023 VIL 13 CESTAT AHM CE]

Declaration under Service Tax Voluntary Compliance Encouragement Scheme not barred when 'true' liability not disclosed earlier

The CESTAT Delhi has allowed assessee's appeal in a case where the assessee had not disclosed its true liability in the service tax return earlier filed for the period April, 2012 to September, 2012 and had subsequently disclosed it in the declaration filed under Section 107(1) of the Finance Act, 1944 relating to Service Tax Voluntary Compliance Encouragement Scheme. The Revenue department had contended that where the assessee had filed the service tax return disclosing the liability, Section 106(1) of the Finance Act does not permit him to file a declaration by merely increasing the liability. Emphasising on the placement of the word 'true' occurring before 'liability' in the first proviso to Section 106, the Tribunal held that it is only in a case where a person has disclosed his 'true' liability but has not paid, that a person would not be eligible to make a declaration. According to the Tribunal, use of the word 'true' enables a person who had filed the service tax returns disclosing the liability and had not paid the service tax to file a declaration if such a person believed that the liability disclosed in the return was not the true liability. [*M P Entertainment and Developers Pvt. Ltd.* v. *Principal Commissioner* – 2023 VIL 18 CESTAT DEL ST]

UP VAT – ITC of tax paid on purchase of import license available even if only imported goods and not licence itself further traded

The Allahabad High Court has allowed the benefit of Input Tax Credit on the tax paid by the assessee on purchase of import license used for import of chemicals which were further traded. It observed that as long as the assessee demonstrates that the use of import licence impacted the cost of the product i.e. sale either directly or indirectly, credit of input tax paid on the import license cannot be denied The Revenue department had refused the benefit on the ground that assessee did not do business of purchase and sale of import license and that the condition attached to Section 13(1)(a) of the U.P. VAT Act, 2008 was not complied with as no manufacturing activities were done. The Court in this regard also noted that the action of the assessee in 'adapting' use of the chemical brought in for the purpose of business would be encompassed under the definition 'manufacturer'. It noted that goods imported in bulk were sold as per the requirement in small quantity, adapting it to the requirement and situation. Delhi High Court decision in the case of *Jagriti Plastics Limited* was relied upon. [*Amit Traders* v. *Commissioner* – 2023 VIL 33 ALH]

NEW DELHI 5 Link Road, Jangpura Extension, Opp. Jangpura Metro Station, New Delhi 110014 Phone : +91-11-4129 9811 --- B-6/10, Safdarjung Enclave New Delhi -110 029 Phone : +91-11-4129 9900 E-mail : lsdel@lakshmisri.com	**MUMBAI** 2nd floor, B&C Wing, Cnergy IT Park, Appa Saheb Marathe Marg, (Near Century Bazar)Prabhadevi, Mumbai - 400025 Phone : +91-22-24392500 E-mail : lsbom@lakshmisri.com
CHENNAI 2, Wallace Garden, 2nd Street, Chennai - 600 006 Phone : +91-44-2833 4700 E-mail : lsmds@lakshmisri.com	**BENGALURU** 4th floor, World Trade Center, Brigade Gateway Campus, 26/1, Dr. Rajkumar Road, Malleswaram West, Bangalore-560 055. Phone : +91-80-49331800 Fax:+91-80-49331899 E-mail : lsblr@lakshmisri.com
HYDERABAD 'Hastigiri', 5-9-163, Chapel Road, Opp. Methodist Church, Nampally Hyderabad - 500 001 Phone : +91-40-2323 4924 E-mail :lshyd@lakshmisri.com	**AHMEDABAD** B-334, SAKAR-VII, Nehru Bridge Corner, Ashram Road, Ahmedabad - 380 009 Phone : +91-79-4001 4500 E-mail : lsahd@lakshmisri.com
PUNE 607-609, Nucleus, 1 Church Road, Camp, Pune-411 001. Phone : +91-20-6680 1900 E-mail : lspune@lakshmisri.com	**KOLKATA** 2nd Floor, Kanak Building 41, Chowringhee Road, Kolkatta-700071 Phone : +91-33-4005 5570 E-mail : lskolkata@lakshmisri.com
CHANDIGARH 1st Floor, SCO No. 59, Sector 26, Chandigarh -160026 Phone : +91-172-4921700 E-mail :lschd@lakshmisri.com	**GURGAON** OS2 & OS3, 5th floor, Corporate Office Tower, Ambience Island, Sector 25-A, Gurgaon-122001 phone: +91-0124 - 477 1300 Email: lsgurgaon@lakshmisri.com
PRAYAGRAJ (ALLAHABAD) 3/1A/3, (opposite Auto Sales), Colvin Road, (Lohia Marg), Allahabad -211001 (U.P.) Phone : +91-532-2421037, 2420359 E-mail : lsallahabad@lakshmisri.com	**KOCHI** First floor, PDR Bhavan, Palliyil Lane, Foreshore Road, Ernakulam Kochi-682016 Phone : +91-484 4869018; 4867852 E-mail : lskochi@laskhmisri.com
JAIPUR 2nd Floor (Front side), Unique Destination, Tonk Road, Near Laxmi Mandir Cinema Crossing, Jaipur - 302 015 Phone : +91-141-456 1200 E-mail : lsjaipur@lakshmisri.com	**NAGPUR** First Floor, HRM Design Space, 90-A, Next to Ram Mandir, Ramnagar, Nagpur - 440033 Phone: +91-712-2959038/2959048 E-mail : lsnagpur@lakshmisri.com

Lakshmikumaran & Sridharan attorneys