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Article

Interest on delayed payment of tax – The saga continues!

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Introduction

This article concerns Section 50 of the Central Goods and Services Tax Act, 2017 ('**CGST Act**'). Much has been said and done about whether interest is liable to be paid on the gross tax liability in case of delayed payment of taxes. With the introduction of the *proviso* to Section 50(1)[1] with effect from 1 July 2017[2], the legislature indicated that their intention is to levy interest only on the portion of output tax liability, discharged by way of cash (i.e., the net tax liability). The introduction of this *proviso* was a welcome measure which provided much-needed relief to taxpayers who were burdened with heavy interest liabilities on their total output tax payments including the portions remitted through input tax credit ('**ITC**').

The scope of the *proviso* to Section 50(1) came up before the Madras High Court in the recent decision of *Srinivasa Stampings*[3]*.* The High Court has interpreted *proviso* to Section 50(1) to not merely apply to a case of delayed payment of tax, but also to a scenario where the tax has been belatedly paid through returns filed after the prescribed due date. In other words, as per the High Court, returns must be filed belatedly and there must be a delay in payment of GST, only then interest is liable to be paid to the extent of the delayed payment of tax in cash. The corollary of this conclusion is that, in a case where there is a delay in payment of tax due to inadvertence or an interpretation issue, though returns are filed on the due date, interest would have to remitted on the gross tax liability.

For instance, let us consider a case where a person manufactures and sells a certain product under the belief that the goods attract GST of 18% and discharges tax at such rate through the returns filed within the due date. Subsequently, the manufacturer understands that the correct rate of tax applicable to the goods in question is 28%. The manufacturer accordingly discharges the differential tax liability of 10% through the returns filed in the subsequent months. The 10% differential liability is discharged through utilization of ITC. The question which arises is whether interest is liable to be discharged on the 10% paid through credit. Basis the reasoning of the Madras High Court, though there is a case of delay in payment of tax to the extent of the differential 10%, since there has been no delay in filing of returns, the *proviso* to Section 50(1) would be inapplicable. Accordingly, interest would have to be remitted on the tax liability discharged by the manufacturer, *albeit* through credit.

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[1] ***Section 50 -*** *(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council.*

Provided that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be payable on that portion of the tax which is paid by debiting the electronic cash ledger.

[2] Section 112 Finance Act, 2021

[3] 2022-VIL-285-MAD.

The rationale adopted by the High Court while arriving at this conclusion cannot be doubted, since the *proviso* itself is couched in such language. The *proviso* states in so many words that interest shall be payable on that portion of the tax which is paid by debiting the electronic cash ledger **in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date.** The High Court has interpreted the *proviso* strictly as any fiscal statute should[4]. This article intends to focus on the impact of the interpretation. In this regard, the authors proceed to trace the history behind introduction of the *proviso* to Section 50(1) with specific focus on the jurisprudence that has developed over time and the GST Council decisions.

The background

The GST Council, through its 31st Meeting[5] granted in principle approval for amendment to Section 50 of the CGST Act, thereby requiring payment of interest only on the net cash liability.[6] Section 100 of the Finance Act, 2019 inserted a *proviso* to Section 50(1) to give effect to the said recommendation.

The intention behind introducing the *proviso* was the natural concept of 'interest', which signifies a compensatory character.[7] The difference between a tax, interest and penalty is categorically brought out by the Supreme Court in *Associated Cement Co. Ltd.* v. *Commercial Tax Officer*[8]. It has been held that-

> *Tax, interest and penalty are three different concepts. Tax becomes payable by an assessee by virtue of the charging provision in a taxing statute. Penalty ordinarily becomes payable when it is found that an assessee has willfully violated any of the provisions of the taxing statute**. Interest is ordinarily claimed from an assessee who has withheld payment of any tax payable by him and it is always calculated at the prescribed rate on the basis of the actual amount of tax withheld and the extent of delay in paying it. It may not be wrong to say that such interest is compensatory in character and not penal.***

Further, the Orissa High Court, in *Executive Engineer* v. *Surendranath,* AIR 1980 Ori 119 observed that the "natural conception of the word 'interest' is the ordinary or normal profit which the person entitled to the principal money might have made if he had the use of the said money, or his expected loss under usual or ordinary circumstances due to the non-payment of the same at the proper time".

Thus, interest is nothing but a compensation payable for deprivation of the use of the principal amount. It is for this reason, the Madras High Court in the decision of *Refex Industries Limited*[9] found fit to observe that interest leviable under Section 50 should not apply to tax liabilities discharged through credit as the availability of ITC itself runs counter to the fact that the revenue department has been deprived of funds. Rather, it was held that payments through credit only meant enrichment for the State.

Apart from the decision in *Refex Industries Limited* (supra), this issue came up before other High Courts[10] and in some cases led to conflicting decisions where interest was held to

[4] *A.V. Fernandez* v. *State of Kerala* [AIR 1957 SC 657]
[5] The 31st GST Council meeting was held on 22.12.2018.
[6] Press release dated 22 December 2018.
[7] *Pratibha Processors* v. *Union of India*, 1996 (88) ELT 12 (SC)
[8] AIR 1981 SC 1887.
[9] 2020-VIL-71-MAD.
[10] *Landmark Lifestyle* 2019-(5)-TMI-1608 Delhi High Court

be payable on the gross tax liability[11]. The reasons for the confusion was attributable to the fact that the *proviso* was yet to be notified and there was a lack of clarity on whether the effect of the law would be prospective or retrospective.

To ensure consistency, the subject was included in the agenda to the 39th GST Council Meeting[12]. The Council recommended that interest should be levied on the net cash liability with retrospective effect.[13] In the Agenda Note to the Council Meeting, the scope of the *proviso* to Section 50 was discussed and it was observed as follows: -

……

> ***Accordingly, in cases of delayed payment of taxes, interest may be charged only on the net cash liability (i.e. that portion of the tax that is paid by debiting the electronic cash ledger) except in cases where proceedings under section 73 or 74 have been initiated in respect of the said period****. However, it may be noted that the said provision has not been notified till date. Prior to the said amendment, interest was to be paid by the taxpayers on the tax payable, irrespective of whether it was to be paid in cash or by utilization of input tax credit.*

It is evident from the said discussion that Council understood the *proviso* as being applicable to all cases of delayed payment of taxes and the only exception was to scenarios where proceedings under Sections 73 or 74 had been initiated. No specific requirement for delay in filing returns had been noted.

To summarise, interest is meant to only compensate for the time value of money lost because of delay in payment of tax. Payment of tax liabilities through credit should not attract interest as the Revenue is not deprived of funds (so long as the taxpayer had sufficient credit balance). Delay in payment of tax may be on account of late filing of returns or late discharge of GST at a subsequent date (through returns filed on the due date). In both cases, rationally, the interest should be attracted only on the net cash liability.

Conclusion

Having understood the nature of 'interest' and the background in which the *proviso* to Section 50(1) was introduced, it can be reasonably concluded that intention of the law makers was not to levy interest on tax liabilities discharged through ITC. Nevertheless, the manner in which the provision reads as on date in bound to create difficulties in implementing the law in cases where there is a delayed payment of GST without delay in filing returns. Businesses may foresee increased litigations on this front. The Revenue Department may levy interest on delayed payment of taxes even on the portions remitted through credit if the returns through which the liabilities have been discharged is filed on time. To mitigate such avoidable litigations, taxpayers may make suitable representations to the GST Council; seeking an amendment to the law or a clarification to extend the applicability of the *proviso* to all cases of belated tax payments so long as the taxpayer had sufficient credit balance.

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[11] *Megha Engineering & Infrastructures Ltd*. 2019-VIL175-TEL.
[12] The 39th GST Council meeting was held on 14 March 2020.
[13] Agenda Item 5A(iv) as recorded in the minutes of the 39th GST Council Meeting dated 14 March 2020.

Goods and Services Tax (GST)

Notifications and Circulars

GSTR-3B and GST PMT-06 – Due dates extended: The due date for filing of return in Form GSTR-3B for the month of April 2022 has been extended till 24 May 2022. Further, the due date for payment of tax under Quarterly Return Monthly Payment (QRMP) scheme in Form GST PMT-06 for the month of April 2022 has been extended till 27 May 2022. Notifications Nos. 5 and 6/2022-Central Tax, both dated 17 May 2022 have been issued for the purpose.

Ratio decidendi

IGST not leviable on ocean freight on RCM basis in CIF contracts – Levy violates principle of 'composite supply': A 3-Judge Bench of the Supreme Court has held that an Indian importer cannot be subject to the levy of Integrated Goods and Services Tax ('IGST') on reverse charge basis, on the component of ocean freight paid by the foreign seller to a foreign shipping line in case of CIF imports. The Court was of the view that the levy of IGST on ocean freight on the Indian importer is in violation of the principles of composite supply enshrined under Section 2(30) read with Section 8 of the Central Goods and Services Tax Act, 2017 and violates the overall scheme of the GST legislation. It noted that the supply of service of transportation by the foreign shipper forms a part of the bundle of supplies between the foreign exporter and the Indian importer, on which the IGST is already payable under Section 5(1) of the IGST Act.

The Apex Court in this decision also held that recommendations of the GST Council are only recommendatory (not binding) in nature. Noting the fact that the Centre has a one-third vote share in the GST Council coupled with the absence of the repugnancy provision in Article 246A of the Constitution, the Court was of the view that the same indicated that recommendations of the GST Council cannot be binding. The Court was also of the view that if the GST Council was intended to be a decision-making authority whose recommendations transform to legislation, such a qualification would have been included in Article 246A or 279A. [*Union of India* v. *Mohit Minerals Pvt. Ltd.* – Judgement dated 19 May 2022 in Civil Appeal No. 1390 of 2022 and Ors., Supreme Court]

Construction services – Deduction of 1/3rd value towards land is not mandatory: The Gujarat High Court has held that Para 2 of Notification No. 11/2017-Central Tax (Rate), providing for 1/3rd deduction (of total agreement) in cases of construction contracts involving element of land, is *ultra vires* the provisions of the GST Acts and violative of Article 14 of the Constitution of India. The Court answered in negative the question as to whether the notification can provide for a fixed deduction towards land in case the specific value of land and value of construction service is available. It was of the view that deeming fiction can be applied only where actual value is not ascertainable. The High Court in this regard also observed that the deeming fiction for deduction of only 1/3rd value was arbitrary as the same is uniformly applied irrespective of the size of the plot of land and construction therein. It held that the deeming fiction will only be available at the option of the taxable person in cases where the actual value of land or undivided share in land is not ascertainable.

The Court also rejected the contention of the Revenue department that full exclusion of value of sale of land, as contested by the petitioner-assessee, will not be available since the land was a developed piece of land. It noted that at the point of time when the buyer entered into the picture, the land was already developed and thus, even without going to Schedule III of the CGST Act, 2017, the only service which was supplied by the supplier to the recipient was the construction undertaken for the buyer. The Court was of the view that it was such supply alone which can be taxed. Going through the history of taxation on construction activity, the Court observed that the legislative intent was to impose tax on construction activity undertaken by a supplier at the behest of or pursuant to contract with the recipient and that there was no intention to impose tax on supply of land in any form. [*Munjaal Manishbhai Bhatt* v. *Union of India* – Judgement dated 6 May 2022 in R/Special Civil Application No. 1350 of 2021 and Ors., Gujarat High Court]

Refund of unutilised ITC, which was distributed to an SEZ unit, available: The Madras High Court has allowed refund of unutilised distributed Input Tax Credit to an SEZ unit. Observing that there is no bar under Rule 89(1) of the Central Goods and Service Tax Rules, 2017 for refund of unutilized input tax credit, the Court also noted that the very purpose of granting this refund was only to give incentive for exports and to reduce the burden of tax to make the exports more competitive in the international markets. Rejecting Revenue department's plea that application for refund in respect of supplies to a Special Economic Zone, can be filed only by a supplier of the goods or services in terms of second proviso to Rule 89(1), the Court noted that on supply of common service to the petitioner's Head office (which was an ISD), the supplier of such common services could not have claimed any refund under 16(3)(b) of the IGST Act, 2017 or exemption as such a supply did not qualify as a 'zero rated supply' and was for a common service with the invoice being raised on the petitioner's HO. [*ATC Tires Private Limited* v. *Joint Commissioner* – 2022 VIL 295 MAD]

Cenvat credit of service tax paid after the appointed date when permissible: The Meghalaya High Court has allowed Cenvat credit of service tax paid long after the appointed date of 1 July 2017 when the goods and services tax regime came to be embraced. The Court in this regard rejected the contention of the Revenue department that since such payment of service tax was not made prior to the appointed date and could not have been reflected in the electronic ledger account maintained by the assessee as on the appointed date, in terms of Section 140 of the Central Goods and Services Tax Act, 2017, the assessee was not entitled to obtain any credit therefor. The Court noted that the service tax return relating to the quarter ended 30 June 2017, i.e., immediately preceding the appointed date, was filed in October 2017, in accordance with the 'existing law' as there was statutory mechanism for filing the service return and making up for the delay by paying a nominal additional amount. [*Commissioner* v. *Amrit Cement Limited* – 2022 VIL 343 MEG]

Levy of advertisement tax/fee by Municipal Corporation, after introduction of GST, permissible: The Karnataka High Court has approved the levy of advertisement tax/fee by the Hubballi Dharwad Mahanagara Palike (Municipal Corporation) even after the introduction of GST. The Court in this regard noted that the incidence of advertisement tax was on the licence granted by the Municipal Corporation permitting the petitioner-assessee to put up hoardings and that this incidence had nothing to do with the supply

of goods or services (display of client's advertisements) by the assessee to the clients. Observing that there were two transactions, the Court held that both the transactions were independent and distinct. Reliance in this regard was placed on Gujarat High Court decision wherein that Court by referring to Articles 243-X and 243-XF of the Constitution had held that the power to impose advertisement tax is conferred on the Municipality. The Gujarat High Court had also concluded that the charges are more of a fee than tax inasmuch as there is *quid pro quo*. [*Hubballi Dharwad Advertisers Association* v. *State of Karnataka* – 2022 VIL 310 KAR]

Internal agreement to merge two GST registrations is not transfer of business as 'going concern': In a case involving an internal agreement for merging two GST registrations of same owner, the Maharashtra AAR has held that the arrangement of merger would qualify as a supply without consideration between two distinct entities. It was of the view that since the constitution of the registered person remained the same post the merger, the arrangement would not qualify as a supply of service of transfer of business as a going concern. Accordingly, it was held that the same will not qualify as an exempt supply and there would be no transfer of unutilized credit as stipulated in Section 18 of the CGST Act, 2017. The Applicant had bought a manufacturing and trading unit and had taken separate GST registration for manufacturing unit to qualify for incentive scheme of the State Government. Subsequently, it was known that separate registration was not a mandate to avail benefit of the scheme. Therefore, the Applicant took a call to merge both the units. [In RE: *Crystal Crop Protection Ltd*. – 2022 VIL 118 AAR]

Supply of software licence when supply of goods and not services: The Karnataka AAR has held that supply of software licence should be treated as supply of goods under HSN 8523 'Application software'. and not services. It noted that the software was pre-designed, pre-developed and without any customisation. It could be downloaded from internet and needed encryption key for usage, which the Applicant issued through various mediums. It noted that Explanatory Notes to the Scheme of Classification of Services stipulated that the SAC 997331 covered licensing services for the right to use computer software and databases but excluded the services of limited end-user licence as part of packaged software from the said SAC. Further, since the product qualified as goods and was to be supplied to government recognised public funded research institution, it was held to be eligible for the benefit of concessional rate under Notification No. 45/2017-Central Tax (Rate) and to be taxed at the rate of 5%. [In RE: *Keysight Technologies India Pvt. Ltd.* – 2022 VIL 120 AAR]

Incentives/discounts received from third party are not trade discounts: The Maharashtra AAR has held that the incentives/discounts received by the Applicant (Distributor) from a third party would not be treated as trade discount for the purpose of valuation of goods as per Section 15(3) of CGST Act, 2017. The case involved import of products (Intel products) by importers who supplied them to the Applicant for mass distribution to retailers in Indian market. Further, as per agreement of the Applicant with Intel, the Applicant was to be incentivized for meeting quarterly sales target as set out in the agreement. Further, it was held that trade discount was in the nature of a consideration that was provided in lieu of marketing services which the Applicant was providing to Intel by increasing sales of their products in India. Furthermore, the

said supply shall not be treated as export of service as the place of supply of such marketing services will be the location where the services will be performed, that is, in India. [In RE: *MEK Peripherals India Pvt. Ltd.* – 2022 VIL 128 AAR]

Activity of developing and operating mine including excavating and delivery to allottee is supply of service – Royalty, etc., charges not includible in value as same paid by allottee directly to Government: In a case where the Applicant was a Mine Developer and Operator and was contracted by Karnataka Power Corporation Limited (KPCL) for developing and operating coal mine and excavating coal and delivering it to KPCL, the Maharashtra AAR has held that the activity was supply of services classifiable under SAC 9986 covering support services to mining. Relying on the agreement between the parties, the Authority held that there was no supply of coal by the applicant because the applicant neither had any ownership rights on the coal nor had any rights to sell the coal excavated by it. On valuation, the AAR was of the view that components like royalty, MMDR, DMF Fund, cess, stowing excise duty, reserve price, etc., which are levied on the coal excavated from the mine, would not be included in the value of supply of services. It noted that these components were paid directly by KPCL to the Government of India and the State Government and that the applicant neither had any liability to pay nor did it make any payment of such amount. [In RE: *Baranj Coal Mines Private Limited* – 2022 VIL 133 AAR]

Merchant exports – Benefit of Notification No. 41/2017-IT (R) not available in case of bill-to-ship-to supplies: The Karnataka Appellate AAR has held that concessional rate of GST at 0.1% in terms of Notification No 41/2017-IT (Rate), is not available in case of supplies made to the merchant exporter under the bill-to ship-to model. The AAAR in this regard upheld the views of the AAR denying the benefit on the grounds that the assessee-appellant did not fulfil the conditions of the said notification since the goods had not moved directly from the Appellant's premises to the port or to a registered warehouse for export. The assessee's case was that since the commodity exported by the merchant exporter was Ethyl alcohol which was purchased from sugar factories, the same can be moved only on packing in the HDPE drums supplied by them and hence they had supplied the drums on bill-to-ship-to model. As regards clause (b) of condition (vi) in the said notification, the AAAR rejected the view that the sugar factory where the drums were shipped to, is deemed to be considered as a 'warehouse'. It also observed that merchant export was not 'aggregating' the drums and ethyl alcohol at the sugar factory. [In RE: *Time Technoplast Ltd.* – 2022 VIL 38 AAAR]

EU VAT – Fixed establishment clarified: The Court of Justice of the European Union has ruled that there cannot be a fixed establishment first, without a discernible structure, which is evidenced by the existence of human or technical resources and second, that structure cannot exist only occasionally. The Court was also of the view that the existence of a suitable structure in terms of human and material resources which display a sufficient degree of permanence must be established in the light of the economic and commercial reality. It noted that although there is no requirement for a taxable person to itself own the human or technical resources, it is however necessary for that taxable person to have the right to dispose of those human or technical resources in the same way as if they were its own. [*Berlin Chemie A. Menarini SRL* v. *Administraţia Fiscală pentru Contribuabili Mijlocii Bucureşti* – Judgement dated 7 April 2022 in C-333/20, CJEU]

Customs

Notifications and Circulars

India-UAE CEPA – First tranche comes into force from 1 May 2022: *Vide* Notification No. 22/2022-Cus. dated 30 April 2022, exemption from BCD has been provided for goods falling under Tariff Items mentioned in Table I, II & III of the Notification. The benefit of the exemption can be availed in respect of the said goods originating in the UAE and imported into India, subject to fulfillment of conditions (as prescribed). For certain goods enlisted in the Notification, exemption from Agriculture Infrastructure and Development Cess (AIDC) has also been provided. The extent of exemption from BCD, as provided in the Notification, varies as per the Tariff Items. The said notification has come into effect from 1 May 2022. Further, it may be noted that electronic filing and issuance of Preferential Certificate of Origin ('CoO') for India's exports under India-UAE Comprehensive Economic Partnership Agreement is effective from 1 May 2022. Applications under the above-mentioned Trade Agreement may be submitted on the eCoO Website. The guidelines to the Indian exporters with respect to requirement of Digital Signature Certificate for electronic submission, initial registration of new applicant exporter on the portal, etc. have been provided in Trade Notice 05/2022, dated 29 April 2022 issued for the purpose.

Iron ore and specified iron and steel products – Export duties increased/imposed: Exercising its powers under Section 8(1) of the Customs Tariff Act, 1975, the Central Government has revised export duties on iron ore and certain iron and steel products. While export duty on iron ore and concentrates (both agglomerated and non-agglomerated), has been revised from 30% to 50%, export duty @ 15% has been imposed on flat-rolled products of stainless steel, of a width of 600 mm or more (Heading 7219), on other bars and rods of stainless steel; angles, shapes and sections of stainless steel (Heading 7222), and on bars and rods, hot-rolled, in irregularly wound coils, of other alloy steel (Heading 7227). Further, description of the goods covered under Headings 7210 or 7212, has been revised to 'flat rolled products of iron or non-alloy steel, clad, plated or coated', from 'flat rolled products of iron or non-alloy steel, plated or coated with zinc'. Notification No. 28/2022-Cus., dated 21 May 2022 amends the Second Schedule to the Customs Tariff Act, with effect from 22 May 2022, for this purpose.

Wheat exports prohibited with effect from 13 May 2022: The Ministry of Commerce has placed exports of wheat (Durum wheat) under prohibited category with effect from 13 May 2022. Notification No. 6/2015-20, dated 13 May 2022 notes that there has been sudden spike in the global prices of wheat arising out of many factors and as a result of which food security of India, neighboring and other vulnerable countries is at risk. It may however be noted that exports are allowed in case of shipments where Irrevocable Letter of Credit has been issued before 13th. Export is also allowed on permission by government of India based on request of other countries.

Waste and scrap of precious metals – Imports placed under restricted category: The DGFT has amended Import Policy of ITC (HS) Codes 7112 30 00, 7112 91 00, 7112 92 00, 7112 99 10, 7112 99 20, 7112 99 90, from 'Free' to 'Restricted' with immediate effect. DGFT Notification No. 01/2015-2022, dated 29 April

2022 amends Chapter 71 of Schedule I to the ITC(HS) for this purpose. Heading 7112 covers waste and scrap of precious metal or of metal clad with precious metal.

Pre-shipment inspection for metal scrap – New online module for application for Pre-Shipment Inspection Agency and issuance and electronic verification of Pre-Shipment Inspection Certificates: As part of IT revamp, DGFT has proposed a new online module for filing application for recognition as Pre-Shipment Inspection Agency ('PSIA') for metal scrap and electronic issuance of Pre-Shipment Inspection Certificates ('PSIC') and electronic verification of authenticity of PSICs with effect from 01.05.2022. All existing PSIAs are required to register online on DGFT website for activation of their online account. Amendment in instruments or operation of existing PSIA many also be done online. PSIC generated online and can be downloaded by Indian importer by navigating to the DGFT website. The given online process shall not be mandatory in the initial period of go-live and the PSIAs as well as the importers are provided time till 30 June 2022 to onboard and familiarise with the said online process. As per Trade Notice 03/2022-23, dated 26 April 2022, the online process shall be mandatory from 1 July 2022. PSICs dated on or after 1 July 2022 not generated using the DGFT online systems may not be accepted by the Indian Customs Authorities.

Non-Preferential Certificate of Origin – Transition period for mandatory filing of applications through Common Digital Portal further extended: In continuation to earlier Trade Notices, the DGFT has further extended the transition period for mandatory filing of applications for Non-Preferential Certificate of Origin ("**NP CoO**") through Common Digital Portal up to 1 August 2022. The exporters and NP CoO issuing authority have the option to use online system but it is not mandatory till 1 August 2022. Post 1 August, if the stakeholders do not use online system for issuing NP CoO, penal action and possible de-listing as authorized agency may be initiated by the authorities. Trade Notice No. 04/2022-23, dated 27 April 2022 has been issued for the purpose.

Ratio decidendi

Valuation – Transaction value cannot be rejected by extrapolations: Observing that each assessment is a quasi-judicial order based on the transaction value in it, the CESTAT Hyderabad has held that transaction values cannot be rejected under Rule 12 of the Customs Valuation Rules, 2007 by way of extrapolations. It observed that if one is found to have undervalued goods in one case, inference cannot be drawn that he has undervalued in all other imports as well. The Tribunal was of the view that penalties and pecuniary liabilities based on extrapolation is impermissible and is inconsistent with the known legal principles. Affirming the setting aside of the re-determination of value by the Department, the Tribunal observed that rejection of the transaction value in the imports covered in specified worksheets of the show cause notice, by extrapolation had no legal basis. [*Principal Commissioner* v. *Sachdev Overseas Fitness Private Limited* – 2022 VIL 293 CESTAT HYD CU]

Valuation – Royalty paid under technical aid agreement when not includible: The CESTAT Delhi has held that royalty paid to the foreign supplier as percentage of sale of final product is not includible in the value of components imported from the supplier, if the payment of such royalty is not a pre-condition to the sale of the imported goods. The Tribunal though noted that the royalty was paid as percentage of the net turnover of goods manufactured, which included not only the component which were domestically

procured but also which were imported as well as any value addition by the assessee, it was of the view that in itself, was not sufficient to add royalty to the assessable value. The Tribunal in this regard noted that goods were not imported under the said agreement and any royalty under the agreement cannot be related to it. It also observed that there was no condition that the importer has to obtain the approval of the technology provider either for import or for procuring components domestically. [*Kruger Ventilation Industries (North India) Private Limited* v. *Commissioner* – 2022 VIL 334 CESTAT DEL CU]

RoSCTL benefit when 'No' mentioned in shipping bill – RoSCTL also an export promotion scheme: Following its earlier decisions relating to MEIS, the Madras High Court has allowed the benefit of RoSCTL in a case where the exporter had inadvertently chosen the option 'NO' (scheme code 19) instead of 'YES' (scheme code 06) while filing the RoSCTL claim in the Shipping Bill. The High Court was of the view that earlier decisions dealing with export under the MEIS scheme, would apply to the facts of the case inasmuch as RoSCTL scheme announced *vide* Notification No.14/26/2016-IT (Vol.II) dated 8 March 2019 of the Ministry of Textiles was for promotion of exports. It also noted that the facts that the petitioner had exported goods out of India and was otherwise entitled to the aforesaid scheme were not in dispute. [*Paramount Textiles Mills Private Limited* v. *Deputy DGFT* – 2022 VIL 298 MAD CU]

No penalty imposable on importer for mistake of exporter/shipper in mis-match of goods: In this case, due to some mistake at the end of the exporter/shipper, there was a mismatch with regard to quantity of the imported goods. Some other goods which were not as per the purchase order were also shipped. The shipper accepted the mistake that it had inadvertently packed other goods. The CESTAT held that there was no case of deliberate mis-declaration on the part of the importer and the Bill of Entry had been filed as per the packing list and Bill of Lading. Considering that the exporter/shipper had accepted its mistake which was found to be true, the CESTAT held that no penalty was imposable on the importer under Section 112(a) of the Customs Act, 1962. [*Callmate India Pvt. Ltd.* v. *Commissioner* – 2022 TIOL 285 CESTAT DEL]

Valuation – Transaction value can be rejected only if evidence available to show that it does not reflect actual transaction price in course of international trade: By placing reliance on the Supreme Court's decision in the case of *Sanjivani Non Ferrous Trading Pvt. Ltd*., 2018-VIL-30-SC-CU, the CESTAT has held that the transaction value as declared by the importer should form the basis for determination of the assessable value for levy of customs duty. The transaction value as declared should normally be accepted and should be rejected only if the revenue has evidence to show that the transaction value does not reflect the actual transaction price in the course of international trade. The Tribunal also observed that contemporaneous import at much higher transaction value, can be a reason for rejection of the declared transaction value, however, evidence has to be produced to that effect. [*Viraj Impex Pvt. Ltd.* v. *Commissioner* – 2022 VIL 217 CESTAT MUM CU]

Customs debt extinguishes when goods confiscated even after being unlawfully introduced – Liability to excise duty and import VAT however not extinguishes: The Court of Justice of the European Union has ruled that a customs debt is extinguished where goods are seized and subsequently confiscated even after they have already been unlawfully introduced into the customs territory of the

European Union. It noted that wording of Article 124(1)(e) of Union Customs Code does not refer to the time at which the seizure of goods takes place as a condition for the extinguishment of the customs debt. The Court was however of the view that such extinguishment of customs debt cannot prevent application of penalties or undermine deterrent effect of those penalties. In this case where the unlawfully detained goods (cigarettes) were confiscated and destroyed, entailing the extinguishment of customs debt, the EU's Apex Court also held that the extinguishment of the customs debt does not lead to the extinguishment of the debt linked, respectively, to excise duty and to import VAT in respect of goods smuggled into the customs territory of the EU. [*UB* v. *Kauno teritorinė muitinė* – Judgement dated 7 April 2022 in C-489/20, CJEU]

Central Excise, Service Tax and VAT

Ratio decidendi

Manpower recruitment or supply agency service – Secondment of employees from foreign group company – Extended period of demand not invokable: A 3-Judge Bench of the Supreme Court of India has set aside the invocation of extended period of limitation in a case pertaining to demand of service tax under Reverse Charge Mechanism from an Indian entity for receiving Manpower Recruitment or Supply Agency Services (secondment of employees) from its foreign group company. The Apex Court in this regard noted that the CESTAT in its decision impugned before it had relied upon two of its previous orders and that in the present case itself, the revenue had discharged the later show cause notices. It was hence of the view that assessee's view about its liability were neither untenable nor mala fide. According to it, this was sufficient to turn down the Department's contention about existence of wilful suppression of facts or deliberate misstatement.

Upholding the demand of service tax under normal period, the Supreme Court in this case observed that while the control (over performance of the seconded employees' work) and the right to ask them to return, was with the assessee (Indian entity), the overseas employer in relation to its business, had deployed them to the assessee, on secondment. It noted that the overseas employer paid the said employees their salaries and their terms of employment, even during the secondment, which was in accord with the policy of the overseas company, who was their employer. The Court also noted that the *quid pro quo* for the secondment agreement, where the assessee has the benefit of experts for limited periods, was implicit in the overall scheme of things. [*Commissioner* v. *Northern Operating Systems Pvt. Ltd.* – Judgement dated 19 May 2022 in Civil Appeal No. 2289-2293 of 2021, Supreme Court]

Refund of amount deposited under different registration number: The CESTAT Delhi has allowed refund of the amount deposited during the course of audit as recognised in the audit report, although, it was deposited under a new different registration number on directions of the department. The Tribunal in this regard noted that the said amount was neither adjusted at the adjudication stage nor at the stage of settlement under the Sabka Vishwas Legacy Dispute Resolution Scheme. Observing that said amount was lying with the Department by way of revenue deposit, the Tribunal held that there is no question of any limitation as provided under Section 11B of the Central Excise Act, 1944. The assessee's appeal was allowed by directing grant of refund of the amount with interest under Section 11BB. [*Tarkeshwar Das Construction* v. *Commissioner* – 2022 VIL 306 CESTAT DEL ST]

Compounded levy scheme – Abatement of duty for temporary closure available under Notification No. 17/2007-C.E.: The CESTAT Ahmedabad has allowed the relief of abatement of duty under Notification No. 17/2007-C.E. in a case involving temporary closure of the factory. The notification prescribed a fix rate of monthly duty on the maximum number of Cold Rolling Machines installed in the factory. Noting that clause 8 of the notification read with clause 3 does not preclude the temporary ceasing of work from benefit of the notification, the Tribunal held that even temporary ceasing of work after following due procedure can entitle the manufacturer to avail the exemption. [*Mahalaxmi Metal Udhyog* v. *Commissioner* - -2022 TIOL 399 CESTAT AHM]

No service tax on services by a milk federation to district milk cooperative societies and milk unions: Applying the principals of the decision of the Supreme Court's Constitutional Bench in the case of *Calcutta Club,* the CESTAT Delhi has set aside the demand of service tax on services rendered by Rajasthan Cooperative Dairy Federation Limited, an apex society to its members who were District Milk Cooperative Societies and the milk unions formed under the Rajasthan Co-operative Societies Act, 2001. The Tribunal noted that although the milk unions (district cooperative societies) and the assessee/appellant (apex society) were registered under the Cooperative Societies Act of the State and were, therefore, distinct legal entities, the nature of relationship between the assessee and the milk unions continued to that of club to its members. The Supreme Court in the case of *Calcutta Club* had held that any amount paid by the members to the club and the services rendered by the club to its members are self-service and cannot be taxed. The Department had demanded service tax on Rajasthan Cooperative Dairy Federation Cess charged by the assessee from its members. [*Rajasthan Co-operative Dairy Federation Limited* v. *Commissioner* – 2022 VIL 338 CESTAT DEL ST]

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