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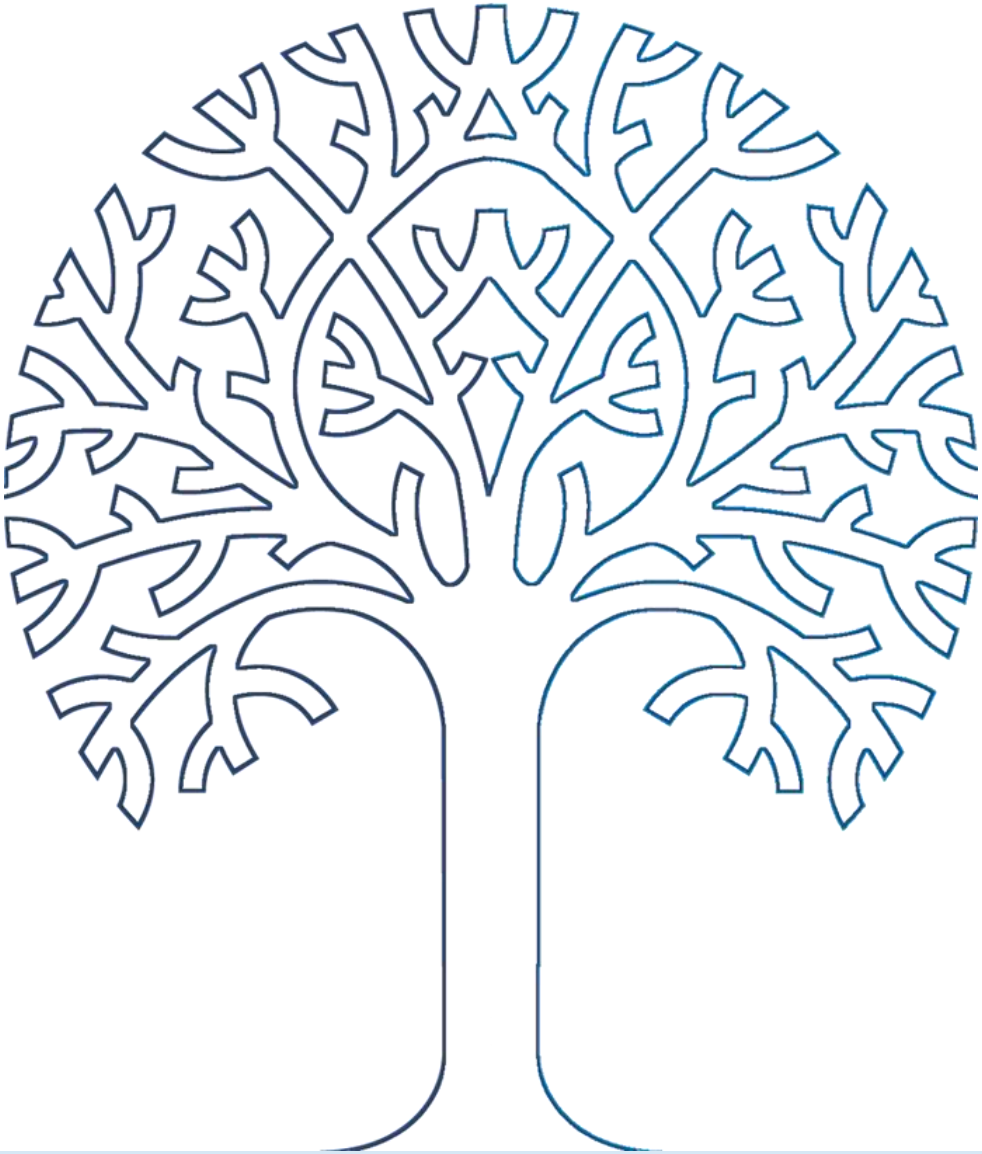

Article

A tale of tax technology and GST matching woes: Balancing idealism and pragmatism

By Shiwani Kaushik

The article in this issue of Tax Amicus discusses the problem of absence of mechanism for matching Input Tax Credit ('**ITC**'). It analyses a recent Rajasthan High Court decision in the case of *Hindustan Lever Ltd.,* where the practicality of this matching exercise has come into question. The article observes that while on one hand, requiring suppliers to collect certificates or proof from recipients may lead to administrative inefficiencies and potential disputes between businesses, on the other hand, allowing businesses to claim reductions in tax liability without verification could lead to misuse of the system and revenue leakage. According to the author, the said decision may have significant implications for the GST framework. If the court upholds the petitioner's argument and directs the tax department to undertake the matching exercise, it could simplify compliance for businesses, but may place additional administrative burden on the tax authorities. She also notes that it is an opportunity for policymakers and stakeholders to restructure the GST framework and explore ways to make it more efficient and business-friendly while maintaining the integrity of the tax system..

A tale of tax technology and GST matching woes: Balancing idealism and pragmatism

When India introduced the Goods and Services Tax (GST), it was touted as a transformative reform that would streamline taxation and integrate technology seamlessly into the tax administration process. This new tax regime promised efficiency for the government and ease of doing business for taxpayers. However, the dream of a perfect blend of tax and technology is yet to fully materialize, and one critical issue stands out — the absence of an ideal matching concept that has been causing hardships for taxpayers.

The GST system being a significant overhaul of the country's indirect taxation structure, aims to create a unified and streamlined tax regime. One crucial aspect of the GST framework is the mechanism for matching Input Tax Credit ('**ITC**'), ensuring that businesses are eligible for the credits they claim.

Section 34 of the Central Goods and Services Tax Act, 2017 ('**CGST Act**') acknowledges the practicality that the value of a supply can change over time. It inter alia allows for the adjustment of excess tax payments through the issuance of GST credit notes. Under the GST regime, there is a concept of matching ITC, wherein the output tax reported by the supplier should ideally align with the credit availed by the recipient. This was reiterated in Circular No. 72/46/2018-GST, dated 26 October 2018, issued by the Central Board of Indirect Taxes and Customs ('**CBIC**').

However, the practicality of this matching exercise has come into question in a recent case before the Hon'ble High Court of Rajasthan, *Hindustan Unilever Ltd.* v. *Union of India* [2023 VIL 626].

In this case, the petitioner has raised a fundamental concern regarding the workability of the GST matching exercise. The crux of the petitioner's argument is that in the absence of a proper mechanism for matching credit notes issued by the supplier with the ITC reversal by the recipient, it becomes practically impossible for businesses to comply with the requirement of submitting certificates as proof of ITC reversal. Consequently, this puts businesses at risk of reporting reductions in their tax liability, creating a challenging compliance landscape.

The petitioner's stance is that it should not be their responsibility to obtain certificates or proof of ITC reversal from the recipient. Instead, they contend that it should be the responsibility of the tax department to undertake the matching exercise and validate the claims. This contention raises important questions about the feasibility and practicality of effectively implementing some of the GST provisions.

The primary issue at hand seems to be the absence of a statutory obligation on the tax department to conduct the matching exercise. As per the GST framework, if a taxpayer wishes

to claim a reduction in their output tax liability, then the corresponding ITC availed by the recipient should be reversed. However, the petitioner argues that collecting such certificates or proof from the recipient to show such alignment is a cumbersome task, leading to difficulties in compliance.

The case highlights the delicate balance between ensuring compliance and the practicality of doing so. On one hand, requiring suppliers to collect certificates or proof from recipients may lead to administrative inefficiencies and potential disputes between businesses. On the other hand, allowing businesses to claim reductions in tax liability without verification could lead to misuse of the system and revenue leakage.

The ideal balance would have been where the matching scheme functions smoothly, suppliers can monitor recipient actions and adjust excess tax accordingly in case of mismatches. However, in the absence of a functional matching system, suppliers remain uncertain about recipient actions and their compliance. Additionally, in the absence of a matching facility in the portal, it is impractical for suppliers to follow up with numerous customers to ensure desired results. Even if suppliers wish to do so, they cannot guarantee that ITC reversal relates to the specific credit note in question.

The case of *On Quest Merchandising* [TS-314-HC-2017(DEL)-VAT] also sheds light on the issue. It questioned whether recipients could avail ITC if they could not verify the tax payment by the supplier. The court noted the existence of matching provisions but highlighted the absence of a mechanism for genuine taxpayers to verify tax payments by their counterparts. The Court's stance was that taxpayers cannot be expected to perform the impossible.

The landmark decision in *BC Srinivasa Shetty* [1981 (2) SCC 460] further emphasizes that if machinery provisions fail, the levy of tax could also fail. In essence, if matching functionality practically does not exist, the demand of tax for mismatch scenarios results in unwarranted disputes and litigations.

The Hon'ble High Court in the case of *Hindustan Unilever Ltd.* v. *UOI* (supra), has not passed any ruling yet but has merely stated hereunder:

> *"We find that the validity of the provision is being challenged more on the ground of workability.* ***For the present we find that in the absence of their being any statutory obligation cast on the respondent to undertake matching exercise, if the petitioner is willing to claim reduction in tax liability, proof of reversal by the recipient is to be provided by the supplier.*** *In the present case, the petitioner has challenged the validity of the provision more on the grounds of difficulty in collecting such certificate / proof from the recipient. Even according to the petitioner he has been able to collect such certificate / proof in some cases.*
>
> ***Though we are not granting any interim order at this stage, learned counsel for Union of India is directed to place before the Court appropriate suggested mechanism****."*

The Court's decision in the *Hindustan Unilever Ltd*. case may have significant implications for the GST framework. If the court upholds the petitioner's argument and directs the tax department to undertake the matching exercise, it could simplify compliance

for businesses. However, it may also place additional administrative burden on the tax authorities.

Conversely, if the Court rules that the proof of reversal of ITC by the recipient is necessary, it may emphasize the importance of timely and accurate documentation in the GST system, albeit at the cost of added complexity for businesses.

In conclusion, the case of *Hindustan Unilever Ltd*. (*supra*) brings to the forefront a crucial issue in the GST framework: the workability of the matching exercise. Striking the right balance between ensuring compliance and reducing administrative burdens will be a key challenge for the Court. Regardless of the outcome, it is an opportunity for policymakers and stakeholders to restructure the GST framework and explore ways to make it more efficient and business-friendly while maintaining the integrity of the tax system. This case serves as a reminder of the ongoing evolution of India's GST regime and its impact on businesses and tax administration.

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Notifications and Circulars

Online gaming and casinos – New Rules for valuation set to be introduced in the Central Goods and Services Tax Rules, 2017

The Central Board of Indirect Taxes and Customs has issued Notification No. 45/2023-Central Tax, dated 6 September 2023 to amend the Central Goods and Services Tax Rules, 2017. As per the notification, new Rules 31B and 31C will be inserted in the CGST Rules, 2017 with effect from the date to be notified. These rules provide for a method of valuation of supply leviable to GST in case of online gaming and casinos. This is as per the recommendations made by the 51st GST Council Meeting on online gaming and casinos. Detailed analysis of the new Rules, including comments from the LKS Indirect Tax Team, is available here.

Ratio Decidendi

Intermediary services – Use of word 'agent' in agreement and fact that services were for clients of assessee's affiliate, are not material to hold service to be intermediary service

The Delhi High Court has directed the Department to process refund of ITC on account of export of services in a case where although the agreement did use the word 'agent', the assessee-petitioner was not acting as an agent for procurement of services for the service recipient. The Court also held that the fact that services were for the clients of the assessee's affiliate, does not make the assessee an 'intermediary' under Section 2(13) of the IGST Act, 2017. The assessee was engaged in the business of providing bookkeeping, payroll, and accounting services through the use of cloud technology to its affiliated entity incorporated outside India. The Court in this regard observed that that the assessee was neither facilitating the provision of services by a third entity nor acting as a middleman for procuring such services for its affiliate. [*Boks Business Services Pvt. Ltd.* v. *Commissioner* – (2023) 10 Centax 44 (Del.)]

Recovery – Closure of financial year, or bank holidays, cannot justify recovery on the day next to the date of unfavourable order

The Patna High Court has held that imminent bank holidays of 2 or 3 days and the close of the financial year cannot be the valid reasons to justify an expedient recovery under the proviso to Section 78 of the CGST Act, 2017. The Court expressed deep anguish and dissatisfaction in the said reasons as recorded, and kept hidden, by the officers in the files while initiating recovery. The Court also found it unclear as to how the interest of the revenue would suffer if the recovery is kept in abeyance for three months or at least a notice is issued to the assessee before the recovery is effectuated from the banks, behind the back of the assessee. According to the High Court, there is a requirement of notice, if not prior to the recording of reasons; at least intimation of the reasons which motivates the proper officer to recover the amounts due, considering such recovery to be expedient with clear specification of the period less than a period of three months, within which the amounts are to be paid. The dispute involved recovering the assessed tax due, just after a day of dismissal of the appeal when there was a further appeal provided in the statute and the Tribunal before which such an appeal was to be filed was not constituted. The Court also relied on Notifications issued for extending the time period for filing appeal before the Tribunal, as the same was yet to be constituted. [*Sita Pandey* v. *State of Bihar* – (2023) 10 Centax 95 (Pat.)]

Limitation for availing Input Tax Credit – CGST Section 16(4) is constitutionally valid

The Patna High Court has upheld the constitutional validity of Section 16(4) of the Central Goods and Services Tax Act, 2017/Bihar Goods and Services Tax Act, 2017. The said provisions deny entitlement of Input Tax Credit (ITC) in respect of any invoice or debit note after 30th day of November following the end of financial year to which such invoice/debit note pertains or furnishing of the relevant annual return, whichever is earlier. Holding that the provision was not violative of Article 300A of the Constitution of India, the Court observed that ITC is not unconditional and a registered person becomes entitled to ITC only if the requisite conditions stipulated therein are fulfilled. It also noted that the language of Section 16 suffers from no ambiguity and clearly stipulates grant of ITC subject to the conditions and restrictions put thereunder. It may be noted that the Court was also of the opinion that fiscal legislation having uniform application to all registered persons cannot be said to be violative of Article 19(1)(g) of the Constitution. [*Gobinda Construction* v. *Union of India* – (2023) 10 Centax 196 (Pat.)]

Blocking of Electronic Credit Ledger under CGST Rule 86A – Jurisdiction of STO

The Bombay High Court has allowed the writ petition filed by the assessee in a dispute involving jurisdiction of State Tax Officer (STO) to block Electronic Credit Ledger under the Central GST Act at the strength of a notification issued under State GST Act. The Court observed that Rule 86A of the Central Goods and Services

Tax Rules, 2017 indicates that such blocking can be done by the Commissioner or an officer authorized by him in this behalf, not below the rank of Assistant Commissioner, and that the STO was an officer below the rank of Assistant Commissioner. The benefit under Notification dated 24 January 2020 was relied upon by the Department to contend that the power has now been delegated by the Commissioner to the STO. This argument was denied by the Court. The Court held that the Notification was under the State GST Act; Rule 86A of the CGST Rules, 2017 contemplates a delegation *vide* amendment to the Rule. The Court thus quashed the blocking of the Electronic Credit Ledger. [*Guru Storage Batteries* v. *State of Maharashtra* – 2023 VIL 630 BOM]

Intra-State movement of goods while passing through another State – Absence of e-way bill when not fatal

In a case where goods were being transported from Gwalior to Panna - both in the State of Madhya Pradesh and were intercepted as they passed through the State of Uttar Pradesh in between on the ground that e-way bill was not accompanying the goods, the Allahabad High Court has held that the seizure ought not to have been made. The Court in this regard observed that in the State of Madhya Pradesh, the said goods were exempted from carrying the e-way bill at the relevant point of time. It also observed that all the authorities below had noted that during transportation of the goods, tax invoices & G.R. were genuine and that it was not the case of the Department that goods were unloaded or intended to be unloaded in Uttar Pradesh. The High Court also held that mainly on the ground of some small technical fault for not carrying the e-way bill, penalty ought not to be levied in the absence of any discrepancy in document accompanying the goods. [*J.K. Cement Ltd.* v. *State of U.P.* – (2023) 10 Centax 13 (All.)]

Refund of Input Tax Credit on exports – Amendment to Rule 89(4) in 2022 is prospective

The Jharkhand High Court has held that amendment in Rule 89(4) of the Central Goods and Services Tax Rules, 2017 which came into effect *vide* Notification No. 14/2022-Central Tax, dated 5 July 2022 is not clarificatory and thus will have a prospective effect. Observing that the amendment inserted a new stipulation for comparison between two values relating to goods exported out of India, and that such an exercise was not contemplated prior to the amendment as what was taken into account was the actual transaction value, the Court held that since it was a substantive change, the amendment ought to operate prospectively. The High Court was also of the view that mere use of the term 'Explanation' will not be indicative of the fact that the amendment is clarificatory/declaratory. The Court also noted that the notification itself, which provided for retrospective effect to certain other changes in the Rules, did not indicate a retrospective date for the said amendment in Rule 89(4). [*Tata Steel Ltd.* v. *Union of India* – 2023 (9) TMI 44-Jharkhand High Court]

Input Tax Credit is not deniable for non-reflection of tax amount in GSTR-2A

The Kerala High Court has held that non-reflection of the tax amount in Form GSTR-2A is not a sufficient ground to deny the assessee the claim of the Input Tax Credit. The Court remanded the matter back to the Assessing Officer to give opportunity to the assessee for his claim for ITC, while it observed that assessee has to discharge the burden of proof regarding the remittance of tax to the seller dealer by giving evidence. It may be noted that the Court also observed that if the seller dealer (supplier) had not remitted the said amount paid by the assessee-petitioner to him, the assessee cannot be held responsible. [*Diya Agencies* v. *State Tax Officer* – (2023) 10 Centax 266 (Ker.)]

Audit – Having failed to conduct audit for long, Department cannot wake up and conduct audit after assessee subsequently got unregistered

In a case where the Department sought to carry-out audit under Section 65 of the Central Goods and Services Tax Act, 2017 of the assessee who had already got itself unregistered, though the audit was sought to be conducted for the past period when the assessee was registered, the Madras High Court has allowed the writ petition of the assessee. The Court in this regard observed that when Section 65 provides for periodical audit, the Department having failed to conduct audit for all these years, suddenly cannot wake up and conduct an audit. The Revenue department was however granted liberty to initiate assessment proceedings under Sections 73 and 74. [*TVL. Raja Stores* v. *Assistant Commissioner* – (2023) 9 Centax 369 (Mad.)]

Appeals – Pre-deposit payment by using electronic credit ledger

The Madras High Court has directed the Department to permit the assessee to debit the amounts lying unutilised in the assessee's electronic credit ledger towards pre-deposit under Section 107(6) of the Central Goods and Services Tax Act, 2017. The Joint Commissioner was directed to number the appeal by permitting the above and dispose the same on merits. [*Larsen & Toubro Ltd.* v. *Joint Commissioner* – 2023 VIL 589 MAD]

Registration cannot be cancelled for discrepancies in tax returns and tax liability

The Delhi High Court has held that if the assessee is disabled from filing the requisite form to record the change of place of business, the same cannot be considered as a ground for not restoring its GST registration, more particularly, since the same was not the ground on which the petitioner's GST registration was cancelled in the first place. Further, the Court also observed that discrepancies in the tax returns and tax liability also cannot be a ground for cancellation of the GST registration. The High Court in this regard observed that the authorities have to proceed in accordance with law in assessing the correct liability, in the event there is any ground to believe that the taxpayer has not truly disclosed the same. Restoring the registration of the assessee, the Court also held that initial order of cancellation of assessee's GST

registration was also not maintainable as was not informed by reason. [*Shiv Ganga Udyog* v. *Commissioner* – 2023 VIL 612 DEL]

Revocation of cancelled registration – Madras High Court extends benefit of amnesty scheme in case where registration was cancelled after cut-off date

The Madras High Court has granted the benefit of Notification No. 3/2023-Central Tax, providing for an amnesty scheme for condonation of delay in filing application for revocation of cancellation of GST registration, to an assessee whose registration was cancelled after the cut-off date (31 December 2022) provided under the scheme. The High Court in this regard noted that although the scheme applies to those whose registrations were cancelled before 31 December 2022, the intention of the Government is to allow the registrants, whose registrations have been revoked, to revive their registrations to carry on the business. [*Active Pest Control* v. *Deputy Commissioner* – 2023 (8) TMI 1350-Madras High Court]

Seizure – Order prohibiting assessee to deal with goods is not a stop gap for Department to take decision on seizure

The Delhi High Court has rejected the contention of the Department that it is open for the concerned authorities conducting search, to first pass an order under the first proviso to Section 67(2) of the CGST Act (directed not to deal with the goods in question) and, thereafter, take an informed decision whether to seize the goods. The dispute involved issuance of show cause notice after more than 6 months of order under first proviso to Section 67(2) though within 6 months from the date of seizure order. According to the Court, the order of prohibition is not a stop gap arrangement for the Department to take an informed decision whether to seize the goods or not, and that that an order of prohibition, is for all intents and purposes, an order of seizure.

It may be noted that the Court however rejected the contention of the assessee that SCN issued after the prescribed time is required to be set aside. The Court in this regard noted that the consequence of Section 67(2) merely provides that if no notice is issued within the stipulated period, the goods seized are liable to be returned, and that it does not postulate that the notice, issued after six months, is invalid. [*Best Crop Science Pvt. Ltd.* v. *Superintendent* – (2023) 10 Centax 295 (Del.)]

Budgetary Support Scheme is not available after change of ownership/constitution or slump sale of unit

In cases involving change in the constitution of the firm from partnership firm to private limited company or when there is acquisition of another company, and hence fresh UID was granted and there was a change in the registration number under the Companies Act, 2013, the Sikkim High Court has rejected the claim for the benefit of Budgetary Support Scheme to the new company for the residual period for which the earlier company was entitled to exemption under Notification No. 20/2007-C.E.

(area-based exemption). Dismissing the assessee's petition, the Court observed that the Budgetary Support Scheme is only a concession and not an exemption and would be liable to be strictly construed keeping in mind the intention of the Government of India for providing the budgetary support to 'eligible units' as defined. It also noted that Scheme was a measure of goodwill only to the units which were eligible for drawing benefits under the earlier excise duty exemption/refund schemes. The High Court in this regard observed that the new companies cannot legally claim that they were entitled to the exemption under the exemption Notification No. 20/2007-C.E. as they did not exist then. [*Zydus Wellness Products Limited* v. *Union of India* – (2023) 10 Centax 153 (Sikkim)]

Not every communication through medium of emails or electronic transfer is OIDAR service

In a case where the assessee was involved in providing of service of production of 3D city models of three cities being Abu Dhabi, AL Ain, AL Dhafra, the Bombay High Court has wondered as to how such specialized service could be said to be of the nature falling under Online Information and Database Access or Retrieval services (OIDAR services) as defined in Section 2(17) of the Integrated Goods and Services Act, 2017. The Court was of the view that though assessee was required to transfer files through electronic medium, it does not mean that such services being rendered by the petitioner *qua* its nature, would fall under the definition of OIDAR. The Court observed that it is not the purport and meaning of OIDAR service to hold any communication of information or providing of service through the medium of emails or any electronic transfer of data to be covered under said services. Allowing petition for refund in case of export of services, the Court observed that the recipient of the service and place of supply was outside India, and consideration was received in foreign currency. [*Globolive 3D Private Limited* v. *Union of India* – 2023 VIL 567 BOM]

ITC available on gold coins, etc., given as incentives to dealers for achieving targets under promotional scheme

The Karnataka AAR has held that Input Tax Credit is available to the assessee on gold coins and white goods given as incentives to the dealers for achieving targets under different promotional schemes. The AAR was of the view that the said goods would not be covered under the scope of 'gift' under Section 17(5)(h) of the CGST Act, 2017 as gift is something given without any condition and stipulation while the subject goods were given on fulfilment of certain conditions. According to the AAR, input tax credit so claimed under section 16 does not become unavailable under Section 17(5)(h) of the CGST Act. It may be noted that the AAR also held that obligation to issue gold coins and white goods to the dealers/ customers upon achieving the stipulated lifting of the material/ purchase target during the scheme period would be regarded as a supply under Section 7 of the CGST Act, 2017. [In RE: *Orient Cement Limited* – (2023) 10 Centax 47 (A.A.R. - GST - Kar.)]

Transport service to education institutions for transportation of students and staff is exempt from GST

The Tamil Nadu AAR has held that the activity of providing transport services to the education institutions by way of transportation of students and staff is eligible for exemption *vide* Sl.No.66(b) of the Notification No. 12/2017-Central Tax (Rate) dated 28 June 2017. According to the Authority, the exemption is available if the services provided by the applicant is to an educational institution defined in the said notification and necessary permit has been obtained as mandated under the Tamil Nadu Motor Vehicles (Regulation and Control of School Buses) Special Rules 2012. [In RE: *Muniyasamy Abinaya* – 2023 (9) TMI 765-Authority for Advance Rulings, Tamil Nadu]

Pre and post examination services provided to universities is exempt

The West Bengal AAR has held that provision of pre and post examination services to universities and education boards is exempt from GST under Serial Number 66 of Notification No. 12/2017- Central Tax (Rate) dated 28 June 2017. The AAR was of the view that the process of conducting examination includes pre-examination works, the examination itself and post-examination works. The question before the Authority was whether the services of; Designing, Developing and managing web based applications and related services for conducting online examination; and post examination services of Scanning and Processing of Examination Results, generation and printing of Mark Sheets (Online and offline), Printing of Pass certificates and other related examination activities, would be eligible for GST exemption. [In RE: *Institute of Education and Examination Management Pvt. Ltd.* – TS-425-AAR(WB)-2023-GST]

Canteen services – GST liability and ITC availability

The Gujarat AAR has held that GST is not payable on the amount recovered by the assessee-applicant from its permanent employees towards canteen services provided by a third party at the premises of applicant, which is obligatory for the applicant to provide and maintain under Section 46 of the Factories Act, 1948. Reliance was placed on CBIC Circular No. 172/04/2022-GST dated 6 July 2022. The AAR was however of the view that GST is leviable on the amount representing the contractual workers' share of canteen charges, as the contractual workers do not fall under the meaning of 'employee'. Further, in respect of Input Tax Credit, the AAR was of the view that ITC will be available in respect of food and beverages as canteen facility is obligatorily to be provided by the assessee to their permanent employees under the Factories Act, 1948. It was also held that the ITC on GST charged by the canteen service provider will however be restricted to the extent of cost borne by the assessee-applicant only, and ITC of GST paid on canteen facility with respect to the food supplied to the contractual workers is not available. [In RE: *Eimco Elecon India Limited* – 2023 (9) TMI 164-Authority for Advance Ruling, Gujarat]

Electrical and mechanical spare parts of electric vehicle are not covered under HSN 8703, liable to GST at 18%

The Telangana AAR has held that electrical & mechanical spare parts of electric vehicle are not covered by any description in the Notification No. 01/2017-Central Tax and therefore they fall under residual entry S. No. 453 of Schedule-III of said notification, liable to GST at 18%. Relying upon Supreme Court's decision in *VVS Sugars* v. *Government of AP*, holding that '*A taxing statute must be interpreted as it reads, with no additions and no subtractions on the ground of legislative intent or otherwise*', the AAR held that it cannot be inferred that parts of electrical vehicles fall under HSN 8703. Further, relying on CBIC Circular No.179/11/2002-GST, the AAR also held that all electrically operated vehicles including three wheeled electric vehicles are classified under HSN 8703 for the purpose of taxation under GST. [In RE: *Versatile Auto Components Private Limited* – 2023 VIL 186 AAR]

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Notifications and Circulars

Phased Manufacturing Program (PMP) for hearable and wearable devices amended

PMP Scheme for wearable devices shall now cover all charging cables/connects under Chapter 85 as opposed to only under Heading 8544 of the Customs Tariff Act, 1975 earlier. For hearable devices, parts under Chapters 39 (plastic), 40 (rubber) and 42 (leather) shall also be eligible for concessional rate of duties under the PMP Scheme. Notification No. 55/2023-Cus., dated 14 September 2023 amends Notifications Nos. 11/2022-Cus. and 12/2022-Cus., for this purpose.

Project imports – BCD exemption to specified project imports extended till 30 September 2025

The Ministry of Finance has extended the exemption/reduced effective rate regarding Basic Customs Duty to certain specified project imports till 30 September 2025. The exemption was earlier expiring on 30 September 2023. The projects on which exemption has been extended include goods required for coal mining projects; power generation projects; power transmission, sub-transmission or distribution projects; specified mega power projects; project for LNG regasification project; aerial passenger ropeway project; specified nuclear power project; and specified water supply projects. Notification No. 54/2023-Cus., dated 14 September 2023 has been issued for the purpose.

Food supplements containing botanicals – SHEFEXIL allowed to issue official certificate for exports to EU and UK

The export policy of 'food supplements containing botanicals', falling under ITC(HS) 1302 and 2106 has been amended in case of exports to UK or EU. The export of such supplements to UK and EU will now be allowed subject to issuance of an official certificate from Export Inspection Council / Export Inspection Agencies or SHEFEXIL. As per Notification No. 31/2023, dated 11 September 2023, SHEFEXIL has also been allowed to issue official certificate for a period of three months from the date of issuance of notification.

Pre-shipment and Post-shipment Export Credit and Packing Credit in Foreign Currency (PCFC) for E-Commerce Exports

The Directorate General of Foreign Trade (DGFT) has issued a Trade Notice guiding and encouraging Banking and financial

institutions to extend the facility of pre-shipment and post-shipment export credit and packing credit in foreign currency to e-commerce exports based on the guidelines issued by RBI on this issue. Trade Notice No. 26/2023-24, dated 4 September 2023 issued for this purpose, also states that any issues in availing such Export Credit may be brought to attention by e-commerce exporters or banks to the DGFT.

Exemption for manufacturing of electronics, semiconductor, etc. under MOOWR

The additional mandate for payment of IGST/Compensation Cess under Section 65A of the Customs Act (MOOWR Scheme) shall not be applicable on manufacturing of electronics, semiconductor, etc. under the MOOWR. This is as per Ministry of Electronics and IT, Office Memorandum dated 18 August 2023.

Ratio Decidendi

Drawback on exports is available even when BCD is not paid on imports, if additional duty is paid

The Delhi High Court has rejected the contention of the Revenue department that it is only when a duty as prescribed by the Customs Act, 1962 has been paid that drawback benefits can be claimed. The Revenue's submission in essence was that unless Basic Customs Duty (BCD) is paid at the time of import, it would be impermissible for the exporter-petitioner to claim drawback benefits. The Court observed that Additional duty (equal to Central Excise duty) was paid by the assessee under Section 3 of the Customs Tariff Act, 1975 while clearing imports and that it continues to remain in the genre of a customs duty as per the decision of the Supreme Court in the case of *Hyderabad Industries*.

Considering the definition of 'drawback' under Rule 2(a) of the Drawback Rules, the Court also held that it is not possible to view the levy under Section 3 as not falling within the ambit of 'duty' or 'tax'. The High Court also noted that since in this case All India Rate was prescribed for drawback, there was no corresponding obligation upon the assessee to independently prove payment of duty/tax. Reliance by the Department on Condition 26 of the Drawback notification was also rejected by the Court while it observed that once the duties as contemplated under Section 3

were paid, it cannot be contended that the goods were imported 'duty free'. [*AJ Gold and Silver Refinery* v. *Assistant Commissioner* – Judgement dated 15 September 2023 in W.P.(C) 5986/2023, Delhi High Court]

MEIS is available in a case involving supply to intermediate consignee in SEZ/FTWZ

The Division Bench of the Delhi High Court has affirmed the benefit of Merchandise Exports from India Scheme ('MEIS') to an assessee-exporter in a case where there was a supply of goods to an intermediate consignee in SEZ/FTWZ. Dismissing the Letters Patent Appeal filed by the DGFT, the Court noted that the principal export transaction was between the assessee and the foreign importer, while the SEZ company merely served as an intermediary facilitating the export transaction. The Court in this regard noted that the assessee had produced export invoice, Bill of Export, and e-Bank Realisation Certificates establishing the relationship of buyer and seller between the foreign importer and the assessee, and that they had also produced documents of the SEZ company like NOC, Shipping Bill and the Cargo Receipt which clearly reflected the SEZ company as intermediate consignee receiving goods on behalf of the foreign company for storage purposes. The Court for this purpose also took note of the objectives of the scheme. Madras High Court decision in *Jindal Drugs Private Ltd.* v. Union of India [2022 (379) ELT 59 (Mad.)] was also noted. [*Director General of Foreign Trade* v. *Horizon Aerospace (India) Pvt. Ltd.* – TS-460-HC-2023(DEL)-FTP]

Time limit for amendment of shipping bill – Amendment in Customs Section 149 in 2019 cannot confer retrospective validity to Circular No. 36/2010-Cus.

The Bombay High Court has allowed assessee's petition in a case involving request for amendment of the Shipping Bill after some 5 months of Let Export Order. The Court rejected the contention of the Department that CBIC Circular No.36/2010-Cus., dated 23 September 2010, which prescribed a time limit of 3 months, and which was held as *ultra vires* Section 149 of the Customs Act by different Courts, was required to be held as valid as it satisfied the mandate of Section 149 as amended by the Finance Act, 2019. Noting that the impugned Circular at the time when it was issued could not be traced to any authority, power and jurisdiction vested with the Board, the Court held that even the 2019 amendment cannot be construed to confer any retrospective validity to the said Circular. The High Court in this regard observed that while the amended Section 149 used the words '*restrictions and conditions, as may be prescribed*', considering definitions of words 'prescribed' (where prescribed means prescribed by regulation) and 'regulations', the impugned Circular cannot be elevated to be any 'regulation'.

It may be noted that the Court also held that once the Gujarat High Court had struck down the Circular, considering that the Customs Act has a pan-India operation being a Central Act, the said decision was applicable and binding on all the customs jurisdictions throughout India. [*Colossustex Private Limited* v. *Union of India* – TS-456-HC-2023(BOM)-CUST]

Valuation – Deductive method – Deduction of expenses towards employee cost, rent, repair maintenance, office expenses and miscellaneous expenses, permissible

The CESTAT Chennai has allowed deduction of expenses incurred towards employee cost, rent, repair maintenance and office expenses and miscellaneous expenses while computing the deductive value under Rule 7 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The Department had contended that the said expenses were port importation expenses which were internal expenses of the importer and hence could not be deducted while using deductive method. Allowing assessee's appeal, the Tribunal observed that the disputed expenses were part of 'general expenses' relating to the direct and indirect cost of marketing the goods. The CESTAT in this regard also observed that since the Department was dealing with legal issues involving costing of goods, it may have helped to have done a cost audit so that could have been examined with reference to Cost Accounting Standards applicable to the case. [*Heidelberg India Pvt. Ltd.* v. *Commissioner* – 2023 VIL 887 CESTAT CHE CU]

Foreign currency – No absolute confiscation if within permissible limits of RBI Circular

In a case involving recovery of foreign currency from a person travelling from Nepal to India, the CESTAT Allahabad has held that currencies which fall within permissible limits of RBI Circular No. 45/2015 should be allowed on payment of redemption fine while currencies which are in total violation of RBI Circular should be absolutely confiscated. According to the Tribunal, in view of the specific provisions made regarding foreign currency (Foreign Exchange Management Act, 1999 and the Regulations made by RBI), reliance by Commissioner (Appeals) on a general Notification No. 9/1996-Cus. (N.T.) (prohibiting import of any third country goods from Nepal to India) for holding currencies to be absolutely prohibited, was not justified. [*Arun Kumar* v. *Commissioner* – (2023) 9 Centax 299 (Tri.-All)]

Universal Joint Parts for Transmission Shafts for further use in motor vehicles are classifiable under Heading 8483 and not under Heading 8708

The CESTAT Delhi has held that Universal Joint Parts to be used in Transmission Shafts which may be further used in motor vehicles, are to be classified under Heading 8483 and not under Heading 8708 of the Customs Tariff Act, 1975. Relying upon Section Note 2 of Section XVI of the Customs Tariff Act, the Tribunal observed that in view of the specific exclusion (by Section Note 2 of Section XVII) of 'articles of heading 8483' from the ambit of the Section XVII under which Chapter 87 falls, the impugned goods will not fall under Chapter 87. [*Kafila Forge Ltd.* v. *Principal Commissioner* – 2023 TIOL 831 CESTAT DEL]

Nikon camera Model No. N2120 is principally a still image digital camera though has unlimited video recording time – Classifiable under TI 8525 89 00 and covered under S. No. 502 of Notification No. 50/2017-Cus.

The Customs Authority for Advance Ruling has held that Nikon Camera Model No. N2120 imported as a complete product (i.e. camera body, lens (optional), battery and battery charger, adapter etc.), is classifiable under Tariff Item 8525 89 00 of the Customs Tariff Act, 1975 and eligible for benefit under S. No. 502 of Notification No. 50/2017-Cus. dated 30 June 2017. Observing that the recording time in the cameras to be imported by the applicant was not limited, the AAR was of the view that such cameras will hence fall outside the purview of 'Digital Still Image Video Camera' as covered under Circular No. 32/2007-Cus., dated 10 September 2007. Further, considering the product's design and its features, the AAR held that subject goods primarily exhibited higher capabilities towards still image photography and hence was principally a still image digital camera.

It may be noted that the AAR also rejected the contention of the Department that since goods were already being imported by the applicant, the Advance Ruling application merits rejection under Section 28E(b) of the Customs Act, 1962. The Authority went on to issue a ruling while it observed that the same would provide certainty to classification and applicability of exemption notification even though, the application relates to an on-going activity. The AAR, further noting that the concerned Commissionerate had not supplied details of import of the subject goods made by the applicant, relied on the applicant's declaration that commercial imports of the subject goods had taken place after filing of the instant application for advance ruling. [In RE: *Nikon India Pvt. Ltd.* – 2023 VIL 30 AAR CU]

'Interactive large format display' is classifiable under Customs TI 8471 4190 (ADP machine) and not under Heading 8528

The Customs Authority for Advance Rulings has held that Interactive Large Format Display merit classification under Tariff Item 8471 41 90 of the Customs Tariff Act, 1975. Rejecting Department's preferred classification under Tariff Heading 8528, the AAR observed that once an item has inbuilt input unit, output unit along with processing unit then it is obvious that the item is capable of performing multiple functions. Further, observing that the word 'interactive' in the description of the goods brings to the front its various capabilities, the AAR was of the view that the capabilities of the subject goods meet the requirement under Chapter Note 6(A) of Chapter 84 for a machine to mean as 'automatic data processing machine'. The AAR in this regard observed that hence the issue of classification in the instant application gets settled in terms of Rule 1 and Rule 6 of General Rules for Interpretation of Import Tariff, without inviting reference to Rule 3. [In RE: *Lenovo India Pvt. Ltd.* – 2023 VIL 27 AAR CU]

Central Excise, Service Tax and VAT

Ratio decidendi

- Body building on chassis purchased from group company eligible for exemption under Notification No. 12/2012-C.E. (Sl. No. 276) – CESTAT Bengaluru
- Mere agreement giving right to sale goods or services is not franchisee agreement – Conferment of representational rights is important – CESTAT Ahmedabad
- Writing-off of Cenvat credit as per practice in automobile industry – No recovery provision under Cenvat Rule 3(5B) before 1 March 2013 – CESTAT Chandigarh
- Services procured from India through separate contracts and supplied to foreign company is not 'intermediary service' – Delhi High Court

Ratio decidendi

Body building on chassis purchased from group company eligible for exemption under Notification No. 12/2012-C.E. (Sl. No. 276)

The CESTAT Bengaluru has held that assessee, carrying out the activity of body building on the chassis supplied/sold to them by a group company, are eligible to the benefit of Notification No.6/2006 C.E. and 12/2012-C.E., as the case may be. Revenue department had contended that benefit of said exemptions during the relevant period was not available as the ownership of the chassis remained vested in the chassis manufacturer (group company) even after the same were sold and possession delivered to the assessee-appellant. Taking note of the definition of 'ownership' in Salmond's Jurisprudence (12th Edition) and Black's Law Dictionary (6th Edition), the Tribunal was of the view that the assessee and the group company manufacturing chassis were independent legal entities as both were incorporated under the Indian Companies Act,1956, furthermore as the chassis were sold to the assessee on payment of applicable VAT and central excise duty. CESTAT in this regard was also of the opinion that reference to concept of 'related person' under Section 4 of the Central Excise Act, 1944, in analysing, the condition of the notification as whether ownership of the chassis is continued to be vested on chassis manufacturer, was out of context. [*Volvo Buses India Pvt. Ltd.* v. *Commissioner* – Final Order No. 20941-20942/2023, dated 15 September 2023, CESTAT Bengaluru]

Mere agreement giving right to sale goods or services is not franchisee agreement – Conferment of representational rights is important

The CESTAT Ahmedabad has held that merely because by an agreement a right is confirmed on the party to sale goods or services, it does not *ipso-facto* bring the agreement within the ambit of franchisee. Observing that conferment of representational rights is important, the Tribunal opined that same would mean that for all practical purposes, the franchisee loses its own identity and acquire that of the franchisor. Considering the terms of the agreement where the assessee had created distribution cum sale-marketing and after sale maintenance network by appointing various distributors in India, the Tribunal held that the agreement was purely for marketing of the product and could not be termed as agreement between the franchisor and franchisee. The Tribunal in this regard also noted that the exclusivity fee charged by the assessee from its distributors was kind of guarantee amount rather than any franchisee fee. [*ITW India Ltd.* v. *Commissioner* – 2023 VIL 864 CESTAT AHD ST]

Writing-off of Cenvat credit as per practice in automobile industry – No recovery provision under Cenvat Rule 3(5B) before 1 March 2013

In a case where the assessee as per the normal commercial practice in the automobile industry had made a provision for writing off the Cenvat credit on inputs as per Rule 3(5B) of the Cenvat Credit Rules, 2004, the CESTAT Chandigarh has set aside the demand of reversal of Cenvat credit on inputs which were written off as per Rule 3(5B). The Tribunal in this regard noted that no recovery mechanism was available during the relevant period under the said Rule 3(5B) and that the Explanation introduced by Notification No. 3/2013-C.E. (N.T.), dated 1 March 2013 was from 1 March 2013. Allowing the appeal, the CESTAT also observed that in terms of proviso to Rule 3(5B) itself if said goods are used subsequently, the assessee was entitled to take credit of the amount equivalent to the Cenvat credit paid earlier. [*GKN Driveline (India) Ltd.* v. *Commissioner* – 2023 VIL 830 CESTAT CHD CE]

Services procured from India through separate contracts and supplied to foreign company is not 'intermediary service'

The Delhi High Court has dismissed the Revenue department's appeal in a case where the CESTAT had in turn dismissed the Department's appeals against allowing refund of unutilised Cenvat credit under Rule 5 of the Cenvat Credit Rules, 2004 to the assessee, holding that the assessee was not providing intermediary services but was exporting services to a foreign company. The assessee was engaged in providing global telecommunication and ancillary support services to a licensed telecommunications service provider in Singapore. The agreement envisaged that assessee to provide necessary infrastructure in India so as to enable the Singapore company to facilitate seamless global telecommunication services to its customers based in Singapore and other foreign territories. Department had contended that the assessee merely procured services from other service providers in India *viz.,* Airtel, Vodafone, Tata, Reliance etc. and supplied the same to the Singapore company without any alteration and was not provided this service on their own account.

Considering the relevant clauses of the agreement between the assessee and the foreign company, the Court observed that was no contract between foreign company and service providers in India like Airtel, Vodafone, Reliance etc., and that the agreement between assessee and foreign company was on principal-to-principal basis. Dismissing the appeal, the Court also noted that the assessee had entered into separate contracts with the telecom operators in India on its own account and not as in the nature of a broker or agent for the foreign company. [*Commissioner* v. *Singtel Global India Pvt. Ltd.* – TS 464 HC 2023(DEL) ST]

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