Lakshmikumaran & Sridharan attorneys

TAX

amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

April 2020 / Issue – 106

Contents

April
2020

Article

Arbitrary relief in GST compliances for taxpayers

By **Arushi Jain**

Due to the current lockdown, the Government has introduced certain relief measures for the industries by extending the timelines for statutory and regulatory compliances under various laws. In this regard, the Finance Ministry has issued multiple notifications on 03-04-2020. A snapshot of the notifications relevant for present discussion is as under:

Notifications	Relief
Notification No. 32/2020-Central Tax (**"Notification 32/2020"**)	Waiver of late fee for late filing of Form GSTR-3B (**"GSTR-3B"**) for the months of February, March and April subject to furnishing of GSTR-3B by the specified date.
Notification No. 31/2020-Central Tax (**"Notification 31/2020"**)	• Reduced rate of interest of 9% p.a. applicable in case of persons having turnover of more than Rs. 5 crores (**"large taxpayers"**) provided GSTR-3B is furnished by them by 24-06-2020. • Interest to be calculated from the day immediately following expiry of 15 days from the due date till the date of payment of tax. • No interest is applicable in case of small taxpayers (i.e., persons having turnover of Rs. 5 crores and less) provided GSTR-3B furnished by specified date.
Notification No. 30/2020-Central Tax (**"Notification 30/2020"**)	Rule 36(4) of the Central Goods and Service Tax Rules, 2017 (**"CGST Rules"**) to be applied cumulatively for the months of February to August. Cumulative adjustment to be done while filing GSTR-3B of September.
Notification No. 35/2020-Central Tax (**"Notification 35/2020"**)	Extension of time limit for completion or compliance of any action for the purpose of *inter alia* furnishing of returns to 30-06-2020 in cases where the due dates for completion of such action falls during the period 20-03-2020 to 29-06-2020.

Even though the Government has brought in various relief measures for the taxpayers, the same are not free from arbitrariness. Let us now analyse the problems that the taxpayers may encounter in light of the aforesaid notifications.

Non-availability of input tax credit

It is a common knowledge that input tax credit is available for utilisation by the taxpayers once the same is credited to their electronic credit ledger. However, the electronic credit ledger gets credited only after GSTR-3B is filed by the taxpayers in terms of Sections 41 and 49(2) of the Central Goods and Services Tax Act, 2017 (**"CGST Act"**). Now, as per Notification No.

31/2020, large taxpayers are required to pay interest at the rate of 9% p.a. in case the output tax liability for the months of February to April is paid by them beyond 15 days from the due date. On the other hand, Notification No. 32/2020 allows filing of GSTR-3B by 24-06-2020 without any late fee. Accordingly, in case where the large taxpayers intend to discharge their output tax liability in order to save the interest cost, they will not be able to utilise the input tax credit in respect of the supplies received by them during the aforesaid months without filing GSTR-3B. Thus, despite the fact that the Government has relaxed the compliance in terms of filing of GSTR-3B, the same would entail working capital outflow in the hands of large taxpayers.

Issues emerging from Rule 36(4)

The deferment of applicability of Rule 36(4) of the CGST Rules for the months of February to August is a welcome initiative however, the same has its own challenges. The first issue that crops up is whether taxpayers will be eligible to take credit in respect of supplies which were received by them prior to February but tax invoices for the same were not uploaded by the corresponding vendors in their Form GSTR-1. On a reading of Notification No. 30/2020, it can be seen that applicability of Rule 36(4) is deferred from February onwards. Thus, if the notification is strictly interpreted then, credit will not be available to the taxpayers in respect of invoices issued prior to February until the same reflect in their Form GSTR-2A. This will result in further delay in availability of input tax credit and will cause undue hardship to the taxpayers.

Apart from the above, another ambiguity in Notification No. 30/2020 is in respect of applicability of interest. Although the notification provides for application of Rule 36(4) cumulatively for the period February to August, a question comes up that in case where the taxpayers utilise input tax credit in excess of the amount cumulatively arrived at for the aforesaid periods then, whether they will be liable to pay interest on such excess utilisation of credit. Further, if it is assumed that interest will be payable then, how such interest will be calculated i.e., from which date the interest will be payable.

Payment of TDS/TCS liability

This is a peculiar problem specific to persons who are liable to deduct TDS or collect TCS. Even though the time limit for furnishing Forms GSTR-7 (TDS return) and GSTR-8 (TCS statement) for the months of March to May has been extended *vide* Notification No. 35/2020, there is a lacuna with respect to payment of such TDS and TCS amount. As per Sections 51(2) and 52(3) of the CGST Act, the TDS amount deducted and TCS amount collected during a month is required to be paid by 10th of the next month. However, the aforesaid notification does not clarify as to whether the time limit for payment of TDS and TCS liability has also been extended or not.

Further in such a case, the issue of applicability of interest also comes into picture. Notification No. 31/2020 provides a reduced interest of 9% p.a. only in case of delayed payment of output tax liability in GSTR-3B. Accordingly, in case of late deposit of TDS/TCS liability, interest at the rate of 18% p.a. will get attracted. This will further aggravate the problems of taxpayers since, they will be left with no option but to file Form GSTR-7/GSTR-8 within the original time limit.

Having said that, it is noteworthy that the Government *vide* Circular No. 137/07/2020-GST, dated 13-04-2020 has clarified that the due date for deposit of TDS amount has also been extended to 30-06-2020 and further, no interest will be levied under Section 50 if TDS liability is deposited by 30-06-2020. However, similar clarification has not been issued by the

Government in respect of deposit of TCS liability. Thus, the point to ponder upon is whether the persons required to collect TCS i.e., e-commerce operators can rely on the aforesaid circular and deposit their TCS liability for the months of March to May by 30-06-2020 without interest.

Interest on reversal of credit

As per Section 17(2) of the CGST Act read with Rules 42 and 43 of the CGST Rules, the taxpayers are required to reverse input tax credit which pertains to exempt supplies. Under Rule 42, the amount of credit that is required to be reversed during a Financial Year (**"FY"**) has to be determined finally by September of next FY. In case the amount so determined exceeds the amount reversed by the taxpayers then, such excess amount is required to be reversed along with interest. Similarly, under Rule 43, the credit pertaining to capital goods which are used for making exempt supplies is required to be reversed along with interest. The issue that arises here is whether the reduced rate of interest of 9% introduced vide Notification No. 31/2020 would also be applicable to such reversals under Rule 42 & Rule 43 or not. The notifications issued by the Government does not bring any clarity in this respect.

From the aforementioned problems, it becomes evident that the relief measures brought in by the Government involves various ambiguities which require clarification. Thus, it is imperative that the Government addresses the aforesaid problems and clarifies the same through issue of relevant circulars so as to allow effective implementation of the measures so introduced.

[The author is a Senior Associate in GST Advisory practice of Lakshmikumaran and Sridharan, New Delhi]

Well begun is half done – Examining adequacy of initiatives by Commerce Ministry providing reliefs under FTP

By **Nupur Maheshwari and Raghav Khurana**

The lockdowns due to COVID-19 in various countries have shrunk global trade with countries choosing to protect their people first before opening any further borders. The Government has also been tweaking the Import and Export Policy for many goods keeping in view the requirement of these goods in India. The Government has also issued an Ordinance, circulars, press releases, etc., on various relief measures for the benefit of the trade and industry. This article while capturing the significant changes introduced in the Foreign Trade Policy 2015-20 ("**FTP**") and the Handbook of Procedures 2015-20 ("**HBP**"**)** and other relief measures introduced by the Government, also highlights the adequacy of such measures.

Extension of duration of the FTP and HBP

The validity of the FTP and the HBP has been extended till 31.03.2021 vide Notification No. 57/2015-20 dated 31-03-2020[1] and Public

[1] Amended by Central Government in exercise of powers conferred under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 read with Para 1.02 of the FTP.

Notice No. 67/2015-20 dated 31-03-2020[2]. Recognizing the difficulties being faced by the trade and industry due to COVID-19, the timelines for applying for benefits under various export incentive schemes such as the Merchandise Exports from India Scheme ("**MEIS**"), Services Exports from India Scheme ("**SEIS**"), the Advance Authorization ("**AA**") Scheme and Export Promotion Capital Goods ("**EPCG**") Scheme have been extended *vide* the abovementioned Public Notice. The same are discussed below.

Reliefs granted under MEIS and SEIS

In terms of Para 3.15(a)(i) of the HBP, the application for obtaining duty credit scrips under the MEIS has to be filed within a period of 12 months from the Let Export Order ("**LEO**") date, or in terms of Para 3.15(a)(ii) of the HBP such application is to be filed within 3 months from the date of uploading of EDI shipping bills onto the DGFT Server by the Customs or Printing/ release of shipping bills for Non-EDI Shipping bills, whichever is later. *Vide* the Public Notice, the timelines for applying for availing MEIS benefit under Para 3.15(a)(i), i.e. the period of 12 months from LEO has been relaxed. For shipping bills whose LEO date falls during the period 01-02-2019 to 31-05-2019, the applications can be filed within a period of 15 months instead of the earlier period of 12 months.

Under the SEIS Scheme, service providers of notified services are rewarded for export of services rendered in the manner as per Para 9.51(i) and (ii) of the FTP. *Vide* the abovementioned Notification, the Central Government has added a paragraph at the end of Para 3.08(a). The said Para provides that the service categories eligible under the SEIS and the rate of reward on such services as rendered w.e.f. 31-03-2019 to 31-03-2020 shall be notified separately in a new Appendix, i.e. Appendix 3X. Also, it has been stated that for services rendered w.e.f. 01-04-2020, the decision on continuation of the SEIS shall be taken subsequently and notified accordingly.

The insertion of the said paragraph has raised doubts amongst the exporters as to which services will get covered under Appendix 3X, and whether any material changes will be made to the existing Appendix 3D. A material change in the list of services could harm service exporters who have already exported services after factoring the SEIS benefit. Also, a change in the rates of rewards can affect the service providers negatively who have already exported the services and might have considered the benefits available under the erstwhile Appendix 3D while exporting the services. Therefore, the Government must notify the Appendix 3X at the earliest to bring certainty. In addition, it would be extremely beneficial if the Government clarifies the services for which SEIS shall continue so that the same can be taken into account while fixing long term service contracts for FY 2020-21.

In addition to the above, the last date for filing applications for claim of duty credit scrips under SEIS has been extended from 31-03-2020 to 31-12-2020. While the Government has extended the timelines for applying for claiming benefits under the MEIS and SEIS, it is important to note that the reliefs may not be enough considering the overall grim situation in the world economy. The benefits under the MEIS and the SEIS Schemes are claimed on the amount realized by the exporter. So, appreciably, while the timelines for applying for the scrips along with

[2] Amended by DGFT in exercise of powers conferred under Para 2.04 of the FTP.

the timelines for realization of export proceeds have been extended[3] and is a step in the right direction, the same may not be enough considering the cash crunch the companies will be facing owing to no economic activity.

It is suggested that the Government can consider extending the benefit in cases where the exporter gets an irrevocable Letter of Credit issued in their favour from the foreign party. On the other hand, to safeguard its own interest, the Government can introduce a provision similar to the provision for recovery of drawback in cases where the export proceeds are not realized. This will be win-win situation for both parties. The Government can recover the benefits granted in case the amount is not realized and the exporters can continue their business while getting some much-needed cash flow.

Reliefs under AA and EPCG

It is important to note that many exporters avail benefits under the various export incentive schemes under the FTP. Amongst these, the AA Scheme is widely used for duty free import of raw material, while the Export Promotion Capital Goods ("**EPCG**") Scheme is used for duty free import of capital goods. While these schemes permit the companies to import raw material or capital goods without payment of duty, the importers have to fulfil a corresponding export obligation ("**EO**") with a specified time period. While the EO period for AA scheme is 18 months from the date of issue of authorization, the EO under the EPCG scheme is required to be fulfilled over a period of 6 years.

Specific reference is drawn to the extension of EO under the AA Scheme. Wherever the import validity period and the export obligation ("**EO**") period under the AA is expiring between 01-02-2020 to 31-07-2020, the said period has been automatically extended by 6 months from the date of expiry without the need for any amendment/ authorization and without payment of any composition fee. Also, the option to revalidate the import period and to avail extension of EO period would remain available for these authorizations as per the eligibility on payment of composition fee in terms of Paras 4.41 and 4.42 of the HBP respectively.

Similar extension is provided for EPCG Authorizations. Where the block wise EO expires between 01-02-2020 to 31-07-2020, the said period will be deemed to be automatically extended by six months from the date of expiry. Also, in case, the EO period expires between 01-02-2020 to 31-07-2020, the EO period will also stand automatically extended by 6 months from the date of expiry. Like the AA Scheme, the option to avail a further extension in block wise EO and the overall EO period would be available to the EPCG Authorization holder where the EO period expiring between 01-02-2020 to 31-07-2020 on payment of composition fee in terms of Paras 5.14 and 5.17 of the HBP.

However, the extension in the time lines do not cover the cases where the EO period is expiring after 31-07-2020. Thus, while the authorization holder with EO period expiring on 31-07-2020 would get an automatic extension without payment of any composition fee, the authorization holder with EO period expiring on 01-08-2020 would not be eligible for the automatic extension and in addition, will have to also pay composition fee for extension of EO.

[3] The time period for realization and repatriation of export proceeds for exports made up to or on July 31, 2020, has been extended to 15 months from the date of export. The measure will enable the exporters to realise their receipts, especially from COVID-19 affected countries within the extended period and also provide greater flexibility to the exporters to negotiate future export contracts with buyers abroad.

This would be absurd to say the least, since the impact of the lockdown on the exports to be made by an authorization holder with EO period expiring on 31-07-2020 would be on an equal footing when compared with an authorization holder with EO period expiring on 01-08-2020 and thereafter.

It would also mean that while the authorization holder with EO period expiring on 31-07-2020 can apply for two extensions after including this automatic extension, while an authorization holder, with EO period is expiring on 01-08-2020 and thereafter, would not get the benefit of such automatic extension.

Therefore, it would have been more prudent if the government had allowed the EO extension for all AA and EPCG authorizations, since the present situation is akin to a ban on the export product – a situation provided for under the HBP itself. Here reference is made to Paras 4.42 (h) and Para 5.20 of the HBP which provide for an automatic EO extension in the event of a ban on the export product in respect of AA and EPCG Authorizations already issued prior to the imposition of the ban for the duration of the ban without any composition fee. Also, the EPCG Authorization holder would not be required to maintain average EO for the said period.

The present lockdown is an unprecedent situation. While there is ***no ban on the export products stricto sensu***, the complete lockdown followed by India and other countries effectively is a ban on industrial activities. While the HBP is allowed to be amended by the DGFT and the DGFT has taken a policy decision regarding extension in EO period for authorizations expiring during a certain period, a question to ponder upon would be whether it would have been more prudent for the DGFT to extend the EO period for the AA and the EPCG Scheme without payment of any composition fee, instead of extending the EO period for authorizations expiring during a certain period.

While the Regional Authorities may allow the extensions in Authorization and the PRC may also take a lenient view for authorizations expiring post 01-08-2020, the Customs Department may demand duty and interest from the authorization holders who fail to fulfil the EO on the ground that even amidst lockdown there was no ban on exports and imports. The Customs might not be inclined to take a lenient view since all Customs formations even amidst the lockdown are functioning 24 x 7 till June 2020[4]. Resultantly, the Authorization holders with authorisation expiring on or after 01-08-2020 will be left high and dry and the only recourse will be to settle the dispute in a manner known to law.

It will be in the interest of the importers and exporters operating under the aforesaid schemes that the EO period is excluded, irrespective of the last date of EO period. By excluding the EO period for the said duration, the industries would be treated at par which would effectively mean that there is no preferential treatment based on the expiry of the EO period. The importers and the exporters should represent to the Ministry of Commerce for relief on the above lines.

[The authors are Partner and Senior Associate, respectively, in Customs Advisory practice of Lakshmikumaran and Sridharan, New Delhi]

[4] Instruction No. 02/2020-Cus., dated 20-02-2020.

Goods and Services Tax (GST)

Notifications and Circulars

GSTR-3B for May 2020 – Last date extended: GSTR-3B for the month of May 2020 can be filed by 27-06-2020 by tax payers having an aggregate turnover of more than Rupees 5 crore in the previous financial year. However, taxpayers having aggregate turnover less than Rupees 5 crore can file this return by 12th or 14th of July, depending upon the State in which they have their principal place of business. Broadly these taxpayers in southern and western States must file this return by 12-07-2020 while such taxpayers in Northern and Eastern part of India have to file GSTR-3B by 14-07-2020. Notification No. 36/2020-Central Tax, dated 03-04-2020 in this regard amends Notification No. 27/2020-Central Tax.

Relief measures due to COVID-19 – Clarifications: In case of an advance under service contract which subsequently gets cancelled, the supplier can issue a credit note under Section 34 and adjust tax liability where invoice was issued before supply of service. According to CBIC Circular No. 137/07/2020-GST, dated 13-04-2020, taxpayer may apply for refund as excess payment of tax, if there is no output liability and in case where the supplier had issued only receipt voucher for advance. Similar procedure also needs to be followed in case of sales return after issuance of invoice.

The Circular also clarifies that as per Notification No. 35/2020-Central Tax, the time limit for filing of LUT for the year 2020-21 shall stand extended to 30-06-2020 and hence the taxpayer can continue to make the supply without payment of tax under LUT provided that the FORM GST RFD-11 for 2020-21 is furnished by 30-06-2020. Further, in respect of TDS, it has been clarified that the due date for furnishing of return in FORM GSTR-7 along with deposit of TDS falling during the period 30-03-2020 to 29-06-2020 has been extended till 30-06-2020. It may be noted that interest under Section 50 will not be leviable if TDS is deposited by 30-06-2020. The Circular also clarifies that due date for filing an application for refund falling during the period 20-03-2020 to 29-06-2020 has been extended till 30-06-2020.

Refund of GST in various circumstances – Clarifications: Restriction on clubbing of tax periods across financial years for claiming refund has been removed. Circular No. 125/44/2019-GST, dated 18-11-2019 has been modified to that extent by Circular No. 135/05/2020-GST, dated 31-3-2020. Further, according to the latest Circular, refund of accumulated ITC under Section 54(3)(ii) of the CGST Act (when rate of tax on inputs is higher than on output supplies) would not be applicable in cases where the input and the output supplies are the same. Clarifying the newly inserted Rule 86(4A) and Rule 92(1A), the Circular also states that where the tax to be refunded has been paid by debiting both electronic cash and credit ledgers, the refund to be paid in cash and credit shall be calculated in the same proportion in which the cash and credit ledger have been used. Also, modifying para 36 of Circular No. 125/44/2019-GST, the latest Circular also states that the refund of accumulated ITC shall be restricted to the ITC as per those invoices, the details of which are uploaded by the supplier in FORM GSTR-1 and are reflected in the FORM GSTR-2A of the applicant. Lastly, Annexure-B to the 2019 Circular has been amended to insert HSN/SAC in

the statement of invoices relating to inward supply for refund application except in cases where supplier is not mandated to mention HSN/SAC

Ratio decidendi

Demand notices issued to successful resolution applicant in respect of company taken over, when not correct: Rajasthan High Court has quashed the demand notices issued to the successful resolution applicant calling them to pay dues of Goods and Services Tax of the company which they took over, for the period before the applicant (writ petitioner) took over the company. Relying upon Supreme Court judgement in the case of *Essar Steel* and the stance of the Finance Minister before the Upper House of the Parliament, the Court held that the operational creditors *viz.* Commercial Taxes Department of the Central Government or the State Government as the case may be, have no right of audience in the Committee of Creditors. It noted that the challenge to the resolution plan by the operational creditors i.e. the Commercial Taxes Department of Govt. of Rajasthan and Commissioner of Goods and Services Tax had already been dismissed by the Supreme Court. [*Ultra Tech Nathdwara Cement Ltd.* v. *Union of India* – 2020 TIOL 760 HC RAJ GST]

Intra-State supply when goods imported at port located in different State, but supplied to customer in State of location of importer: In a case where the imported goods were to be supplied directly from the port of import to the customer located in other State/Union Territory other than the State where the importer was located, Karnataka AAR has held that the transaction shall be treated as supply of goods in course of inter-State supply and that the importer would be liable to issue IGST invoice. The AAR in this regard observed that though the applicant would import the goods at the port nearest to the location of the recipient, said imported goods will be deemed to have been supplied to location of importer and then further supplied to customer. The applicant was registered in the State of Karnataka and intended to import goods at a port nearest to the customer's place and supply the same directly to the customer's location. It was however held that if the applicant supplies the goods to the customers within the State of location, such transaction will be treated as intra-State supply. Further, the Authority allowed ITC of the IGST paid on imports and held that there was no need to obtain separate registration in the State where port of import was located, if the importer does not have an establishment in that State. [In RE: *Kardex India Storage Solution Pvt. Ltd.* – 2020 VIL 76 AAR]

Exchange rate of imported goods applicable for goods supplied in India against payment in foreign currency: Uttarakhand AAR has held that the value of goods supplied in India, where the billing is done in foreign currency, has to be determined under Rule 34 of the Central Goods and Services Tax Rules, 2017. The Authority also held that the rate of exchange for imported goods and not export goods, as notified by CBIC under Section 14 of the Customs Act, 1962 shall be applicable. The AAR in this regard observed that the foreign currency price in the contract was to cover the imported content of the material used for setting up power station in India, where in the company made foreign currency payment for import of goods and claimed foreign currency from customers. [In RE: *Bharat Heavy Electricals Ltd*. – 2020 VIL 80 AAR]

Transfer of under-construction project is transfer of going concern and exempted from GST: Uttarakhand AAR has held that the sale of business as a going concern which consisted of transferring under-construction project was exempt from GST under Serial No. 2 of Notification No. 12/2017-Central Tax (Rate). The

Authority observed that transfer of business as a going concern is the sale of business including assets and that in terms of financial transaction 'going concern' means that at the point in time to which the description applies, the business is live or operating and has all parts and features necessary to keep it in operation. It observed that 'transfer of a going concern' could be described as transfer of a running business which will be capable of being carried on by the purchaser as an independent business. Further, the Authority referred to relevant internationally accepted guidelines in relation to transfer of business as a going concern issued by UK's Her Majesty's Revenue & Customs (HMRC) which provides that (a) the assets must be sold as part of a business as a going concern; (b) the purchaser intends to use the assets to carry on the same kind of business as the seller; (c) where only part of a business is sold it must be capable of separate operation; (d) there must not be a series of immediately consecutive transfers. [In RE: *Rajeev Bansal & Sudershan Mittal* – 2020 VIL 83 AAR]

Service rendered by Director to company for which consideration paid in any head, liable to GST: Rajasthan AAR has held that the services rendered by the Directors to the company for which consideration is paid to them in any head is liable to GST under RCM under Sl. No. 6 of the Notification No. 13/2017-Central Tax (Rate). The Authority observed that the consideration paid to the Directors by the applicant was against the supply of services provided by them to the company and the same was not covered under clause (1) of the Schedule III to the CGST Act, 2017 as the Directors were not the employee of the company. It was also held that situation will remain the same even if a Director is a part-time Director in other company as well. The applicant was paying salary to the Directors against the services provided by them to the company and was deducting TDS on their salary with PF laws being also applicable. [In RE: *Clay Craft India Pvt. Ltd*. - 2020 VIL 86 AAR]

ITC on goods/ services procured for installation of certain plants or machinery when not available: Karnataka AAAR has upheld the AAR ruling denying ITC against purchase of goods or services used for installation of chillers, air handling unit, list, escalator, travellator, water treatment plant, sewage treatment plant, high speed diesel yard, mechanical car park, surveillance systems, DG sets, transformers, electrical wiring and fixture, fire-fighting and water management pump system, in the shopping mall under construction. The AAAR observed that in respect of few of the items, assessee had not submitted information as to how the items were getting embedded to earth, and in respect of others no information was furnished as to who was doing the installation. In respect of water treatment plant, sewage treatment plant, DG set and transformer, ITC was denied as they formed part of the civil structure of the immovable property. It may be noted that the AAAR however, observed that the word "or" in Section 17(5)(d) of the CGST Act could be read as "and" since it appears to give effect to the intention of the legislature to allow ITC on the construction of plant and/ or machinery. [In RE: *Tarun Realtors Pvt. Ltd*. - 2020-VIL-17-AAAR]

Maintenance service to housing societies with different contract with residents to supply water: The Applicant proposed to undertake business of providing maintenance services to housing societies and enter into another contract with the residents of such society to supply water. Advance ruling was sought on whether GST would be payable on water charges collected from the customers for supply of water traded as such. The Authority observed that the applicant was providing

services to the society in two parts viz. all kinds of maintenance services (other than supply of water) and supply of water under the respective contracts. Further, it was observed that as a general practice across trade and market, the maintenance services included of supply of water. It also noted that the water charges to be collected from the individual residents would be based on per square feet (size of the flat), instead of per tanker of water, which would be similar to the maintenance charges to be collected from the society. Observing that the applicant seemed to bifurcate the services provided to RWA in order to escape the condition of Rs. 7500, it was held that both the contracts in which the applicant proposed to enter into would be directly linked with each other as there was no case of direct supply of water to the individual residents of the society. Accordingly, it was held that the applicant is required to pay GST applicable on supply of maintenance services to the society. [In RE: *Latest Developers Advisory Ltd*. – 2020 VIL 85 AAR]

UK VAT - Supply of "action day planner" is not zero-rated as supply of books: United Kingdom's Upper Tribunal (Tax and Chancery Chamber) has held that supply of action day planner is not a zero-rated supply as in case of supply of books. The Tribunal in this regard relied upon a High Court judgement in the case of *Colour Offset* where in the product under consideration contained both information that could be read and blank spaces in which a person could write. The Tribunal observed that the High Court had taken into consideration the main function of the product (read or write) for the purpose of classification. First Tier Tribunal's decision holding that any item with the necessary physical characteristics "which has as its main function informing/educating or recreational enjoyment" is also a book, was thus set aside. The Upper Tribunal was of the view that the action day planner was not a book as its main function was to be written in (as distinct from being read or looked at). [*Commissioner, HMRC* v. *Thorstein Gardarsson* – Decision dated 31-3-2020 in Appeal number: UT/2019/0143, UK's Upper Tribunal (Tax and Chancery Chamber)]

EU VAT – Secondment of director to subsidiary – Payment of 'consideration' even when costs merely reimbursed: In a case involving secondment of a director to a subsidiary where the subsidiary merely reimbursed the costs relating to the secondment and applied VAT for the purposes of the subsequent exercise of the right to deduct, CJEU has rejected the department's argument that in the absence of a requirement for remuneration higher than the costs borne by the holding company, the secondment did not take place with the aim of receiving 'consideration'. The Court observed that the secondment was carried out on the basis of a legal relationship of a contractual nature, and that there was reciprocal performance, namely, the secondment on one hand and payment on the other. The Court also observed that if it is established that the payment by subsidiary, of the amounts invoiced to it by its parent company, was a condition for the latter to second the director and that the subsidiary paid those amounts only in return for the secondment, there is a direct link between the two services. [*San Domenico Vetraria SpA* v. *Agenzia delle Entrate* – Decision dated 11-03-2020 in Case C-94/19, Court of Justice of the European Union]

UK VAT – Sale of second-hand repossessed car by finance company is not covered under Margin Scheme: UK's Upper Tribunal (Tax and Chancery Chamber) has held that the sale of a second-hand motor vehicle by a finance company, which it had repossessed from (or had returned to it by) a customer following the termination of a finance agreement under which that customer originally took possession of the

car, is not covered within the provisions of the Margin Scheme. Dismissing the appeal by the finance company, the Tribunal rejected the contention that the return of the vehicle from the customer is a "supply of goods" as the transfer of possession of the vehicle to the customer is deemed as supply for the purposes of VAT. The Upper Tribunal also upheld the First Tier Tribunal's decision that the financial consequences of the repossession of the vehicle were pre-ordained by the terms of the finance agreement and not constituted a separate 'consideration' for the return of the car. [*Volkswagen Financial Services (UK) Limited* v. *Commissioner, HMRC* – Decision dated 27-02-2020 in Appeal number: UT/2019/0044, Upper Tribunal (Tax and Chancery Chamber)]

Customs

Notifications and Circulars

Ventilators, PPE, masks and COVID-19 testing kits - Exemption from BCD and health cess: In light of the COVID-19 health crisis, the CBIC has exempted the import of respiration apparatus (ventilators), personal protection equipment, face and surgical masks, and COVID-19 testing kits from the whole of BCD and health cess. Inputs required for the manufacture of these products have also been exempted from the whole of BCD and health cess, subject to the importer following the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017. Notification No. 20/2020-Cus., dated 09-04-2020 issued for this purpose will remain in force till September 30, 2020.

Advance Authorisation, EPCG and EOUs - Extension of exemption from IGST and Compensation Cess: CBIC has extended the exemption from payment of IGST and compensation cess till 31-03-2021 on the imports of capital goods in respect of the Export Promotion Capital Goods Scheme and import of inputs under the Advance Authorisation scheme. Similarly, exemption from payment of IGST and compensation cess has also been extended till 31-03-2021 on imports by EOUs in terms of Notification No. 52/2003-Cus. Notifications Nos. 16/2020-Cus., dated 24-03-2020 and Notification No. 18/2020-Cus., dated 30-03-2020 have been issued for this purpose. It may also be noted that the Foreign Trade Policy has also been amended in this regard by DGFT Notification No. 57/2015-2020, dated 31-03-2020.

Regional Authorities can institute or continue proceedings under FT (D&R) Act, 1992 against companies/firms facing proceedings under IBC: DGFT has *vide* ECA Circular No. 32/2015-20, dated 20-3-2020 quoted the opinion of the Department of Legal Affairs that unless there are specific directions by the NCLT prohibiting proceedings under the Foreign Trade (Development & Regulation) Act, 1992 /Rules against companies against whom proceedings have been instituted under IBC, the Adjudicating Authority can proceed under the FT (D&R) Act or Rules. The Department has instructed that in case the Adjudicating Authority institutes or continues proceedings under FT (D&R) Act or

Rules, the liquidator should be added as one of the respondents along with the company or firm. The Circular in this regard takes note of proviso to Section 33(5) and Section 35(1)(k) of Insolvency and Bankruptcy Code, 2016.

Customs clearance - Acceptance of undertakings in lieu of bonds: In order to expedite the Customs clearance of goods during the COVID-19 pandemic, the CBIC has relaxed the requirement to submit bonds prescribed under Section 18, Section 59 and Section 143, and under notifications issued under Section 25 of the Customs Act, 1962, subject to compliance of certain specified conditions. The aforesaid relaxation will be available to the Government, Public Sector Undertakings, actual user importer, Authorised Economic Operators, Status Holders and importers availing warehouse facility in terms of Section 59 of the Customs Act. The relaxation will be available against submission of an undertaking having same contents as those of a prescribed bond. According to Circular No. 17/2020-Cus., dated 3-4-2020 read with Circular No. 21/2020-Cus., dated 21-4-2020, the requirement for submission of bonds has been relaxed till 15-04-2020. However, the undertaking should be duly replaced with a proper bond by 30-05-2020. This will be subject to review by the Board at the end of the lockdown period.

RFID Sealing for goods transported for deposit or removal from Customs bonded warehouse again deferred: The CBIC has deferred the implementation of the RFID Sealing regulations for transport of goods for deposit in and removal from warehouse. According to Circular No. 20/2020-Cus., dated 21-04-2020, the said regulations will come into effect from 01-07-2020. It may be noted that the procedure for RFID sealing is prescribed in Circular No. 10/2020-Cus., dated 7-2-2020.

FTAs - Provisional clearance where original Certificate of Origin is not furnished: The DGFT had issued Trade Notice No. 62/2019-2020 dated 6th April 2020 to address the difficulties being faced by importers in producing the original Certificates of Origin (COO) on account of disruptions caused by the Covid-19 pandemic. The aforesaid Trade Notice provides that the benefit of concessional rate of duty claimed under a Free Trade Agreement will be allowed on provisional basis, in case an importer produces a digitally signed COO or a physical COO not signed by the competent authority. In order to enforce the said Trade Notice, the CBIC has directed the customs authorities to provisionally assess such import consignments in terms of Section 18 of the Customs Act, 1962. As per Circular No. 18/2020-Cus., dated 11-04-2020, the provisional assessment will be finalised once the original signed COO is submitted by the importer.

Electronic filling and issuance of Preferential Certificate of Origin (CoO) for exports made under various FTA's/ PTA's: The online platform for application and issuance of preferential CoO is in operation since 19-09-2019 at https://coo.dgft.gov.in. To further the initiative, the facility for applying and issuing preferential COOs online has been extended to various other FTA/PTAs w.e.f. 07-04-2020. The FTA's/ PTA's covered under the Trade Notice No. 01/2020-21, dated 07-04-2020 are ASEAN-India Free Trade Agreement, India Japan Comprehensive Economic Partnership Agreement, SAARC Preferential Trading Agreement, South Asian Free Trade Area Agreement, Asia Pacific Trade Agreement and India Sri Lanka Free Trade Agreement.

Retrospective issuance of COO under India's Trade Agreements: Taking note of the difficulties faced by agencies in issuing a COO on account of closure of offices, the DGFT has

instructed that the certificates would be issued retrospectively by the concerned Indian agencies after they open their offices. In the interim period, the customs authorities and other competent authorities in the trading partners with whom India has a trade agreement have been requested to allow eligible imports under preferences on a retrospective basis subject to subsequent production of COO by the Indian exporters. Trade Notice No. 59/2019-20, dated 28-03-2020 has been issued for this purpose. It may also be noted that as per Trade Notice No. 62/2019-20, dated 6-4-2020 issued in respect of applications made on digital platform, digitally signed copies will be transmitted to the applicants while physical copies will be issued once office of agencies open.

Paperless customs clearance facility launched: In order to expedite the customs clearance process, the CBIC has decided to enable electronic communication of PDF based final Electronic Out of Charge (eOoC) copy of Bill of Entry and eGatepass to the importers/Customs Brokers. In accordance with this paperless facility, the electronic copy of final eOoC and eGatepass will be emailed to the concerned Customs Broker and/or importer once the Out of Charge is granted. As per Circular No. 19/2020-Cus., dated 13-04-2020, the eGatepass copy will be used by the Gate Officer or the Custodian to allow physical exit of the imported goods from the Customs area. The said facility will come into effect from 15-04-2020.

Foreign Trade Policy extended till 31-3-2021 – Last dates for various obligations relaxed: Foreign Trade Policy 2015-20 and the Handbook of Procedures Vol. 1, which were expiring on March 31, 2020, have been extended till March 31, 2021. DGFT has in this regard, with immediate effect, also made various other changes in the FTP and in the HoP, extending the validity and time periods of various provisions and thus granting relief to the exporters and importers in the present troubled times. Notification No. 57/2015-20 and Public Notice No. 67/2015-20, both dated 31-3-2020 have been issued for this purpose. Detailed news report is available at www.lakshmisri.com .

Registration cum Membership Certificate (RCMC) - Extension of validity: Taking note of the difficulties being faced by the exporters for re-validation of their RCMCs from their respective councils, DGFT has decided that the Regional Authorities will not insist on valid RCMC till 30-09-2020 for any incentive/ authorizations, in case the same has expired on or before 31-03-2020. The EPCs will collect the applicable fees for FY 2020-21 on restoration of normalcy. Trade Notice No. 60/2019-20, dated 31-03-2020 has been issued for the purpose.

Remission of Duties and Taxes on Exported Products (RoDTEP) Scheme - Manner of phasing out of MEIS: DGFT has clarified that the benefits under the MEIS shall continue up to 31-12-2020, for any item/ tariff line/ HS Code currently listed in Appendix 3B. Trade Notice No. 03/2020-21, dated 15-04-2020 issued for the purpose also states that prior to 31-12-2020, as and when an item/ tariff/ line/ HS Code is notified to be covered under the RoDTEP Scheme, it would be removed from the coverage of MEIS. According to the Trade Notice, the detailed operational framework for RoDTEP scheme will be notified separately in consultation with the Department of Revenue, Ministry of Finance.

One-time condonation under EPCG Scheme - Extension till 31-03-2021: In October 2017, the DGFT had issued Public Notices granting one-time condonation for obtaining block-wise extension of export obligation, obtaining extension in export obligation period and condonation of delay in submission of installation certificate under the EPCG Scheme. The validity of the timelines was extended from time to time.

The DGFT has now further extended the timelines till 31-03-2021. Public Notice No. 01/2015-20, dated 07-04-2020 has been issued for this purpose.

SIMS - Validity of automatic registration number extended by 60 days: The automatic registration number generated till 31-03-2020 under the Steel Import Monitoring System (SIMS) shall now remain valid for a period beyond the 75 days period notified *vide* Notification No. 17, dated 05-09-2019, in view of delays in shipment due to COVID-19. As per Notification No.58/2015-2020 dated 31.03.2020, all the automatic registration numbers generated under SIMS till 31-03-2020 will now be valid for a period of 135 (75 + 60) days.

Ratio decidendi

Revocation of Customs Broker licence - Doctrine of waiver applicable where limitation period is voluntarily foregone: In the instant case, it was specifically agreed by the Customs Broker/Licensee that the period to be consumed for keeping the file in abeyance as per its request, would be reduced from the overall limitation period of 90 days. The Madras High Court though held that the time limit of 90 days to pass an order of revocation of licence of customs broker is mandatory and must be strictly followed, it was of the view that if the concerned party is ready to forgo the limitation issue out of necessity by a written agreement, the doctrine of 'waiver' or doctrine of 'acquiescence' can be invoked. Department's appeal was allowed observing that after the licensee's act of relinquishment of right, department need not be insisted to adhere to time schedule under Regulation 20(7) of CBLR, 2013. [*Principal Commissioner* v. *Sea Queen Shipping Services Pvt. Ltd.* – 2020 TIOL 600 HC MAD CUS]

No time limit prescribed in law for seeking amendment of bill of entry: CESTAT Ahmedabad has held that the only requirement for amendment of bill of entry was that the document related to the amendment should be available on record at the relevant time. The Tribunal also observed that there is no time limit prescribed for the same under Section 149 of the Customs Act, 1962. It was noted that the requisite document, i.e., the advance licence was in the possession of the appellant on the date of filing of the bill of entry when importer sought clearance on payment of duty, and that only when anti-dumping duty was later demanded from him, it sought for amendment in B/E. [*Sainest Tubes Pvt. Ltd.* v. *Commissioner* - Final Order No. A/10789/2020 dated 12-03-2020, CESTAT Ahmedabad]

Date of filing of bill of entry is not date of import: CESTAT Ahmedabad has held that when the goods enter into territorial water of India that is the stage of completion of import into India and not the date of filling of bill of entry. In a case where dispute involved possession of licence on date of import, the Tribunal also observed that though in the Foreign Trade Policy the date of reckoning the import is given as per the date of bill of lading but the import gets completed only when goods enter into India. The matter was however remanded to verify whether the importer possessed the licence on the date of import. [*Radhe Exim Pvt. Ltd.* v. *Commissioner* – 2020 TIOL 555 CESTAT AHM]

Foreign going vessel – Engagement of vessel in entirety to be considered: Observing that the vessel, engaged for cable repair and cable-laying work in the specified areas, requires to be in readiness to leave for repairs in case of any exigency and that the vessel was paid both fixed charges as well as operational charges, CESTAT Bangalore has upheld the view that the vessel was a foreign going vessel in terms of inclusive

definition contained in Section 2(21)(ii) of the Customs Act, 1962. The Tribunal was of the view that the vessel was squarely covered by the terms "any vessel engaged in fishing or any other operations outside the territorial waters of India". Rejecting the department's view that the vessel was engaged only for some time in operations outside territorial waters, it noted that the engagement of the vessel in its entirety under the agreement was to be considered and not for a specific voyage or time period. [*Asean Cableship Pvt. Ltd.* v. *Commissioner* – 2020 VIL 170 CESTAT BLR CU]

Valuation – Price at which goods sold after import when not relevant: Court of Justice of the European Union has held that the fact that goods imported into the European Union were sold at a loss (at a price lower than the CIF import price as in the customs declaration) is not in itself a sufficient ground for a finding that CIF import price was not correct. The Court noted that the importer had proved that all the conditions under which the consignment of those goods took place confirmed that the price was correct. The case involved a dispute where additional duties were payable on the import of a concerned product if its CIF import price was less than the trigger price referred to in Article 141(1)(a) of the Single CMO Regulation. [*X BV* v. *Staatssecretaris van Financiën* – Judgement dated March 11, 2020 in Case C-160/18, CJEU]

Self-heating patches and belts classifiable under Heading 3005 and not under 3824: Self-heating patches or belts to relieve pain made of a soft synthetic material conforming to the body's shape which contains a number of discs filled with iron powder, charcoal, salt and water which, on exposure to the air, generate heat as a result of an exothermic reaction, are classifiable under Heading 3005 and not under Heading 3824 of the EU's Common Customs Tariff. The Court of Justice of the European Union in this regard was of the view that these goods specifically designed to prevent, detect or treat illnesses or injuries relate to 'medical purposes' within the meaning of Heading 3005. [*Pfizer Consumer Healthcare Ltd.* v. *Commissioners for Her Majesty's Revenue and Customs* – Judgement dated 26-03-2020 in Case C–182/19, CJEU]

Central Excise, Service Tax and VAT

Ratio decidendi

Area-based exemption – Notifications issued in 2008, restricting refund, not hit by doctrine of promissory estoppel and are clarificatory in nature: A 3-Judge Bench of the Supreme Court has held that subsequent notifications/industrial policies in respect of area-based exemptions, which limited the exemption of Central Excise to the extent of the value addition, were not hit by doctrine of promissory estoppel. Relying on number of case law relating to retrospectivity/clarificatory/applicability of promissory estoppel in the fiscal statute, the Court opined that the respective notifications/industrial policies impugned before the High Courts can be said to be clarificatory in nature and it can be defined as an act to remove doubts. Allowing Revenue department's appeals, the Court was also of the view that it cannot be said that by the subsequent

notifications/industrial policies, the rights which have been accrued under the earlier notifications had been taken away. It also stated that the object of the subsequent notifications/industrial policies was prevention of tax evasion. The Court however clarified that the present judgment shall not affect the amount of excise duty already refunded. [*Union of India* v. *V.V.F Limited & another* - Civil Appeal Nos. 2256-2263 of 2020 and Ors., decided on 22-4-2020, Supreme Court]

Cenvat credit of duty paid in excess as per final assessment, admissible: CESTAT Ahmedabad has upheld the Commissioner (A) Order allowing Cenvat credit of the duty paid on provisionally assessed bill of entry in a case where the final assessment revealed that less duty was payable. The Tribunal in this regard relied upon number of case law and observed that it is settled that even though certain amount of excise duty/service tax is not payable as per law but the manufacturer/service provider pays it, Cenvat Credit cannot be denied at the recipient end only on the ground that the same was not payable by the manufacturer/service provider. [*Commissioner* v. *Hindalco Industries Ltd.* – 2020 TIOL 563 CESTAT AHM]

Discount given for non-provision of certain service to foreign buyer not liable under BAS: In a case where the assessee had exported goods to sister concern who in turn had sold them to buyers there, with the foreign importer being responsible for providing after sales services, CESTAT Delhi has held that the discount given in consideration for non-provision of warranty and after sales services by the Indian exporter, was not liable to service tax under BAS. Deliberating upon provisions of the agreement, the Tribunal was of the view that the foreign importer was not rendering after sales service on behalf of the exporter-assessee and that the discount was merely an adjustment in the price of goods sold. It was held that the discount was not towards provision of any service. [*Man Trucks India Pvt. Ltd.* v. *Commissioner* – 2020 VIL 180 CESTAT DEL ST]

Cenvat credit on common input services enumerated under Cenvat Rule 6(5), also used in trading – Numerator and denominator in formula under Cenvat Rule 6(3A): Observing that the input services on which Cenvat Credit was availed were mentioned under sub-rule (5) of Rule 6 of the Cenvat Credit Rules, 2004, CESTAT Mumbai has allowed credit on the said input services also used in business of trading. Taking note of the non-obstante clause in said Rule 6(5), the Tribunal rejected the contention of the Revenue department that if the Cenvat Credit is not used in providing taxable output services, credit availed on such services cannot be allowed in view of Rule 3 and hence, application of sub-rule (5) of Rule 6 does not arise. Further, on the issue of applicability of sub-rule (3A) of Rule 6 in apportioning the Cenvat Credit on common input services also used in trading, the Tribunal was of the view that the value of non-taxable service i.e. 'trading' cannot include the value of the imported goods, but the total value of the services/expenses incurred in trading ought to be considered as part of 'value' for the purpose of the formula prescribed in said Rule for the period 01-04-2008 to 31-03-2011. [*Mercedes Benz India Pvt. Ltd.* v. *Commissioner* – 2020 VIL 169 CESTAT MUM CE]

BSS – Services provided by representative office outside India: CESTAT Delhi has held that if the 'permanent establishment' is treated as a 'service provider' to its own head office in India then it will amount to charging service tax for an activity provided to own self. The Tribunal was of the view that a comprehensive reading of Section 66A indicates that a permanent establishment situated abroad as a 'separate person', is only to determine whether the provision of service is in India or out of India. Demand of service tax under

Support Service for Business for the alleged service by the foreign representative office of the assessee, was hence set aside. [Steel Authority of India Limited v. Commissioner – 2020 VIL 161 CESTAT DEL ST]

Medical Oxygen IP and Nitrous Oxide IP are covered under Entry 88 of Schedule IV of AP VAT Act as drugs and medicines: Medical Oxygen IP and Nitrous Oxide IP are medicines used in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings and are classifiable under Entry 88 of Schedule IV of the Andhra Pradesh Value Added Tax Act, 2005 and not under Schedule V of the said Act as unclassified goods. Entry 88 covered drugs & medicines whether patent or proprietary, as defined in clauses (i), (ii) and (iii) of Section 3(b) of Drugs and Cosmetics Act, 1940. Upholding the High Court decision, the Supreme Court observed that the concerned products fell within the ambit of Section 3(b)(i) of the Drugs & Cosmetics Act, 1940. The Apex Court in this regard noted that in the proceedings before this Court, it was not seriously disputed that Medical Oxygen IP and Nitrous Oxide IP sub-serve a medicinal purpose. [*State of Andhra Pradesh* v. *Linde India Ltd.* – 2020 TIOL 82 SC VAT]

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.
Ph: +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

GURUGRAM
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 . +91-0532 - 2421037, 2420359
Email:lsallahabad@lakshmisri.com

KOCHI
First floor, PDR Bhavan,
Palliyil Lane, Foreshore Road,
Ernakulam Kochi-682016
Tel: +91 (0484) 4869018; 4867852
E-mail: lskochi@laskhmisri.com