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Articles

'Intermediary' – Mediating required for intermediary

By **Rinku Panbude & Shankar Rochlani**

While various established pre-GST concepts were transitioned into GST era, perhaps many were coupled with legacy disputes as well. To quote an illustration, 'Intermediary' could be one of them. Yet, what one should be worried about in today's GST regime is the additional intricacies in GST.

In October 2014, the service tax law was amended to widen the tax net by including agents/ brokers engaged in facilitating sale of goods between two persons. The primary objective was to tax Indian subsidiary companies who helped their foreign counterpart to directly sell goods to Indian customers.

Legacy dispute:

The definition of the term 'intermediary' as existed in service tax law is the same as in GST law. The definition in both laws provides that 'intermediary' means any person who arranges or facilitates supply of goods between two persons. However, a valid question here is whether sales agents who are merely marketing or promoting the goods of ultimate seller in general would be an 'intermediary'. The Tribunal has dealt with such scenarios under service tax and provided some relief to the taxpayers.

Given the varied industry practise and fine difference in case of a normal sales agent *vis-à-vis* an intermediary, the issue cannot be expected to be settled soon.

Complexity in GST:

GST provisions were drafted continuing the old practise of taxing intermediary services provided by Indian companies to their foreign customers. The place of supply in such scenario is prescribed in Section 13(8)(b) of the Integrated Goods and Services Tax Act, 2017 ("**IGST Act**"), as the location of supplier is India. Accordingly, Indian intermediaries are required to pay tax on services when provided in India.

Given the dual GST system in India, it is also important to identify whether a taxpayer should discharge CGST+SGST or IGST. The said issue needs to be examined in the light of legal provisions and the recent Gujarat High Court in the case of *Material Recycling Association of India* [2020 VIL 341 GUJ].

The petitioner in above case challenged the constitutional validity of Section 13(8)(c) of the IGST Act (determining the place of supply for intermediary) primarily on the grounds of arbitrariness and territorial jurisdiction. However, what is alarming for the industry is not only the fact that Court dismissed the petition, rather, some of the arguments and observations made in the judgement.

Before, delving deep, it is pivotal to appreciate following aspects:

- Two key ingredients which determine the transaction as "inter-state" *vis-à-vis* "intra-state" are: (i) location of supplier and (ii) place of supply.
- As per Section 7 of the IGST, where location of supplier and place of supply are in two different States, it is an inter-state supply.

- Similarly, as per Section 8 of the IGST Act a supply is intra-state supply, where location of supplier and place of supply are in the same State.
- Further, as per Section 7(5)(c) of the IGST Act if a supply made in India is not an intra-state supply it would be an inter-state supply.

CGST+SGST or IGST?

To reiterate, Section 13(8)(c) of the IGST Act determines the place of supply for intermediary as the location of supplier.

A first blush reading of the above provision would suggest that in case of intermediary services, the supply would always be an intra-state supply, since place of supply would coincide with the location of supplier. The petitioner, while challenging the constitutional validity of the above provision, canvased similar argument before the Court that the supply of intermediary services provided by Indian companies to its foreign customers would amount to 'intra-state supply'. The High Court decided the matter in light of above submission and held that such transaction is an 'intra-state supply'.

Let us now go through the other connected provisions under GST. Section 8(2) of the IGST Act provides that a supply would be an 'intra-state supply' when the supplier and place of supply are in same State. However, a closer look at Section 8(2) provides a special condition attached to it which reads as *'Subject to the provision of Section 12, supply of services……'*

The provision begins with the term 'subject to' thereby giving a meaning that Section 8 is inextricably conditional upon Section 12. The Supreme Court in the case of *K.R.C.S. Balakrishna* [(1961) 2 (SCR) 736] has held that the use of words 'subject to' is to effectuate intention of legislation and the correct meaning would be 'conditional upon'. Thus, in other words, Section 8 does not have its own identity unless, Section 12 is being invoked.

Section 12 of the IGST Act deals with various scenarios for determining the place of supply of services. However, the scope of Section 12 is restricted only to determine nature of supply of service where both supplier and recipient are located in India.

On the contrary, where either of the parties is situated outside India, the place of supply would be governed by Section 13. Hence, in case of 'intermediary services' provided by an Indian company to foreign customer, the same is covered under Section 13(8)(c) of the IGST Act.

Therefore, in cases where intermediary service is provided by an Indian supplier to its foreign customer, can it be said that the said transaction does not qualify as 'intra-state supply' in terms of Section 8(2), since the place of supply in this case is not determined under Section 12.

If the answer is in affirmative, the residuary provision i.e. Section 7(5)(c) should come into play and accordingly, the transaction may be deemed as inter-state supply. At this juncture, another judgement of the Gujarat High Court in the case of *Mohit Minerals* [2020 (33) ELT 321 Guj] may also be referred. The Court here was dealing with the applicability of IGST on ocean freight in the hands of Indian importers. While deciding the said case, the Court also held that Section 13 of IGST Act is applicable to identify a transaction as inter-state supply under Section 7(5). The Court further held that Section 7(5)(c) is a residuary clause intended to capture any substantial transaction which should not escape tax net.

Indeed, Section 7(5)(c) intends to cover any supply in taxable territory i.e. India and not the case where place of supply is in India. In any case, the term 'supply in taxable territory' is not

defined. Also given the nature of residuary provision tangled with the fact that both supplier and place of supply are located in India, the said transaction may fit within four corners of Section 7(5)(c).

Obiter dicta:

Certainly, it would not be an irrelevant question to examine whether the above discussed legal position is in direct conflict with the ruling given by the Gujarat High Court.

It should be appreciated that the High Court had given its decision on constitutional validity of Section 13(8)(c), so far as it deals with place of supply for intermediary services. The question whether the said transaction should qualify as inter-state or inter-state supply was never raised before the court and hence its view on the same is a mere passing remark which is referred to as '*Obiter dicta*'.

The concept of '*Obiter dicta'* is explained by Bennion's Statutory Interpretation (sixth edition) as "a gratuitous opinion, an individual impertinence (that is something strictly not pertinent) which, whether it be wise or foolish, right or wrong, bindeth none – not even the lips that utter it".

In the light of above backdrop, it can be argued that the decision of court in so far as intermediary service is held as intra-state supply is merely *obiter dicta* and hence, not a binding precedent.

Though many such arguments may be raised, it is ultimately the taxpayer who would suffer financially, unless relief is granted.

Conclusion:

While the legacy issue of sales agent vs. intermediary is still continuing on one hand, this possible dispute under GST is also rising. In such uncertain situation, it is high time for CBIC to clarify the nature of applicable tax. Also, relaxation in terms of internal adjustment in the Governments account i.e. transfer from IGST to CGST+SGST and *vice-versa* could be even more business friendly, rather than making payment and seeking refund. The Kerala High Court in case of *Saji S.* [2018 (19) GSTL 385 (Ker.)] has also suggested the same, while allowing release of seized goods. The GST Council which has representatives from both centre and States therefore should now 'mediate' on 'intermediary'.

[The authors are Principal Associates in GST practice at Lakshmikumaran & Sridharan, Pune]

Contractual payment = Consideration?

By **Mansi Goel**

GST is a contract-based levy similar to service tax and sales tax. Contract-based taxes *generally* require the presence of a consideration that flows from one contracting party to another. In some cases, consideration is clearly identifiable in the contract whereas in some cases, there is a need to identify what constitutes consideration and what is not. While identifying the consideration, there are various aspects which need to be looked into, however, one thing that needs to be borne in mind is that **every payment is not consideration**.

In this article, we shall be discussing about the thin line which a payment needs to cross in order to become consideration.

The term 'consideration' is defined in Section 2 of CGST Act, 2017 to include '*any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government; ……'*

Considering that GST is a contract-based levy, the provisions of Indian Contract Act, 1872 are also relevant which define 'consideration' as follows:

> *'When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.'*

Based on the above definitions, it can be said that in order to qualify as consideration, a payment should possess the following characteristics:

- It should be made in respect of, in response to, or for the inducement of supply. There should be a supply and the payment made should have a direct link with such supply; and
- It should be made at the desire of the promisor.

Let us discuss above characteristics in detail.

Direct nexus with the underlying supply

The definition of consideration requires that the payment should be *in respect of, in response to or for inducement of supply.* These words indicate that the payment should have a direct and sufficient nexus with the supply for which it is sought to be treated as consideration. Merely because some payment is made by one party to another does not necessarily imply that there would be some supply for which the payment is a consideration. Presence of payment itself does not pre-suppose the reciprocity.

In order to understand, let us take an example of a sporting tournament where the participants enroll themselves upon payment of entry fee. Cash prize is awarded to the tournament winner. Here, can it be said that the prize money is the consideration in the hands of the winner against his activity of enrolling himself in the tournament? Can an argument be taken that prize money is paid to the winner *in response to* his participation in the tournament? In the case of *Vijay Baburao Shikre* [2019 (30) GSTL 63 (AAR)], the Authority of Advance Ruling has held that the prize money is consideration for the race winner and chargeable to GST. Another example can be of incentive given to the contractor for early completion of work or for appreciating the quality of work.

At the desire of the promisor

Second attribute of the consideration is that it should be made at the desire of the promisor. This aspect is quite important, however, generally, it is overlooked while determining the taxability of a payment.

In case some act is done or payment is made by the promisee/recipient but the same is not at the desire of promisor/supplier, the same cannot be said to be a consideration.

Recently, this aspect was discussed by the Larger Bench of Tribunal in the matter of *Repco Home Finance Ltd.* (Service tax Appeal No. 511 of 2011) while dealing with the issue of taxability of foreclosure charges collected by the banks from their borrowers upon early termination of

loan. The Tribunal observed that the lender will never desire early termination of the loan since it thrives on the interest income earned from lending activities. After extensive analysis of various aspects of consideration, the Tribunal held that foreclosure charges cannot be treated as consideration in the hands of the bank and hence, service tax cannot be levied on the same.

A similar argument can also be taken in case of cheque bouncing charges or liquidated damages payable upon breach of contract. Though the supplier receives these payments, it should be seen whether the same are made at his desire or not. Does the bank desire that the cheque of the customer gets bounced and bouncing charges becomes payable. Does any party desire that the contract is breached so that he can receive the liquidated damages? Certainly not.

In all the above cases, the fact that certain payment has been made gives an immediate impression that some activity *would have* been carried out for which the payment is made. However, this does not hold good in every situation. For each payment, it should be determined whether there is any corresponding activity or not, and whether the payment has the attributes of consideration or not.

[The author is a Principal Associate in GST practice at Lakshmikumaran & Sridharan, New Delhi]

Goods and Services Tax (GST)

Notifications and Circulars

Interest on delayed payment of GST to be paid on net tax liability – Amendment in CGST Section 50 comes into force from 01-09-2020: The Central Government has appointed 01-09-2020 as the date on which the provisions of Section 100 of the Finance (No. 2) Act, 2019 shall come into force. Section 100 inserts a proviso in Section 50 of the Central Goods and Services Tax Act, 2017, prescribing that interest in case of delayed furnishing of Section 39 return (e.g. GSTR-3B), shall be levied on that portion of tax that is paid by debiting the electronic cash ledger, i.e., after excluding input tax credit (ITC). The new proviso however excludes situation when such return is furnished after commencement of any proceedings under Section 73 or Section 74. Notification No. 63/2020-Central Tax, dated 25-08-2020 has been issued for the purpose. It may be noted that the GST Council in its 39th meeting held on 14-03-2020 has recommended that interest for delay in payment of GST is to be charged on the net cash tax liability with effect from 01-07-2017, and that the law should be amended retrospectively.

Registration – Amendments in Aadhar based authentication process: The Ministry of Finance has amended the Central Goods and Services Tax Rules, 2017 ("**CGST Rules, 2017**") to revise the procedure for Aadhar based authentication

process for registration under GST. According to the newly substituted sub-rule (4A) of Rule 8, if any person [other than those notified under Section 25(6D)] opts to undergo authentication of Aadhar number, the date of submission of application will be the date of authentication of the Aadhar number or 15 days from submission of application in Part B of Form GST REG-01, whichever is earlier. In case a person [other than those notified under Section 25(6D)] fails to undergo such authentication or does not opt for it, notice in Form GST REG-03 may be issued within 21 days from the date of submission of the application. Further, amendment has been made in Rule 9(4) to substitute the word "shall" by the word "may" in respect of rejection of registration application. Rule 9(5) has also been amended to revise few timelines in respect of deemed approval of application for grant of registration. Notification No. 62/2020-Central Tax, dated 20-08-2020 has been issued for this purpose to amend the CGST Rules, 2017 for the tenth time this year.

E-invoice – Increase in threshold limit and exclusion of SEZ units: Registered persons having aggregate turnover in a Financial Year exceeding INR 500 crore are only required to comply with Rule 48(4) of the Central Goods and Services Tax Rules, 2017, i.e. e-invoice provisions. The threshold limit was INR 100 crore earlier. Further, Special Economic Zone units have been excluded from complying with e-invoice provisions in addition to persons referred to in Rule 54(2), (3), (4) and (4A). Notification No. 61/2020-Central Tax, dated 30-07-2020 amends Notification No. 13/2020-Central Tax, dated 21-03-2020 for this purpose. It may be noted that the provisions of e-invoice will be effective from 01-10-2020.

Ratio decidendi

Refund due to inverted duty structure available of credit accumulated on input services: The Gujarat High Court has held that Explanation (a) to Rule 89(5) of CGST Rules is *ultra vires* the provision of Section 54(3) of the CGST Act, 2017. The said Explanation which denied the refund of unutilised input tax paid on input services as part of input tax credit ("ITC") accumulated on account of inverted duty structure, was hence read down to that extent. The Court observed that Section 54(3) provides for claim of refund of 'any unutilised input tax credit' and that the phrase 'input tax credit' as defined in Section 2(63) means the credit of 'input tax', which itself is defined to mean the tax charged on any supply of goods or services or both made to any registered person. It was hence of the view that 'input' and 'input service' are both part of the 'input tax' and 'input tax credit'. It held that when as per provisions of Section 54(3), the legislature has provided that registered person may claim refund of 'any unutilised input tax credit', such claim of the refund cannot be restricted by way of Rule 89(5) only to 'input', excluding the 'input services' from the purview of 'input tax credit'. The High Court also held that the intent of the government by framing the rule restricting the statutory provision cannot be the intent of law as interpreted in Circular No. 79/53/2018-GST, dated 31-12-2018. [*VKC Footsteps India Pvt. Ltd.* v. *Union of India and others* – Judgement dated 24-07-2020 in R/Special Civil Application No. 2792 of 2019 and others, Gujarat High Court]

Place of supply in case of intermediary – Section 13(8)(b) of IGST Act is intra vires Constitution of India: The Gujarat High Court has upheld the validity of Section 13(8)(b) of the Integrated Goods and Services Tax Act, 2017 which provides that in case of intermediary services where the recipient of service is located

outside India, the location of the service provider in India should be considered as place of supply of service. The Court was of the view that merely because the invoices were raised on the person outside India with regard to the commission and foreign exchange was received in India, it would not qualify to be export of services when the place of supply is in India. It also held that a person who is an intermediary cannot be considered as exporter of services because he is only a broker who arranges and facilitates the supply of goods or services or both. The assessee was held liable to CGST and SGST by the Court as it observed that on reading Notification 20/2019-Integrated Tax, it could be inferred that Section 13(8)(b) was enacted to levy CGST and SGST and that such intermediary services are out of the purview of IGST. [*Material Recycling Association of India* v. *Union of India & Ors.* – Judgment dated 24-07-2020 in R/Special Civil Application No. 13238 of 2018 and 13243 of 2018, Gujarat High Court]

No detention when e-way bill did not mention tax amount: The Kerala High Court has allowed the writ petition in a case where the goods were detained during transportation alleging that there was no mention of the tax amount separately in the e-way bill that accompanied the goods. Observing that Form GST EWB-01 as prescribed under Rule 138(A) of CGST Rules, 2017 does not have any field wherein the transporter is required to indicate the tax amount payable in respect of the goods being transported, the Court held that the non-mentioning of the tax amount is not in contravention of the Rules. It also noted that the transporation was covered by a valid tax invoice which clearly showed the tax amount. Detention under Section 129 of the CGST Act, 2017 was hence set aside. [*M.S. Steel and Pipes* v. *Asst. State Tax Officer* – Judgement dated 12-08-2020 in W.P(C). No. 16356 of 2020, Kerala High Court]

No detention when invoices not bearing continuous serial number: The Kerala High Court has set aside the detention of goods in a case where the department had objected that the invoices accompanying the goods did not bear continuous numbers and hence the invoices with serial numbers falling between could have been used for transportation of other goods which were not brought to their notice. The Court observed that goods were accompanied by tax invoices as also e-way bills that clearly indicated the particulars required under Rule 46 of CGST Rules, 2017. Allowing the writ petition, it was held that detention under Section 129 of CGST Act, 2017 was also not justified as department's doubt pertained to goods other than those which were actually detained. [*Devices Distributors* v. *Assistant State Tax Officer* – Judgement dated 23-07-2020 in W.P(C). No. 14969 of 2020, Kerala High Court]

Best judgement assessment can be done immediately after failure to file return despite notice: The Kerala High Court has held that the reference to Section 44 of the CGST Act, 2017 in Section 62 does not mandate that the steps for completing the best judgment assessment should be initiated only after 31st December, following the end of the financial year in which the default in filing of monthly returns occurred. Dismissing the writ petition, the Court held that the reference to Section 44 in Section 62(1) is only for determining the five-year period within which the assessing officer has to complete the best judgment assessment. It held that best judgment assessment can be done immediately after detection of the failure to file the returns despite service of notice, and that the outer time limit for completing the best judgment assessment is five years from the date specified under Section 44. [*Amani Machine Centre* v. *State Tax Officer* – Judgement dated 30-07-2020 in WP(C). No. 2757 of 2020, Kerala High Court]

Anti-profiteering – No penalty imposable for violations before 01-01-2020: Observing that penalty provisions were not in existence between the period from 01-07-2017 to 31-08-2018 when the assessee had violated the provisions of Section 171(1) of the CGST Act, 2017 relating to anti-profiteering, the National Anti-Profiteering Authority has held that the penalty prescribed under Section 171(3A) cannot be imposed. The Authority observed that specific penalty provisions for violation of Section 171(1) came into force only from 01-01-2020 and cannot operate retrospectively. It also noted that violation of the provisions of Section 171(1) is not covered under Section 122 as it does not provide penalty for not passing on the benefits of tax reduction and ITC and since the profiteered amount is not a tax imposed under the CGST Act, 2017. [*Varun Goel* v. *Eldeco Infrastructure and Properties Ltd.* – 2020 TIOL 43 NAA GST]

Recipient of service – Foreign manufacturer is recipient of repair service provided by Indian distributor in India during warranty period: Appellate AAR Karnataka has held that for repair and servicing of vehicles during the warranty period by the distributor of vehicles in India, the recipient of supply is the foreign manufacturer and not the Indian customer. Setting aside the AAR ruling, the AAAR observed that the distributor undertakes the activity of repair and/or replacement of parts during the warranty period, at the behest of the foreign manufacturer, and reimbursement received from the foreign manufacturer is in the nature of consideration paid by the manufacturer to the distributor. It also noted that that the person who is required to make a payment for getting a job done is the recipient of service. Finding of the AAR that the activity amounted to a composite supply of goods and service with the principal supply being a supply of service was however upheld. [*Volvo-Eicher Commercial Vehicles Ltd.* – 2020 VIL 42 AAAR]

No ITC available on paver blocks laid in parking area: Holding that the paver blocks laid in the parking area of the land, even though not attached to the earth, were immovable property, the Authority for Advance Rulings, Maharashtra has denied the Input Tax Credit ("ITC") of tax paid on purchase of such blocks. Relying on Supreme Court's decision in the case of *T.T.G. Industries Limited v. CCE* [(2004) 4 SCC], the AAR observed that paver blocks, once they were erected and assembled, continued to operate from where they were positioned and became a part of the parking facility. Noting that the flexibility to re-use does not mean that blocks will be removed and re-erected frequently, the AAR held that paver blocks would qualify as an immovable property and therefore, ITC would not be available as per Section 17(5)(d) of the CGST Act, 2017. The assessee had pleaded that the expenses on the paver blocks were not capitalized as a part of immovable property in the books of account. [In RE: *Sundharams Private Limited* – 2020 VIL 224 AAR]

Setting up of data centre is not works contract but composite supply: AAR Maharashtra has held that supply of goods and service for setting up Data Centre does not qualify as 'works contract' as defined under Section 2(119) of the CGST Act, 2017. The applicant had entered into an agreement to undertake work for completing data center project on turnkey basis and had pleaded that the activity involved creation of immovable property, and hence would qualify as works contract. The Authority however observed that there was no supply of works contract as there was no building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair maintenance, renovation, alteration or commissioning of any immovable property. It noted that the value of civil construction was insignificant, as compared to

the value of goods/ services. Further, observing that there was clear demarcation of goods and services, it held that there was no works contract. Holding the service to be a composite supply, it noted that such supplies were naturally bundled and in conjunction with each other, as the major part of the contract was supply of goods and that the services could not be supplied without the goods. [In RE: *Prasa Infocom & Power Solutions Private Limited* – 2020 VIL 227 AAR]

Supply of food to hospitals on outsource basis is liable to GST – Exemption available only to clinical establishments: AAR Telangana has held that GST is payable on the food supplied to hospitals on outsourcing basis. It held that exemption under Notification No. 12/2017-Central tax (Rate) was available only when the clinical establishment itself supplies food as part of health care services to in-patients. It noted that the proposition was supported by CBIC Circular No. 32/06/2018-GST, dated 12-02-2018. As regards the rate of tax, CGST and SGST @ 9% were held applicable as per Sl. No. 7(v) of Notification No. 11/2017-Central Tax (Rate) during 01-07-2017 to 26-07-2018. Further, from 27-07-2018 onwards, CGST and SGST @ 2.5% were held applicable, with the condition of non-availability of input tax credit. The applicant supplied food and beverages at the canteen of various hospitals and were not getting paid by the consumers of the food and beverages, but by the hospitals on monthly basis based on the coupons collected. [In RE: *Navneeth Kumar Talla* – 2020 VIL 228 AAR]

ITC on tax paid on lease premium, annual lease rentals and maintenance charges paid for land lease when not available: AAR Telangana has held that input tax credit is not available of GST paid on lease premium charges, annual lease rentals and maintenance charges paid to the lessor for land for construction of a building for laboratory. The AAR noted that the services were received by the applicant for construction of immovable property on their own account, and hence ITC is not eligible under Section 17(5)(d) of the CGST Act, 2017. It also noted that the building is also excluded from the definition of plant and machinery, for which there is an exclusion under the restrictive clause 17(5)(d). The applicant was engaged in providing Technical Testing and Analysis Services and had acquired a land on lease for a period of 33 years for construction of laboratory. [In RE: *Daicel Chiral Technologies (India) Private Limited* – 2020 VIL 229 AAR]

Assignment of leasehold rights and transfer fee are taxable under Other Miscellaneous services @ 18%: AAR Telangana has held that the activity of assignment of leasehold rights is transfer of one's leasehold rights and does not amount to further sub-leasing as the applicant's rights as per the sub-lease deed stand extinguished after assignment. The Authority observed that such assignment does not create fresh benefit from the land and is classifiable under 'Other miscellaneous service', SAC 999792, taxable at the rate of 18% under Notification No. 11/2017-Central Tax (Rate). The transfer fee charged by the sub-lessor was held in the nature of consideration for tolerating an act and was held to be classifiable under SAC 999794, taxable at 18%. It was also held that Input tax credit of GST paid on transfer fee was admissible to the applicant. The applicant had leasehold factory unit as one of the assets under liquidation, and as per the deed, applicant, after the expiry of five years from the date of the deed, was entitled to assign to another person the unexpired residual period of the sub-lease on payment of transfer fee. [In RE: *Enfield Apparels Limited* – 2020 VIL 233 AAR]

UK VAT – Supplier of service vs. agent – Liability towards customer: In a case where a website was taking orders for academic works from customers and in turn giving it to

writers/academics, the UK's Upper Tribunal (Tax and Chancery Chamber) has held that the supply of academic work was made by the website and not by the writers. Analysing the contracts between the parties, the Appellate Tribunal observed that there was a legal relationship between the website and a customer under which the website assumed liability for the obligation to provide a limited right to use the academic work within the stipulated timescale. It also held that the fact that a writer could be directly liable to a customer under the "no plagiarism guarantee" was not material. The website's contention that they were acting as agent to the writer was hence rejected while dismissing its appeal. The issue involved valuation for the supply. The website contending that it was liable only for the amount retained by them while the HMRC pleaded that payment made to the writer was for a separate supply made by the writer to the website. [*All Answers Limited* v. *Commissioner for HMRC* – Decision dated 30-07-2020 in Appeal number UT/2019/0067, UK's Upper Tribunal (Tax and Chancery Chamber)]

Customs

Notifications and Circulars

Faceless assessment – 2nd phase launched with inclusion of Delhi and Mumbai: CBIC has from 03-08-2020 begun the 2nd phase of all India roll-out of faceless assessment. While Delhi and Mumbai Customs Zones have been included, the scope of faceless assessment at Chennai and Bengaluru Customs Zones have been extended. Now, while Bengaluru, Chennai and Delhi Customs Zones will cover faceless assessments for imports under Chapters 50 to 71, 84, 85, and 89 to 92, Mumbai will cover import of goods falling under Chapter 29 of the Customs Tariff Act, 1975.

FTAs – Administration of Rules of Origin under Trade Agreements – Guidelines: Central Board of Indirect Taxes and Customs (CBIC) has issued guidelines regarding implementation of Section 28DA of the Customs Act, 1962 and the Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 ("CAROTAR, 2020") which will come into force on 21-09-2020. Observing that CAROTAR, 2020 provides a form, containing list of basic minimum information which an importer is required to obtain while importing goods under claim of preferential rate of duty, the Circular No. 38/2020-Cus., dated 21-08-2020 states that in case of doubt with regard to origin of goods, information should be first called upon from the importer of the goods before initiating verification with the partner country. However, it also notes that the compulsory verification of assessment (in case the importer fails to provide information) should be discontinued once the importer demonstrates that he has established adequate system of controls to exercise reasonable care. The Circular also lays down certain SOPs for forwarding of requests for verification to the Board.

Gold, silver, other precious and semi-precious metals and articles – Regulations notified for manufacture in special warehouse: The Ministry of Finance has notified the Manufacture and Other Operations in Special Warehouse Regulations, 2020 which have come

into force from 17-08-2020. These regulations allow manufacturing and other operations in a special warehouse licensed under Section 58A of the Customs Act, 1962 with regard to warehoused goods specified in clause (1) of Notification No. 66/2016-Cus. (N.T.), i.e. gold, silver, other precious metals and semi-precious metals and articles thereof. Circular No. 36/2020-Cus., dated 17-08-2020 while explaining the Regulations, specifies procedures and documentation for such warehouse in a comprehensive manner including application for seeking permission under Section 65, provision of execution of the bond and security by the licensee, receipt, storage and removal of goods, maintenance of accounts, conduct of audit, etc. Consequential amendments have also been made in Manufacture and Other Operations in Warehouse (no. 2) Regulations, 2019 and Special Warehouse (Custody and Handling of Goods) Regulations, 2016.

Authorised Public Undertakings extended benefit of deferred payment of Customs duty: The Ministry of Finance has extended the benefit of deferred payment of Customs duty to Authorised Public Undertakings approved by the Directorate of International Customs under the CBIC. Notification No. 78/2020-Cus. (N.T.), dated 19-08-2020 amends Notification No. 135/2016-Cus. (N.T.) with effect from 19-08-2020, for this purpose. Further, Circular No. 37/2020-Cus. of the same date, while specifying the procedure for availing such facility, also states that the facility would be available to Public Undertakings of Central and/or State Government which satisfy various specified criterion like, must be recommended by an officer not below the rank of the Deputy Secretary to the Government of India or an officer of equivalent rank in the State Government. Hitherto, only importers certified under Authorized Economic Operator programme as AEO (Tier-Two) and AEO (Tier-Three) were eligible for this facility. It may also be noted that Rule 4 of Deferred Payment of Import Duty Rules, 2016, relating to intimation about intent to avail the benefit of deferred payment, has been omitted by Notification No. 79/2020-Cus. (N.T.), dated 19-08-2020.

Import of pets or live animals – Procedure revised: In line with the Ministry of Fisheries, Animal Husbandry & Dairying, Department of Animal Husbandry & Dairying Office Memorandum dated 15-07-2020 prescribing procedure for import of live animals in general and also for import of pets (only dogs and cats) as baggage/personal imports by passengers, the CBIC has also revised the procedure to be followed for clearance of pets/live animals including dogs and cats. As per Circular No. 35/2020-Cus., dated 10-08-2020, passengers have to obtain advance NOC from Animal Quarantine and Certification Service as the airline will not lift the live animals until advance NOC from AQCS is obtained by the passenger.

Colour television sets – Import Policy revised: Import Policy of colour television sets falling under ITC (HS) Code 8528 7211 to 8528 7219 has been amended to 'restricted' from 'free'. Further, as per DGFT Notification No. 22/2015-20, dated 30-07-2020, amending Chapter 85 of ITC (HS), actual user condition would not be applicable for importers applying for an authorisation to import said goods.

Ratio decidendi

Child parts used in manufacture of parts of motor vehicle seats are classifiable under Heading 9401: CESTAT Ahmedabad has held that the child parts imported by the appellant are classifiable under Tariff Item 9401 90 00 as parts of vehicle seats as declared by the importer-assessee and not under Tariff Item 8708 99 00 as parts and accessories of motor vehicles of Heading 8701 to 8705 of the Customs Tariff Act,

1975 as assessed by the Customs. The imported child parts where assembled into round recliners which were further used to make recliner assembly which in turn was welded into seat frame for manufacture of complete seat for motor vehicles. The Tribunal noted that classification of round recliner and all subsequent goods under Heading 9401 was not disputed by department and that vehicle seats are not covered under Heading 8708. It also observed that child parts were not used in the motor vehicle but were used in the manufacture of other parts and were an integral part of motor vehicle seats. [*Shiroki Auto Components India Pvt. Ltd.* v. *Commissioner* – Final Order No. A/11132/2020, dated 29-07-2020, CESTAT Ahmedabad]

Water signal/sensors, pressure sensors, heart film air mass meters/air mass sensors and temperature sensors are classifiable under Heading 9026 and not Heading 9032: CESTAT Bengaluru has held that water signal/sensors, pressure sensors, heart film air mass meters/air mass sensors and temperature sensors are classified under Heading 9026 and not under Heading 9032 of the Customs Tariff Act, 1975 as contended by the department. The Tribunal was of the view that the goods were only measuring instruments and did not have any control on the operation of the main engines. Going through the literature submitted by the Revenue department, the Tribunal observed that it was not clear that the goods were capable of triggering the stop or start of the engine and were capable of controlling the main machines. Chapter Note 7(a) to Chapter 90 and HSN Explanatory Notes to Chapter 90 were also relied upon. Allowing the assessee's appeal, the Tribunal stated that the Revenue department could not establish the controlling feature of instruments and hence not discharged its responsibility to establish the correctness of the classification proposed by them. [*Bosch India Ltd.* v. *Commissioner* - Final Order No. 20376 /2020, dated 02-07-2020, CESTAT Bengaluru]

Digital cameras for capturing still images and videos classifiable under Tariff Item 8525 80 20: CESTAT Mumbai has held that goods 'GoPro HERO5 Black' Action Camera is classifiable under Tariff Item 8525 80 20 of the Customs Tariff Act, 1975 and eligible for exemption under Notification No. 50/2017-Cus. Revenue department's claim of classification under TI 8525 80 90, solely for the reason that the cameras were capable of capturing still as well as moving images, was dismissed observing that description under said TI as 'others' was more of general type. Allowing the appeal and the exemption, the Tribunal held that the embargo created in the earlier Notification 15/2012-Cus. in terms of the criterion of quality and capacity to record images/events, will not impact eligibility under the superseding Notification 50/2017-Cus. Exemption provided for "digital still image video camera" was held to be available. [*Creative Peripherals & Distribution Ltd* v. *Commissioner* – 2020 TIOL 1146 CESTAT MUM]

Valuation – Advertisement and sales promotion expenses incurred by importer on own account, not includible: CESTAT Delhi has held that in absence of any condition precedent, the expenditure by the importer-appellant on advertisement and sales promotion incurred on its own account and not for discharge for any obligation of the seller (foreign exporter) under the terms of the sale, is a post import activity and does not attract provision of Rule 10(1)(e) of the Custom Valuation (Determination of Value of Imported Goods) Rules, 2007. Relying upon Interpretative Note to Rule 3(b) of the Rules, it noted that any activity undertaken by the buyer on its own account, even though by agreement, are not considered as indirect payment, even though they might be regarded as

benefit to the seller. It was held that such expenditure cannot be added to the value of the goods under Rule 10 while determining transaction value. [*Indo Rubber and Plastic Works* v. *Commissioner* - 2020 (373) ELT 250 (Tri. - Del.)]

Surgical tape rolls not eligible for exemption as 'skin barrier micropore surgical tapes': The CESTAT Bengaluru has held that specified surgical tape rolls do not satisfy the description 'skin barrier micropore surgical tapes' and hence are not eligible for the exemption under Sl. No. 22 of List 37 in terms of Sl. No. 363A of Notification No. 21/2002-Cus. Observing that the product named and known as 'skin barrier micropore surgical tapes' existed in reality, the Tribunal rejected the assessees contention that comma is missing in the description in the notification and that the said entry should be read as two different items, namely, 'skin barrier' and 'micropore surgical tapes'. The Tribunal observed that there was no ambiguity in the notification and there was no need to interpret the notification by supplying what is assumed to be missing in the notification. [*3M India Ltd.* v. *Commissioner* - 2020 (373) ELT 385 (Tri. - Bang.)]

Central Excise, Service Tax and VAT

Ratio decidendi

Foreign bank's charges for transfer of money to settle export payments, not liable to service tax in the hands of the bank of Indian exporter: CESTAT Delhi has held that charges charged by foreign bank (bank of the importer) or a foreign intermediary bank in the course of settlement of export payments, in a case of exports from India, are not liable to service tax under reverse charge mechanism at the hands of the Indian bank (bank of the exporter). The department had contended that the foreign bank provided a service to the Indian bank in relation to transfer of money and letter of credit, which was classifiable under Section 65(12)(a)(ix) during period prior to 2012 and under 65B(44) of the Finance Act, 1994 for the period under the Negative list regime. The Tribunal however held that the bank in India cannot be the recipient of service for the activities undertaken by the foreign banks, the charges for which were deducted at source on the export bill. Further, observing that there is marked distinction between 'conditions to a contract' and 'considerations for the contract', the Tribunal noted the Indian bank had not paid any consideration to the foreign bank and hence also was not the recipient of service. [*State Bank of Bikaner & Jaipur* v. *Commissioner* - Final Order No. 50737/2020, dated 05-08-2020, CESTAT Delhi]

Cenvat credit when portion of output service not liable to service tax: CESTAT Bengaluru has held that Cenvat credit of service tax paid under reverse charge mechanism for availing services of insurance agents was available in a case when a portion of the premium amount (consideration towards output service), in case of ULIP policies, was not liable to service tax. It observed that the assessee was engaged only in rendering

insurance services and merely because a portion of the premium amount (investment opportunity) charged in respect of ULIP policies was not liable to tax, it cannot be said that the said service was exempted, when tax was paid on the portion of premium collected on risk coverage. It held that provision of break-up of premium amount as shown in the policy was immaterial, as the subscriber had not taken two separate policies. [*Metlife India Insurance Company Limited* v. *Commissioner* - Final Order No. 20467/2020, dated 18-08-2020, CESTAT Bengaluru]

Sabka Vishwas (Legacy Dispute Resolution) Scheme – Oral admission of demand: Observing that the duty liability stood admitted in an oral statement by the petitioner before 30-06-2019, the Delhi High Court has quashed the rejection order issued by the Designated Authority in respect of a declaration filed under the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019. It noted that the audit was concluded on 28-06-2019 and the amount due and payable was not only determined as well as communicated by the department to the assessee-petitioner but was also admitted by the latter, even though the audit memo was issued in writing only on 02-07-2019, i.e. after the cut-off date. Rejecting department's plea that the amount was not 'quantified' as defined under Section 121(r) of the Finance (No. 2) Act, 2019, the Court held that the said expression has been extended/widened by para 2(v) of Circular dated 12-12-2019 and paras 4(a) and 10(g) of Circular dated 27-08-2019. [*Seventh Plane Networks Private Limited* v. *Union of India* – Judgement dated 14-08-2020 in W.P.(C) 3934/2020, Delhi High Court]

Nestle Milky Bar and Eclair are not white chocolate – Exemption available: CESTAT Bengaluru has held that Nestle Milky Bar and Eclair, classified under Tariff Heading 1704.90 of the Central Excise Tariff Act, 1985, are not white chocolates and hence are eligible for exemption under Notification 6/2002-C.E. (SI. No. 247) and Notification No. 3/2006-C.E. (SI. No. 16). It noted that the difference in the arguments of the Revenue department and the assessee was based on the presence or absence of ingredients like cocoa butter and hydrogenated vegetable oils, and that the department had not discharged the burden of proof with any indisputable proof or test report that the impugned products contained cocoa butter. CESTAT Allahabad's decision in the case of *Marko Foods* was relied upon while the decision of the coordinate Bench in the case of *Nestle Products* decided in 2008 was distinguished. [*Campco Chocolate Factory* v. *Commissioner* - Final Order No. 20394-20401/2020, dated 14-07-2020, CESTAT Bengaluru]

Valuation of goods prior to and after 01-07-2020 – Supreme Court lists principles: The 3-Judge Bench of the Supreme Court has upheld the CESTAT order remanding the matter involving valuation of goods, both for periods before 01-07-2000 and after that. Elaborately discussing the provisions of Section 4(1) of the Central Excise Act, 1944 for both for periods, the Court laid down certain principles for valuation where the period of assessment is prior to 01-07-2000 (normal value) and when the same is after 01-07-2000 (transaction value). As part of the principles applicable during both periods, it stated that wherever there is a finding that a particular dealer/customer had paid a consideration over and above the invoice value, the additional payment made by him together with the invoice value shall be the transaction value, for all the transactions that the particular dealer/customer had with the assessee. [*Commissioner* v. *CERA Boards and Doors* – Judgement dated 19-08-2020 in Civil Appeal Nos. 72407248 of 2009 and Ors., Supreme Court]

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