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Unhappy toy story – A classification conundrum under GST

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Introduction

The toy industry in India has seen quite a few developments over the past few years. Taking steps in line with the vision of making India a global manufacturing hub for toys, the government has devised a comprehensive action plan to boost production and sale of indigenous toys across the country. Accordingly, the government has significantly increased the customs duty on toys. Further, the toy manufacturers have been mandated to comply with the quality control and safety standards. In spite of these efforts, the toy industry has not evolved the way it should have. One of the reasons attributable for the dismal growth of this industry could be the classification issue under the Goods and Services Tax regime, with multiple rates and ambiguous wordings.

It may be noted that an incorrect classification can result in grave consequences to the business and its reputation. This article analyses the controversial issue relating to the classification of *'different kinds of toys products'* under GST.

Relevant entries for classification

The Central Government had, in exercise of its powers under Section 9 of the Central Good and Services Tax Act, 2017, issued Notification No. 1/2017-CT(Rate), dated 28 June 2017 ('**Rate Notification**') which prescribes the rate of tax (Schedules) for specified goods.

The relevant entries for classification of various kinds of toys are as under:

Schedule II – 12%		
S. No./Entry No.	**Chapter/ Heading/ Sub-Heading/ Tariff Item**	**Description**
228	9503	Toys like tricycles, scooters, pedal cars etc. (including parts and accessories thereof) [other than electronic toys]
229	9504	Playing cards, chess board, carom board and other board games, like ludo, etc. [other than Video game consoles and Machines]

Schedule III – 18%		
S. No./Entry No.	**Chapter/ Heading/ Sub-Heading/ Tariff Item**	**Description**
440	9503	Electronic Toys like tricycles, scooters, pedal cars etc. (including parts and accessories thereof)
440A	9504	Video game consoles and machines, articles of funfair, table or parlour games, including

Schedule III – 18%		
S. No./Entry No.	**Chapter/ Heading/ Sub-Heading/ Tariff Item**	**Description**
		pintables, billiards, special tables for casino games and automatic bowling alley equipment [other than playing cards, ganjifa card, chess board, carom board and other board games of 9504 90 90 like ludo, etc.]
453	Any Chapter	Goods which are not specified in Schedule I, II, IV, V or VI

While the Rate Notification under GST provides the rate of tax on goods and services, one has to read the same along with the First Schedule (including the Section and Chapter Notes and General Explanatory Notes) of the Customs Tariff Act, 1975 ('**CTA**') in order to interpret the Rate Notification for purposes of levy of GST.[1] The relevant Chapter and Tariff Items in the present case are as follows:

Chapter 95: Toys, games and sports requisites; parts and accessories thereof[2]	
Tariff Item	**Description**
9503	Tricycles, scooters, pedal cars and similar wheeled toys; dolls' carriages; dolls; other toys; reduced-size ('scale') models and similar recreational models, working or not; puzzles of all kinds.

Chapter 95: Toys, games and sports requisites; parts and accessories thereof[2]	
Tariff Item	**Description**
9504	Video game consoles and machines, articles of funfair, table or parlour games, including pintables, billiards, special tables for casino games and automatic bowling alley equipment.

On a plain reading of the above entries, it is clear that the tariff headings under Customs Tariff Act are broadly divided into two categories under GST: **electronic products and non-electronic products**. While electronic toys and games attract higher rate of tax i.e. 18% (Schedule III), non-electronic toys attract lower rate of tax i.e. 12% (Schedule II). The intention of the legislature for implementing the same is probably that non-electronic toy products like toy cars, chess, cards etc. are games of common use which are important for child's development and therefore, should be affordable to the masses. On the other hand, electronic toys like video games, casino games, etc. are luxury items, purchased by the more affluent section of the society and therefore attract the higher rate of GST @18%.

However, let us delve deeper to analyse whether the classification is really this simple.

GST rate notification v. Customs Tariff Act

It is pertinent to note that the GST rates under the Rate Notification are specified on the basis of tariff headings given under the Customs Tariff Act.

Under Customs Tariff Act, Heading 9503 includes *tricycles, scooters, pedal cars and similar wheeled toys, dolls' carriages, dolls, other toys, puzzles of all kinds etc*. In order to understand the real scope and meaning of the entry, one must refer to the relevant entries of

[1] Explanation to the Rate Notification No. 1/2017-Central Tax (Rate) dated 28 June 2017.
[2] Customs Tariff Act, 1975, Chapter 95.

Harmonized System of Nomenclature ('**HSN**') Explanatory Note on which the Customs Tariff Act is based.

The HSN Explanatory Notes provides a long illustrative list of what kind of toys can come under the term "*other toys*". It includes toy pistols and guns, constructional toys, toys representing animals, toy clocks, educational toys, skipping ropes, toy musical instruments, dolls' houses, etc. In short, it includes various kinds of toys which are not included specifically under any other heading of Chapter 95. Hence, we can say that the scope of the Heading 9503 under the Customs Tariff is quite wide.

Sl. No 228 of Schedule-II of the Rate Notification covers "*Toys like tricycles, scooters, pedal cars etc. (including parts and accessories thereof) [other than electronic toys]*". A question that arises here is whether the toys like guns, skipping ropes, musical toys and the toys which fall under the scope of *"other toys*" in the HSN explanatory note can be classified under this entry. The use of word "*like"* and *"etc"* in the said entry creates ambiguity about the actual scope of the entry. In the regard, the department might contend that the use of the words "*like*" and "*etc"* in the above Sl. No. has ***restricted*** the scope only to those goods which are in nature of/or similar to "*tricycles, scooters, pedal cars, etc*." . Further, in the absence of any specific entry covering these products in question, the Department may classify the said products under the residuary entry i.e. Sl. No. 453 of Schedule-III on which GST is applicable @18%.

On the other hand, an assessee can argue that the use of word "*etc*" in Sl. No. 228 & Sl. No. 440 would extend the coverage to also include "*other toys*" that are not in nature of / similar to "*tricycles, scooters, pedal cars or similar wheeled toys"* for example, toy guns or pistols, toy representing animals, educational toys, etc. which are otherwise included in the same tariff heading of the Customs Tariff Act. In this regard, resort may also be taken to the intent of the legislature while introducing these entries.

It can be said that a pandora's box for classification of toys has been opened where there are two competing entries under the same notification. Since there is no guiding principle for classification of various toys, the difference between 12% and 18% may have a long-lasting impact on the businesses of toy manufacturers.

Conclusion

In this period of economic difficulties, it is unfortunate that there is no clarification from the Department on the classification of the toy products. The Government instead of proactively clarifying its stand on the issue, chose to wait, and when the taxpayers make supplies discharging tax at 12%, ask them to discharge their liability at the rate of 18%. The issue needs to be addressed at the earliest if our country wants to be a global toy production hub. Adequate clarity from the department will go a long way in adoption of proper principles, ensure appropriate classification and finally the GST rate. The toy story can end well only if these problems are addressed and the government manages to bring the industry out of the woods.

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Goods and Services Tax (GST)

Notifications and Circulars

GSTR-1 cannot be filed if GSTR-3B not filed for preceding period: The Central Board of Indirect Taxes and Customs ('**CBIC**') has revised the Central Goods and Services Tax Rules, 2017 ('**CGST Rules, 2017**') to prohibit the furnishing of the details of outward supplies of goods or services or both under Section 37 of the Central Goods and Services Tax Act, 2017, in Form GSTR-1 if the registered person has not furnished the return in Form GSTR-3B for preceding two months. In case of assesses filing quarterly returns, non-furnishing of GSTR-3B for preceding quarter would lead to prohibition in filing GSTR-1. Further, GSTR-1 cannot be furnished by the registered persons covered under the new Rule 86B, who have not furnished GSTR-3B for preceding tax period. Notification No. 1/2021-Central Tax, dated 1 January 2021 inserts sub-rule (6) in Rule 59 of the CGST Rules, 2017, for this purpose.

Ratio decidendi

Detention of exempted goods during inter-State transportation – No liability under State GST Act: The Kerala High Court has rejected the contention of the Revenue department that once the detention of exempted goods (in the course of inter-State transportation) is held justified, it is incumbent upon the assessee to pay not only the amount of INR 25,000 in terms of Section 129(1)(b) of the CGST Act, 2017 but also a similar amount under Section 129(1)(b) of the SGST Act. The Court was of the view that the 4th proviso to Section 20 of the IGST Act, 2017 would not be applicable in the present case and that the word 'amount' under Section 129 must be seen as referring to a civil liability. It noted that in such situation there is no liability to pay tax under the IGST Act that includes components of tax under the CGST and SGST Acts as also no penalty based on tax liability is attracted under both the said enactments. [*State of Kerala* v. *Mohammed Shereef* – 2020 VIL 638 KER]

No confiscation without opportunity of being heard: In a case involving confiscation of goods and the conveyance, the Madras High Court has quashed the confiscation of conveyance as no notice affording opportunity of hearing was served to the owner of conveyance. The Court noted that the notice was addressed only to the hirer (owner of goods) and not to the transporter (owner of conveyance) even though the order involved confiscation of goods as well as the conveyance. It also observed that as per Section 130(4) of CGST Act, no order of confiscation of goods or conveyance or for imposition of penalty would be issued without giving the person an opportunity of being heard. [*Lakshay Logistics* v. *State of Gujarat* – 2021 VIL 16 GUJ]

***Mens rea* an essential ingredient for confiscation:** The Kerala High Court has held that Section 130 of the CGST Act, 2017 can be invoked only when ingredient of *mens rea* has been established. It also reiterated that Sections 129 and 130 are independent provisions and though detention of goods or vehicle under Section 129 could entail proceeding under Section 130, it is not always necessary that where Section 130 is invoked, it should be preceded by detention of goods or vehicle. The goods and the vehicle, during transit through State of Kerala, were detained because the vehicle was not on the normal route as per the

invoice and the e-way bill. The Court quashed the confiscation order observing that the IGST tax liability was declared by the petitioner in the tax invoice and no material was brought to point out any intention to evade payment of tax. [*Gokul P.G.* v. *The State of Kerala* – 2020 VIL 665 KER]

Non-maintenance of records at place of business when not leads to confiscation: Observing that there was no finding that any supply was made with an intent to evade payment of tax, and no ingredients as required for confiscation under Section 130 existed, the Allahabad High Court has set aside the confiscation of goods, terming it as wholly arbitrary and illegal. The Anti- evasion department had visited the factory premises and goods were confiscated and penalty was levied as no records of GST were maintained at the principal place of business which is a requirement as per Section 35(1) of CGST Act read with Rules 56 and 57 of CGST Rules, 2017. The Court also noted that though as per Section 35(6) of CGST Act, the unaccounted goods are deemed to be supplied, the determination and quantification of tax must be done as per Section 73 or 74 which require issuance of prior show cause notice. It noted that no such notice was issued in the instant case. [*Metenere Ltd.* v. *Union of India* – 2020 VIL 641 ALH]

Refund of unutilized ITC – Assessee should not suffer because of laches of the department: The Jharkhand High Court has held that an assessee cannot be made to suffer on account of laches on the part of the department in not communicating the resolution comment to the assessee. Due to technical glitches, the petitioner could not upload the application for refund of unutilized input tax credit in respect of compensation cess for the period 2017-2018. Hence, a complaint was raised to the help desk of GSTN portal for which no response was received even after generation of a ticket number. Further, refund application for the period 2018-2019 could not be filed as the RFD-01 for the period 2017-2018 was not filed. Observing that the assessee was denied the opportunity to adhere to the directions contained in the resolution comment as the same was never communicated, the Court directed the department either to open GST portal or to accept manual application for refund for the period 2017-2018 and 2018-2019. [*Atibir Industries Co. Ltd.* v. *Union of India & Others* – 2021 VIL 18 JHR]

Notice pay recovered from employees is consideration for 'tolerating the act': The Gujarat AAR has held that notice pay can be regarded as a consideration to the employer for 'tolerating the act' of the employee to not serve the notice period, which was the employee's agreed contractual obligation. It noted that notice pay is a sum mutually agreed between the employer and the employee for the breach of contract. The AAR was hence of the view that transaction of the employer agreeing to the obligation of tolerating an act (quitting without any advance notice) on the part of the employee, for payment of a sum (notice pay), will be covered under Clause 5(e) to Schedule II to the CGST Act 2017, as a declared service. Court and Tribunal decisions, holding to the contrary, were distinguished by the AAR observing that the decisions were related to the service tax regime and would not be applicable under GST. [In RE: *Amneal Pharmaceuticals Pvt. Ltd.* – 2021 VIL 34 AAR]

Consultancy service by foreign company to Indian company when not import of service: In a case involving provision of consultancy services by the Japan based company (applicant) to the Indian company where the applicant had to maintain suitable structures in terms of human and technical resources at the project site in India, the Odisha AAR has held that the applicant

would be liable to take registration and pay GST. The Authority observed that the applicant supplied the service at the site from fixed establishment as defined under Section 2(7) of the IGST Act and hence, by the virtue of Section 2(15)(c) of the IGST Act, the location of the supplier i.e. applicant should be in India. The supply was held as not an import of services and hence outside the preview of reverse charge mechanism. [In RE: *Tokyo Electric Power Company, Holding Inc.* – 2020 VIL 329 AAR]

Refund of IGST under Rule 96(10) – Scope of 'availing' benefit of Notification No. 79/2017-Cus: The Gujarat AAR has held that availing exemption under Notification No. 79/2017-Cus. for additional customs duty under Section 3(1), (3) and (5) of the Customs Tariff Act, 1975 and anti-dumping duty under Section 9A, but opting to pay IGST on imports under Advance Authorization, would amount to availing the benefit of exemption under said notification. The Authority was hence of the view that the applicant would not be eligible to claim refund under Rule 96(10) of the CGST Rules, 2017. [In RE: *Balkrishna Industries* – 2021 VIL 33 AAR]

Refining and testing of gold – Job work and mixed supply: Relying upon definition of 'job work', the Gujarat AAR has held that refining, testing and conversion services provided by the applicant on the goods (old gold/ jewellery) belonging to another person who is a registered person, would be covered as job work services. However, it held that if the services are provided to unregistered persons, the same would not be covered under the scope of job work. The authority also held that if the services of refining and testing are provided together, same would qualify as mixed supply and tax liability would be determined accordingly. Further, the authority, in view of Sl. No. 26 of Notification No. 11/2017-CT (Rate), ruled that service of refining and conversion of gold jewellery and coins/biscuits would merit classification under SAC 9988 and be taxable @ 5% in case of registered person and @18% in case of un-registered person. It also held that as per Sl. No. 21 of the said notification, service of testing of purity of gold would merit classification under SAC 9983 and be taxable @ 18%. [In RE: *Uday Laxman Jadhav* – 2021 TIOL 09 AAR GST]

No supply in case of high sea sales when goods do not enter India: In a case involving high sea sales where the transaction involved supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering India, the Gujarat AAR has held that GST would not be leviable with effect from 1 February 2019. The Authority relied upon Sl. No. 7 in the Schedule-III to the CGST Act, 2017 as effective from 1 February 2019, treating such supply neither as a supply of goods nor a supply of services. It noted that since the supply of goods was taking place from Poland directly to Bangladesh without the said goods entering into India, the transaction was similar to that mentioned in Entry No.7 of Schedule-III. The transaction involved generation of one invoice by Poland company to the applicant and generation of another invoice by the applicant on the recipient company located in Bangladesh. [In RE: *SPX Flow Technology (India) Pvt. Ltd.* – 2021 TIOL 08 AAR GST]

ITC taken on inputs and input services used in manufacture of finished goods destroyed by fire, need to be reversed: The Gujarat AAR has held that input tax credit ('ITC') on inputs and input services used in manufacture of finished goods destroyed by fire is required to be reversed. The authority was of the view that since the inputs and capital goods were used in the manufacture of finished goods that have been destroyed, the same cannot be said to have been used in the course or furtherance of business. Accordingly, ITC was held as required to be

reversed by the virtue of Section 17(5)(h) of the CGST Act, 2017. [In RE: *Jay Chemical Industries Ltd.* – 2021 TIOL 07 AAR GST]

Forfeiture of advance money due to non-fulfilment of conditions in agreement for sale of land is not sale of land: In a case involving receipt of money, by way of forfeiture of advance money, on account of non-fulfilment of conditions as stipulated in an agreement for sale of land, the Gujarat AAR has held that the said transaction cannot be treated as sale of land as enumerated in Schedule III of CGST Act, 2017. Further, the Authority ruled that as consideration was received on account of breach of condition of agreement, the same would get covered under clause 5(e) of Schedule II of CGST Act, 2017 which provides that, 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' and should be treated as supply of service. [In RE: *Fastrack Deal Comm Pvt. Ltd*. – 2021 TIOL 30 AAR GST]

Customs

Notifications and Circulars

RoDTEP – Benefit available to all goods with effect from 1 January 2021: The Central Government has extended the benefit of the Scheme for Remission of Duties and Taxes on Exported Products ('**RoDTEP**') to all export goods with effect from 1 January 2021. Though the rates have not been notified yet, the Ministry of Finance Press Release dated 31 December 2020 states that the notified rates, irrespective of the date of notification, shall apply with effect from 1 January, 2021 to all eligible exports of goods. The scheme would refund to exporters the embedded Central, State and local duties/taxes that were so far not being rebated/refunded. As per ICEGATE Advisory dated 1 January 2021, the exporters have to make a claim for RoDTEP in the shipping bill by making a declaration. The Ministry of Commerce (SEZ Division) has in the meanwhile issued a letter dated 15 January 2021 to allow SEZ units to file shipping bills claiming benefit of RoDTEP after examination by the Customs on the pattern of MEIS.

Coal imports to be mandatorily prior-registered: The Ministry of Commerce and Industry has *vide* Notification No. 49/2015-20, dated 22 December 2020 amended the import policy of coal falling under the Heading 2701 of the ITC (HS) 2017, from 'Free' to "Free subject to compulsory registration under Coal Import Monitoring System ('CIMS')''. A new Policy Condition No. 7 has been inserted under Chapter 27 of the ITC(HS) 2017 to prescribe the procedures and conditions. Effective from 1 February 2021, the CIMS will require importers to submit advance information in an online system and obtain an automatic registration number, after paying prescribed registration fees. The importer can apply for registration not earlier than 60th day and not later that 15th day before the expected date of arrival of import consignment. The Automatic Registration Number shall remain

valid for a period of 75 days. Importer shall have to enter the Registration Number and expiry date of registration in the Bill of Entry to enable Customs for clearance of consignment. The facility of online registration is available with effect from 31 December 2020. It may be noted that Steel Import Monitoring System ('SIMS'), introduced on similar lines to collect the data relating to import of steel, is also effective at present.

No Bank Guarantee by carriers for carriage of EXIM cargo for transhipment through Sri Lanka and Bangladesh: The CBIC has decided to extend the exemption from requirement of furnishing of Bank Guarantee by the carriers for carriage of EXIM cargo for transhipment through foreign territories of Sri Lanka and Bangladesh. This relaxation will be applicable if the carrier fulfils the requirement of waiver of Bank Guarantee as provided by Circular No. 45/2005-Cus., dated 24 November 2005. Circular No. 1/2021-Cus., dated 14 January 2021 has been issued for the purpose.

Courier import and export of COVID-19 vaccines – Regulations revised: To facilitate import and export of vaccines in relation to COVID-19, through courier, at locations where the Express Cargo Clearance System (ECCS) is operational, CBIC has issued the Courier Imports and Exports (Electronic Declaration and Processing) Amendment Regulations, 2020. These regulations amend the Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010 to provide for import and export of such vaccines without any value limitation. Further, for export of durable containers (including accessories thereof) in which vaccines will be imported, Regulation 6(3) and declaration in Form H have been suitably amended. As per CBIC Circular No. 56/2020-Cus., dated 30 December 2020, the clarifications contained in Circular No. 51/2020-Cus., dated 20 November 2020 would apply for temporary importation and re-export of durable containers including accessories imported in relation to COVID-19 vaccine through courier. Notification No. 115/2020-Customs (N.T.), dated 30 December 2020 has been issued for the purpose.

Posting of staff at Customs areas and collection of Cost Recovery Charges – Guidelines: The CBIC has issued comprehensive guidelines for posting of officers and staff on cost recovery basis and grant of exemption from payment of Cost Recovery Charges. Circular No. 2/2021-Cus., dated 19 January 2021 covers issues relating to the applicability, staffing norms, creation of posts on basis of cost recovery charges, payment of cost recovery charges, exemption from such charges, withdrawal of exemption, etc.

Modifying PAN based IEC – Procedure introduced: Paras 2.14 (d) and (e) have been inserted under Chapter 2 of the Handbook of Procedures Vol.1, providing for modification of IEC. According to the new provisions, in case of any change in the constitution of PAN based IEC due to merger, acquisition, liquidation, inheritance etc., where the PAN of new entity is different from the earlier one, IEC can be availed against PAN of new entity. All previous IECs can also be linked to the PAN and/or IEC of the new entity. Also, application for linking the obligations under the previous IEC can be submitted online to the jurisdictional RA of the new entity with supporting document and RA can sanction the same after due scrutiny. In case of such approval, previous IEC will be treated as surrendered. Public Notice No. 34/2015-20, dated 24 December 2020 has been issued for the purpose.

Online e-PRC system for seeking policy/procedure relaxation: The DGFT has introduced a new online e-PRC system for seeking policy/procedure relaxation in terms of Para 2.8 of the Foreign Trade Policy. As per Trade Notice No. 38/2020-21, dated 15 January 2021, all applications for policy or procedure relaxations are to be mandatorily submitted online with effect from 25 January 2021, through the exporter's dashboard on the DGFT website. The Trade Notice also states that any PRC submission, communication, clarification, correction as well as approval on submitted applications would be electronic.

Paperless processing – Additional PGAs for uploading COO and membership certificate on eSANCHIT: CBIC has prescribed two more Participating Government Agencies ('**PGAs**') which will be required to digitally upload Licenses/Permits/Certificates/Other Authorizations ('**LPCOs**') on eSANCHIT application. As per Circular No. 57/2020-Cus., dated 30 December 2020, Trade Promotion Council of India and Export Promotion Council for EOUs & SEZs will be required to upload directly on the eSANCHIT application, signed Certificate of Origin and Membership certificate, respectively, with effect from 15 January 2021. The Circular also states that LPCOs issued on a date prior to cut-off date may also be uploaded by the PGAs on eSANCHIT. The total number of PGAs is not 53.

Odoriferous preparations not operating by burning – Import conditions relaxed: Import of odoriferous preparations such as room fresheners, car fresheners that do not operate by burning and covered under HS Code 33074900 is now 'free' (earlier restricted). DGFT Notification No. 54/2015-2020, dated 1 January 2021 issued for the purpose amends Chapter 33 of Schedule-I (Import Policy) to ITC (HS).

Ratio decidendi

Exemption – Words 'for use' mean 'intended for use' – No proof of end use required: The Karnataka High Court has held that the term 'for use' used in an exemption notification should be construed as 'intended for use'. The Court was of the view that no proof of end use is required for claiming benefit of such exemption where the notification does not specifically stipulate such condition. It noted that wherever the benefit is granted subject to condition of actual use, the Notification No. 21/2002-Cus. used the words 'only, exclusively or entirely'. Ministry of Finance Circular dated 11 January 2005 and the Supreme Court's decision in the case of *Dalmia Dadri Cement Ltd.* [2004 (178) ELT 13 (SC)] were relied upon. [*Ratnagiri Impex Pvt. Ltd.* v. *Commissioner* – 2021 (1) TMI 102 - Karnataka High Court]

Penalty not imposable in the absence of mention of specific clause of Section 112 and *mens rea*: In a case involving imposition of penalty under Section 112 of the Customs Act, 1962, the CESTAT Kolkata has held that Revenue department must provide specific finding towards satisfaction of *mens rea*. It was additionally held that the department must also satisfy the test of balance of convenience for imposition of penalty. The Tribunal observed that the penalty was imposed mechanically in the case without mentioning any particular clause of Section 112 and without referring to any of the ingredient of any clause of said Section. Setting aside the penalty, it also noted that the importer had not role in the mis-declaration. [*Sanjay Kumar Agarwal* v. *Commissioner* – 2021 VIL 13 CESTAT KOL CU]

Valuation – No need to apply Customs Valuation Rules, once importer accepts enhanced value: The CESTAT Delhi has held that once the importer accepts the enhanced value and voluntarily relinquishes his rights under Sections 124 and 17(5) of the Customs Act, 1962, the assessing officer need not pass a speaking order as per Section 17(5). Further, it was held that once the importer accepts the enhanced value, it is not necessary for the assessing authority to undertake the exercise of determining the value of declared goods as per Rules 4 to 9 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 2007. [*Commissioner* v. *Hanuman Prasad & Sons* – 2020 VIL 520 CESTAT DEL CU]

SAD refund – Limitation period of one year not applicable: Following the decision of the Delhi High Court in the case of *Sony India Ltd.* v. *Commissioner* [2014 (304) ELT 660], the CESTAT Delhi has held that merely because Section 27 of the Customs Act, 1962 provides for a period of limitation for filing refund claim, the same would not be applicable for claiming refund under Notification No. 102/2007-Cus. The Tribunal observed that the Bombay High Court in its decision in the case of *CMS Infosystems Ltd.* v. *Union of India* [2017 (349) ELT 236] though disagreed with the Delhi High Court decision, it did not distinguish various findings of the Delhi High Court including that the right to claim refund in terms of the notification accrues to the importer only when the sale takes place. [*Commissioner* v. *S.R. Traders* – 2020 VIL 550 CESTAT Del CU]

DEEC scheme – Exemption not deniable even if imported inputs written off: The Karnataka High Court has held that the word 'any manner' in Notification No. 30/97-Cus. cannot include within its ambit written off duty free imported material in the books specially when the same was in the custody of the importer itself. The dispute involved writing off the inputs imported under the said notification relating to Duty Exemption Entitlement Certificate scheme. The Court noted that the importer had fulfilled the export obligation but was not able to utilize some of the components imported under the scheme as had closed its particular product division. Further, noting that provisions of the Income Tax Act, 1961 permit the assessee to write off the unused assets, it held that clause (vii) of the said notification (stating that *exempt materials shall not be disposed of or utilized in any manner except for utilization in discharge of export obligation*…) must be read in the context of the legal provisions and cannot be read in isolation. [*Commissioner* v. *Motorola India Ltd.* – 2021 TIOL 111 HC KAR CUS]

Non-possession of BIS certificate will not make goods 'prohibited': In a case involving import of skimmed milk under DFIA, where the importer did not have the required BIS certificate, the CESTAT Mumbai has set aside the absolute confiscation of the goods. The Tribunal held that non-possession of BIS certificate in itself does not make the goods 'prohibited goods'. It also noted that the goods in issue were not prohibited goods under the Customs Act, 1962 or under the provisions of Foreign Trade Policy or under any other law and that the assessee had complied with the mandatory food safety standard under the Food Safety and Standards Act, 2006. [*Global Exim* v. *Commissioner* – 2021 TIOL 31 CESTAT MUM]

Central Excise, Service Tax and VAT

Ratio decidendi

Sale in course of import – High sea sales – Effect of filing of Bills of Entry by seller: In a case where the assessee-seller had contended that the goods were transferred on high seas by endorsing the bills of lading in favour of the end-buyers but, cleared the goods from the customs after filing the bills of entry and thereafter raised debit notes showing sales to the end-buyers, the Supreme Court has held that the sale to end-buyers was not 'in the course of the import'. Holding that the transaction would not qualify for exemption under Section 5(2) of the Central Sales Tax Act, the Apex Court rejected the plea that filing of bill of entry and assessment to customs duty in accordance with the Customs Act are not the factors determinative of the ownership of goods. The assessee had pleaded that the importer could be the owner or even any other person and merely because the appellant filed the bills of entry, the legal consequences of transfer of bill of lading when the goods were on high seas cannot be ignored. The Court however noted that the name of the end-buyer was not mentioned in the Import General Manifest. [*Vellanki Frame Works* v. *Commercial Tax Officer* – 2021 TIOL 12 SC VAT]

Recovery of compensation/liquidated damages when not consideration for service: In a case involving charging of compensation/penalty from the buyers on short-lifted/un-lifted quantity and non-compliance of terms and conditions, and for liquidated damages, the CESTAT Delhi has set aside the demand of service tax under Section 66E(e) of the Finance Act, 1994. It rejected the contention of the Revenue department that the assessee had agreed to the obligation to refrain from an act or to tolerate the non-performance of the terms of the contract by the other party and was thus liable to service tax from July 2012 to 2016. Holding that there is marked distinction between 'conditions to a contract' and 'considerations for the contract', the Tribunal noted that requirement to fulfil certain contractual conditions not necessarily mean that it would form part of the value of taxable services provided. Further, observing that the intention of the parties was not for flouting the terms of the agreement so that the penal clauses get attracted, it held that recovery of liquidated damages/penalty cannot be said to be towards any service *per se*. [*South Eastern Coalfields Ltd.* v. *Commissioner* – Final Order No. 51651/2020, dated 20 December 2020, CESTAT Delhi]

Sabka Vishwas (LDR) Scheme – Interest for delayed deposit of tax along with returns filed belatedly not covered: The Allahabad High Court has upheld the Order of the Designated Committee rejecting the declaration filed under Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 in a case where the assessee-petitioner had belatedly deposited service tax along with returns and therefore was liable to interest, for which declaration under said scheme was filed. Petitioner's reliance on clauses (c), (d) and (e) of Section 123 of the Finance (No.2) Act, 2019 covering the scheme, was rejected, holding the provisions as not applicable in the case. The Court observed that the scheme, which was a complete code in itself, was for recovery of duty/indirect tax to unlock the frozen assets and to recover the tax arrears. [*Beenu Gupta* v. *Union of India* – 2021 TIOL 131 HC ALL ST]

Sabka Vishwas (LDR) Scheme – Declaration cannot be rejected after issuing Form SVLDRS-3: Observing that the Sabka Vishwas (Legacy Dispute Resolution) Scheme nowhere provides for rejection of the declaration that has already been accepted, the Madras High Court has held that the Designated Committee cannot reject the declaration after issuing Form SVLDRS-3. It held that designated authority can revisit the issue after issuance of Form SVLDRS-3 only in the circumstances set out in Section 128 of the Finance (No.2) Act, 2019 read with Rule 6(6) of the Sabka Vishwas (Legacy Dispute Resolution) Scheme Rules, 2019. It may be noted that the Court however clarified that the question of eligibility can be taken up if the department files a writ petition either for forbearing the designated committee from issuing the discharge certificate or for quashing the discharge certificate. [*GT Holidays Private Limited* v. *Designated Committee* – 2020 VIL 668 MAD ST]

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