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TAX amicus

10th Anniversary issue

An e-newsletter from
Lakshmikumaran & Sridharan, India

July 2021 / Issue – 121

July 2021 issue of Tax Amicus calls for celebrations, as this is our **10th Anniversary issue**. This monthly newsletter was introduced with a purpose to deliver regular insights to our readers on the latest developments in Tax – both indirect and direct taxes, initially. Through Tax Amicus, we at Lakshmikumaran and Sridharan Attorneys presently share our knowledge and experience in a broad array of indirect tax laws ranging from Goods and Services Tax (GST), Customs and legacy laws like Central Excise, Service Tax, Value Added Tax (VAT), Entry Tax, Central Sales Tax, etc. It brings me great pleasure to commemorate the 10-year journey of this knowledge base. I take this opportunity to thank our professionals whose regular contributions have made this achievement possible. Most importantly, I am grateful for the pleasure of serving our growing number of readers and thank you, for your support and patronage. With a decade gone by, I look to the one ahead, with even more zeal and enthusiasm, to continue this unwavering commitment to knowledge sharing.

V. Lakshmikumaran

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July
2021

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Shifting the burden of indirect taxes: A contract conundrum

By **Sahana Rajkumar and Derlene Joshna**

Taxes are commonly categorized as 'direct taxes' and 'indirect taxes' due to the economic theory that indirect taxes are ultimately borne by the consumer despite being charged on the supplier. Simply put, the burden of an indirect tax can be shifted onto another and from this facet, the nomenclature 'indirect tax' is derived.

It is well recognized that assessees can contract to shift their liability to bear the burden of an indirect tax.[1] In *Mahindra Mills Ltd. v. UOI*[2], it was observed that only an unwise business man would suffer the burden of indirect taxes. Therefore, in commercial transactions, it is common to negotiate and record specific terms regarding which party would bear the burden of the taxes in the agreement(s) governing the transaction.

The Supreme Court has held that indirect taxes are 'indirect' only in economic theory and not in 'constitutional law'.[3] This essentially means that if a person chooses to not contractually shift the burden of tax, the same will not alter the nature of the tax. The levy would continue to persist and the same would be recoverable from the person liable to pay the tax. For instance, a service provider may choose to contractually agree to bear the burden of service tax himself without passing on the same to the service recipient. Such a contract clause would not render the tax any less a service tax.

Thus, a key takeaway is that the terms of a contract play a vital role in affixing the ultimate liability to bear the burden of taxes. With the introduction of the Goods and Service Tax (GST) regime, several contractual disputes have risen due to ambiguities in tax clauses on which party would be liable to bear the new tax. While the nature of disputes vary based on the contractual arrangements, this Article will analyze few select situations for highlighting the importance of drafting contracts with a proper tax clause.

Tax clause dealing only with the erstwhile levy

A very common scenario is when the tax clause deals only with the erstwhile levy. In these cases, the burden of erstwhile taxes such as service tax/excise duty/VAT is either agreed to be passed on to the recipient or borne by the supplier. The tax clause would make no mention of future levies and thus, would be silent on which party would bear the burden of GST.

In this context, the question arises as to whether a party has agreed to bear GST simply because such party had agreed to bear the burden of erstwhile levies?

To understand this scenario better, the following clause can be taken as an example:

> *"The above prices are inclusive of excise duty at the rate prevailing on the date of your quotations. If the rate of Excise Duty has since then decreased, you shall charge Excise Duty at the rate prevailing at the time of supply and decrease the price*

[1] *Rashtriya Ishpat Nigam Ltd.* v. *Dewan Chand Ram Saran*, 2012 (4) TMI 457 - Supreme Court.
[2] 1991 (12) TMI 71 – Gujarat High Court.
[3] *Union of India* v. *Bengal Shrachi,* 2017 (11) TMI 444 – Supreme Court; *British India Corporation* v. *Collector of Central Excise*, 1962 (8) TMI 2 - Supreme Court.

proportionally and inform the office of such decrease if any with detail calculations."

The above clause was interpreted in *Bipson Surgical*[4] and it was held that the liability to bear an increased rate of tax was always on the supplier and merely because VAT and excise duty had been substituted with GST, the supplier cannot claim price revision. It was observed that in the absence of a specific clause which permitted price revision due to increase in rate of tax/introduction of a new tax such as GST, granting relief by way of directing price revision would tantamount to varying the terms and conditions of the contract.

From an alternate standpoint, if a contract allows for recovery of service tax/VAT from the recipient, however, is silent on whether GST can be recovered, one could argue that GST being an indirect tax and a replacement to the existing tax on goods or services, the supplier can recover the tax from the recipient. A similar view in the context of service tax was enunciated in the decision of *Meattles Pvt. Ltd.* v. *HDFC Bank Limited*.[5]

The answer to the question of whether a party has agreed to bear GST since it has agreed to bear the erstwhile levies would depend on the holistic interpretation of the contract between the parties. If the contract has a change in laws clause which allocates the risk, costs, etc., associated with the introduction of a new levy, the parties would be bound by those terms. If the contract is silent, litigation can be expected as varied views are possible.

Vague tax clauses

In some scenarios, the tax clause would be worded in a wide manner such that the burden of all the taxes would be agreed to be borne by a party. The question which arises in these contexts is whether a new levy such as GST has been agreed to be borne by such party.

Example 1

"The Licensee/Licensees shall also duly pay during the continuance of this license all cesses, rates, water charges, taxes and other charges or taxes in respect of the said premises"

The above tax clause was interpreted by the Madras High Court in *T. Karthick Raja* v. *Southern Railway* [2021-VIL-343-MAD]. The Court was of the view that through the tax clause, the licensee(s) have admitted to bear the liability of all taxes including GST in respect of the licensed premises.

Example 2

"11.2. Payment of taxes/ dues - The Service Provider will be liable for payment of all taxes/duties service tax and other liabilities in respect of the business".

In *IRCTC* v. *Deepak & Co.*[6], the Delhi High Court interpreted the above clause and held that it does not throw any light on the liability of GST. Therefore, it was held that the service provider would not be liable to bear GST and the same would be payable by IRCTC.

The different views taken in the examples above is due to the Railway Board circulars which clarified the GST implications under the contracts with the Railways. In *IRCTC* v. *Deepak & Co.*, a Railway Board Commercial Circular had directed that GST would have to be reimbursed to the service provider on submission of proof of

[4] *Bipson Surgical (India) Pvt. Ltd.* v. *State of Gujarat,* 2018 (12) TMI 69 - Gujarat High Court.

[5] 2012 (10) TMI 685 - Delhi High Court**. Affirmed in** *Satya Developers & Anr*. v. *Pearey Lal Bhawan & Anr.,* 2015 (10) TMI 2667 - Delhi High Court. This view was also taken in other decisions such as *Central Warehousing Corporation* v. *Aqdas Maritime Agency Pvt. Ltd.,* 2019 (6) TMI 1148 - Bombay High Court and *Bhagwati Security Services (Regd.)* v. *Union of India*, 2013 (11) TMI 649 - Allahabad High Court.

[6] 2021 (7) TMI 235 - Delhi High Court.

deposit, indicating that GST was in addition to the production charges. This fact was crucial to arrive at the conclusion that GST is over and above the production charges agreed to be paid to the service provider.

It is clear from the above examples that even vague and all-encompassing tax clauses may be interpreted to not include a future levy if other terms governing the contract provide a different intention.

No tax clause in the contract

A rare but a possible scenario is when the contract is completely silent on the tax burden. In such a case, if the Courts were to decide on which party is required to bear the burden of indirect taxes, what factors would influence the decision?

There are many factors in GST law which both support and reject the view that the burden of GST would be passed on by the supplier to the recipient. For example, the statutory presumption that GST has been passed on in the context of refund provisions and the anti-profiteering mandate, support the view that GST is usually passed on. On the other hand, recipient of a supply is not recognized as a person from whom recovery of tax can be made under Section 79 of the CGST Act. The relevance of these factors under GST law is debatable.

Courts may also consider parole evidence (i.e., pre-contractual negotiations, emails, documents, etc.) to ascertain the intention of the parties. However, if the oral arrangements or conduct of the parties is inconsistent with the formal contract, the latter would prevail.[7] The law provides a greater scope to admit parole evidence in cases involving contracts for sale of goods.[8]

It is also relevant to note that Section 64A of the Sale of Goods Act, 1930 provides that the burden of increase or decrease of taxes on the sale or purchase of goods shall be on the buyer unless a different intention appears from the terms of the contract.

Conclusion

This Article has analyzed select situations for highlighting the importance of drafting contracts with a proper tax clause. Since tax rates under GST are as high as 28% of the value of supply, parties must pay careful attention to the terms of the contract. To conclude the present discussion, the following key points may be noted while entering into contracts.

- It is vital to have a clear understanding between the parties on who would be liable to bear taxes and other levies. The tax clause in the contract should explicitly record this understanding. It would be advisable to include a clause to factor in changes/modifications in existing taxation laws.
- Parties should not view the change of law and price variation clauses as boilerplate clauses. Parties must pay careful attention in wording these clauses based on the commercial requirements of each transaction.
- Ensure the contract and all correspondences (pre-contractual documents, purchase orders, etc.) do not have conflicting terms on tax liability. Conflicting terms may lead to a battle of forms situation which will present further interpretative challenges.

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[7] Section 92, Indian Evidence Act, 1872.
[8] Section 19(2), Sale of Goods Act, 1930.

Goods and Services Tax (GST)

Notifications and Circulars

Covid – Extension of limitation, by the Supreme Court, of various time lines under GST clarified: Clarifying the scope of the Supreme Court's Order dated 27 April 2021, extending limitations in light of the circumstances prevalent due to Covid, the Central Board of Indirect Taxes and Customs ('**CBIC**') has stated that proceedings that need to be initiated or compliances that need to be done by the taxpayers would continue to be governed only by the statutory mechanism and time limit provided/ extensions granted under the statute itself. The Board in this regard relied on the legal opinion that the Supreme Court had granted extensions only with reference to judicial and quasi-judicial proceedings in the nature of appeals/ suits/ petitions, etc., and not to every action or proceeding under GST. As per CBIC Circular No. 157/13/2021-GST, dated 20 July 2021, issued for the purpose, the tax authorities can continue to hear and dispose-off proceedings where they are performing the functions as quasi-judicial authority, including disposal of application for refund, revocation of cancellation of registration, adjudication proceedings of demand notices, etc.

Ratio decidendi

Refund of tax paid under mistake of law – Section 54 of CGST Act is not applicable: The Division Bench of the Gujarat High Court has held that Section 54 of the CGST Act, 2017 is applicable only for claiming refund of any tax paid under the provisions of CGST Act. It noted that the tax collected by the revenue department without any authority of law cannot be considered as tax collected and therefore Section 54 shall not be applicable in such cases. According to the Court, Section 17 of the Limitation Act, 1963 is the appropriate provision for claiming refund of tax paid under 'mistake of law'. The writ was filed as refund of IGST paid on ocean freight under reverse charge mechanism in pursuant to the case of *Mohit Minerals (Pvt.) Ltd*. [2020 VIL 36 GUJ] was rejected by the department stating that claims were not filed within the statutory time limit provided under Section 54. The department was directed by the Court to process the refund. [*Comsol Energy Private Limited* v. *State of Gujarat* – 2021 VIL 477 GUJ]

ITC reversal not required under Section 17(5)(h) of CGST Act for manufacturing loss: The Madras High Court has held that manufacturing loss occurring during the process of manufacturing cannot be equated to any of the instances covered under Section 17(5)(h) of the CGST Act. It noted that the situations covered under clause (h) indicate loss of inputs that are quantifiable and involve external factors or compulsions and that a loss occasioned by consumption in the process of manufacture is one which is inherent to the process of manufacture itself. Relying on the decision of the Court in the case of *Rupa & Co. Ltd.* [2015 (324) ELT 295] relating to Cenvat credit, it held that there would be no requirement for reversal of input tax credit in such cases. [*ARS Steels & Alloy International Pvt. Ltd.* v. *The State Tax Officer & Ors.* – 2021 VIL 484 MAD]

Proceedings for cancellation of registration cannot be kept hanging even when assessee filed reply late: Observing that as per Rule 22(2A) of the CGST Rules, the Assessing Authority is required to give 30 days' time to

explain the reason why the registration ought not to be cancelled, the Rajasthan High Court has held that requiring the assessee to file reply within 7 days from the date of service of the notice itself was contrary to the statutory provisions. Further, noting that provisions of Rule 22(3) mandates an order to be passed within 30 days of receipt of the reply, the Court held that proceedings of cancellation of registration cannot be kept hanging fire on any pretext, including that assessee failed to file reply within the time allowed. The High Court observed that suspension of registration is worse than cancellation as an assessee can take legal remedies against cancellation but, the authorities/Courts would normally show reluctance in case of suspension pending inquiry. The department had issued a notice to the assessee proposing to cancel the registration and had simultaneously suspended his registration with immediate effect. [*Avon Udhyog* v. *State of Rajasthan & Ors.* – 2021 VIL 511 RAJ]

RWAs – Contributions upto INR 7500 exempt – GST payable only on contributions in excess of said amount: Observing that exemption notification must be interpreted strictly, the Madras High Court has rejected the contention of the Revenue department that in case of contributions to Resident Welfare Associations, if the contribution exceeds INR 7,500, there was an automatic disentitlement and GST must be paid on the whole value. Noting that there was no ambiguity in the language of the exemption provision and hence the Supreme Court judgment in *Dilip Kumar* was not applicable, the Court was of the view that use of word 'upto' can only be interpreted to state that any contribution in excess of the same would be liable to tax. Quashing the AAR Ruling and the CBIC Circular No. 109/28/2019-GST, dated 22 July 2019, the High Court also compared the Entry in question with other entries under central excise, service tax and GST, granting exemptions. [*Greenwood Owners Association* v. *Union of India* – Common Order dated 1 July 2021 in W.P. Nos.5518 & 1555 of 2020 and Ors., Madras High Court]

'Business' covers any trade or commerce, even if not for a pecuniary benefit: The Gujarat High Court has held that any trade or commerce whether or not for a pecuniary benefit, would be included in the term 'business' as defined under Section 2(17) of the CGST Act, 2017. The High Court upheld the AAR Ruling that a medical store run by the charitable trust would require GST registration, and that the activity of the medical store providing medicines even if supplied at a lower rate would amount to supply of goods. [*Nagri Eye Research Foundation* v. *Union of India* – 2021 VIL 534 GUJ]

Hiring v. renting – Operating buses for State Transport Undertaking when is not 'giving on hire': The Maharashtra AAR has answered in negative the question as to whether the service of operating buses by the applicant/assessee for a State Transport Undertaking would be exempt Tariff Heading 9966, i.e. '*services by way of giving on hire to a state transport undertaking, a motor vehicle meant to carry more than twelve passengers'.* The AAR noted that the State Transport Undertaking was vested with the exclusive right to use the buses owned by the assessee, while the Undertaking paid service charges to the assessee on kilometer basis for all the services such as providing driver, expenses on fuel and maintenance of the buses. Observing that activity would amount to 'renting of motor vehicle where the cost of fuel in included in the consideration', the AAR held that the service would be liable to 5% or 12% GST from 13 October 2017 vide Sl. No. 10 of Notification No. 11/2017-CT(R), depending upon availment of input tax credit. [In RE: *MP Enterprises & Associates Ltd*. – 2021 VIL 235 AAR]

Track assembly for car seats is classifiable as part of motor vehicle and not part of seat: Track Assembly which is affixed on the floor of the motor vehicle on which seats are mounted, to enable the person to adjust the seat positions, is classifiable as part and accessory of motor vehicle under Heading 8708 of the Customs Tariff and not as parts of seats for motor vehicles under Heading 9401. The Tamil Nadu AAR in this regard noted that the car seat was complete without these mechanisms and HSN 9401 99 00 covered only those items which constituted specific part of a seat like backs, bottoms, arm rests etc. Further, it noted that the product satisfied all the conditions listed in the Explanatory Notes to classify it under Heading 8708. [In RE: *Daebu Automotive Seat Indian Ltd*. – 2021 TIOL 149 AAR GST]

Arranging sales of goods for overseas suppliers is not export of service: The services by way of arranging sales of goods for various overseas manufacturers and traders is not 'export of service'. Observing that such supply of services was inextricably linked with the supply of goods made by the overseas supplier and the applicant did not hold the title of the goods at any point of time during the entire transaction and did not supply such goods on his own account, the West Bengal AAR held that activity fulfilled all the required condition to be called as 'intermediary'. The supply was held as intra-State supply as per Section 13(8) of the IGST Act, 2017. [In RE: *Teretex Trading Pvt. Ltd.* – 2021 TIOL 154 AAR GST]

EU VAT – Taxable amount of concealed transaction – Amounts paid and received to be regarded as including VAT: The Court of Justice of the European Union has held that in the determination of the taxable amount of a transaction concealed by taxable persons for VAT purposes, the amounts paid and received as reconstituted (performed in the context of an inspection of direct taxes) by the tax authority must be regarded as already including that tax. The Court was of the view that the determination of the taxable amount of a transaction between taxable persons in case of fraud cannot in itself serve to penalise taxable persons. It noted that any other interpretation would be contrary to the principle of VAT neutrality. [*CB* v. *Tribunal Económico-Administrativo Regional de Galicia* – Judgement dated 1 July 2021 in Case C-521/19, CJEU]

Customs

Notifications and Circulars

Licences/Registration under Customs Brokers Licensing Regulations and Sea Cargo Manifest and Transhipment Regulations to be valid for lifetime: The Central Board of Indirect Taxes and Customs ('**CBIC**') has abolished the renewals of licence/registration under the Customs Brokers Licensing Regulations, 2021 and the Sea Cargo Manifest and Transhipment Regulations, 2018. The licenses/registrations once issued under the

abovementioned Regulations would thus be valid for lifetime. However, provision have also be made for voluntary surrender of licence/registration and for making the licenses/registrations invalid in case the same is inactive for more than one year. Principal Commissioner or Commissioner of Customs can renew such licence/registration which has been invalidated due to inactivity. CBIC Circular No. 17/2021-Cus., dated 23 July issued for the purpose notes that the renewal exercise is an avoidable interface between the licensee and Customs officers, which is not in sync with the objective of the 'Contactless Customs' programme and is a burden on the licensee/registration holder. Necessary changes have been made in the two Regulations for this purpose by Notifications Nos. 62 and 61/2017-Cus. (N.T.), both dated 23 July 2021.

IGST and compensation cess leviable on re-import of goods sent for repairs: Re-import of goods sent abroad for repair are liable for IGST and compensation cess in addition to the Basic Customs Duty, on a value equal to the repair value, insurance and freight. Notifications Nos. 45 and 46/2017-Cus. have been amended by Notifications Nos. 36 and 37/2021-Cus., both dated 19 July 2021, in line with the recommendations of the 43rd meeting of the GST Council. Interestingly, the CBIC Circular No. 16/2021-Cus., dated 19 July 2021 states that the amendment is 'clarificatory' and is without prejudice to the leviability of IGST on such imports as it stood before the amendment. The CESTAT in its decision in the case of *Interglobe Aviation Limited* had observed that intention of the legislation was only to impose basic customs duty on such imports and thus integrated tax and compensation cess on such goods is wholly exempt.

IEC modifications – Fees waived for modification till 31 July 2021: The Directorate General of Foreign Trade ('**DGFT**') has extended the period for updating the IEC for the year 2021-22 till 31 July 2021. No fee shall be charged on the modifications carried out in IEC during the period up to 31 July 2021. DGFT Notification No. 11/2015-20, dated 1 July 2021, issued for this purpose, amends Para 2.05(d) of the Foreign Trade Policy 2015-20. According to the said paragraph, the IEC holder must ensure that the details in IEC are updated every year during April-June.

Rice exports – Requirement of Certificate of Inspection for export to specified European countries postponed: The Notification No. 51/2015-2020 dated 29 December 2020 has been amended to provide that export of rice (both basmati and non-basmati) to EU member states and other European Countries namely Iceland, Liechtenstein, Norway and Switzerland only will require Certificate of Inspection from Export Inspection Council/Export Inspection Agency. Export to 'remaining' European countries will require Certificate of Inspection from such agencies for export from 1 January 2022. It may be noted that as per the earlier notification, Certificate of Inspection for exports to remaining European countries was mandatory from 1 July 2021. DGFT Notification No. 12/2015-20, dated 1 July 2021 has been issued for the purpose.

Palm oil – Customs duty reduced till 30 September 2021 while import restrictions relaxed till 31 December 2021: Duty of customs on import of crude palm oil (Tariff Item 1511 10 00) has been reduced to 10%. Duty of customs on import of palm oil other than crude palm oil (sub-heading 1511 90) has been reduced to 37.5%. Such reduced rates are applicable from 30 June 2021 till 30 September 2021. Notification No. 34/2020-Cus., dated 29 June 2021 has been issued for this purpose. Further, goods falling

under sub-heading 1511 90 are now freely importable till 31 December 2021. Import Policy of items under HS Codes 1511 9010, 1511 9020 and 1511 9090 has been amended from restricted to free by DGFT Notification No. 10/2015-20, dated 30 June 2021. Imports are however not permitted through any port in Kerala.

Covid – Specified inputs for medicines and raw materials for Covid test kits exempted: Import of certain specified active pharmaceutical ingredients/ excipients falling under Tariff Items 2923 2090 and 2906 1310 for Amphotericin B, have been exempted from Basic Customs Duty till 31 August 2021. Also, raw materials falling under any chapter of the Customs Tariff, for manufacturing Covid test kits, have been exempted from BCD till 30 September 2021. The exemption is available subject to the importer following the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017. Notification No. 35/2020-Cus., dated 12 July 2021 has been issued for the purpose.

Ratio decidendi

Amendment of shipping bill – Flimsy grounds cannot deny legal right: The CESTAT Chennai has dismissed the Revenue department's appeal in a case where the Commissioner (A) had allowed the amendment to the shipping bill. The assessee had requested for amendment of the shipping bill to include MEIS benefit. The Department had contended that it would not be able to retrieve the shipping bill so as to check and verify the amendment made etc. Relying on provisions of Section 41(3) of the Customs Act, 1962, the Tribunal held that when the law provides for amendment of shipping bill, flimsy grounds as above cannot be raised by the department to deny legal right of exporter. It also noted that it was not the case of Department that the appellant was not eligible for MEIS benefit claimed. [*Commissioner* v. *Angel Starch & Food Pvt. Ltd.* – 2021 (7) TMI 660 CESTAT Chennai]

Non-filing of EGM when only an omission which is a condonable lapse – Penalty imposable only for continued non-compliance beyond 1 April 2019: Observing that there was no allegation against the vessel operators that they had omitted to file the EGM with malicious intention of making any wrongful gain and that they had rectified the EGMs on being pointed out, the CESTAT Chennai has held that in such circumstances, non-filing of EGM was only an omission which was a condonable lapse. Relying upon CBIC Circular No. 1/2019Cus., dated 2 January 2019, the Tribunal held that only for continued non-compliance beyond 1 April 2019 the penalty is required to be imposed and that imposition of same under Section 117 for inadvertent omission / system error is unwarranted. [2021 VIL 313 CESTAT CHE CU]

Provisional release not barred even when proceedings under Section 124 initiated: Relying upon the words '*pending the order of the adjudicating authority*' in Section 110A of the Customs Act, 1962, the Bombay High Court has held that notwithstanding the pendency of proceedings initiated by issuance of a show-cause notice under Section 124(a), the adjudicating authority may, in its discretion, allow a provisional release of goods. Observing that no contrary provision was shown to the Court, the High Court noted that the legislative intent in Section 110A, introduced by way of an amendment, was clear. It directed the authority to consider the prayers for provisional release. [*Minal Gems* v. *Union of India* – 2021 TIOL 1466 HC MUM CUS]

Penalty invalid when SCN issued by DRI invalid – CBIC Instruction cannot override dictum of Supreme Court: Extensively relying on the decision of the Supreme Court in the case *Canon India Pvt. Ltd.* v. *Commissioner*, the CESTAT Chennai has held that penalty imposed was invalid since the SCN issued by the DRI was *void ab initio*. Further, in respect of CBIC Instruction No. 04/2021-Cus., dated 17 March 2021, the Tribunal was of the view that the Instruction cannot override the decision of the three Judge Bench of the Supreme Court which is binding as the law of the land. [*Sattva CFS & Logistics Pvt. Ltd.* v. *Commissioner* – 2021 (7) TMI 634 CESTAT Chennai]

Notification mandating BIS standards mandatory: Relying on Rule 7(7)(b) of the Bureau of Indian Standards Rules, 1987, the Andhra Pradesh High Court has held that conformity with BIS Standards is not mandatory unless it is referred to in a legislation or so pronounced by a specific order of the Government. Observing that no such notification/order was brought before the Court by the Revenue department, the Court held that the Customs authorities were not legally justified in demanding production of BIS certificate for imported High Alumina Refractory Cement. The High Court in this regard also rejected the contention that the product is covered in the definition of 'cement' by use of phrase 'any other variety of cement' in Cement (Quality Control) Order, 2003. [*Kerneos India Aluminate Technologies Private Limited* v. *Union of India* – 2021 VIL 498 AP CU]

EPCG export obligation can be discharged by direct or third-party exports: Noting that the conditions of EPCG License allowed the license holder to discharge the export obligation by way third-party exports, the CESTAT Chennai has allowed the appeal of the assessee in a case where another exporter had exported the garments manufactured from the fabric manufactured by the assessee using capital goods imported under EPCG scheme. Further, the Tribunal also observed that any SCN issued before the expiry of the EO period is premature and hence not sustainable. [*Sri Angallamman Knit Fabrics* v. *Commissioner* – 2021 (7) TMI 685- CESTAT Chennai]

Apple HomePod classifiable under TI 8517 62 90 based on 'essential character' test: The Customs Authority for Advance Ruling at Mumbai has held that the Apple HomePod is essentially a home entertainment device which connects user wirelessly to internet *via* Wi-Fi or Bluetooth. Hence, it is classifiable based on its 'essential character' under TI 8517 62 90 of the Customs Tariff Act, 1975 which covers 'machines for reception, conversion and transmission or regeneration of voice, images, other data, including switching and routing apparatus'. The Authority noted that device is capable of receiving voice commands and covert such voice commands into text to perform multiple tasks. [In RE: *Apple India Pvt. Ltd.* – 2021 TIOL 01 AAR CUS]

Drones having zoom-in and video recording facilities classifiable as 'drones' on application of GRI Rule 1: In the present case, the subject goods were designed to capture still images and record videos in zoom. The Advance Ruling Authority while disregarding the application of decision of 55th Session of HS Committee of WCO under tariff heading 8525 wherein GRI Rule 3(b) was applied, instead classified the subject goods under Tariff Entry 8802 11 00 which covers 'other aircrafts' by applying GRI Rule 1. [In RE: *Ingram Micro India Pvt. Ltd.* - Ruling No. CAAR/Mumbai/ARC/15/2021, decided on 25 June 2021]

Show-cause notice issued by DRI – Adjudicating authority to decide issue of jurisdiction as preliminary issue: In a petition filed before it challenging the power of DRI to issue a show-cause notice, the Delhi High Court has disposed the petition with a direction to the Adjudicating Authority to decide the issue of jurisdiction as preliminary issue. The Court has however clarified that if the petitioner is aggrieved by the decision of the Adjudicating Authority, it shall be open to the petitioner to challenge the said decision along with the show-cause notice in accordance with law. [*Rajesh Vedprakash Gupta & Ors.* v. *Additional Director General-Adjudication, DRI* – 2021 TIOL 1503 HC DEL CUS]

Central Excise, Service Tax and VAT

Ratio decidendi

Venture Capital Funds, rendering taxable services of asset management, liable to service tax: CESTAT Bengaluru has held that a Venture Capital Fund (VCF) set up as a Trust is a 'distinct entity' separate from its contributors/investors. Disregarding the principle of mutuality of interest, VCF was held as rendering taxable services of portfolio or asset management to its contributors for a consideration on which service tax was liable. On going through the Trust Deed, the Tribunal observed that Trusts are essentially mutual funds engaged in Portfolio management etc., and though they are named Trusts, the essential function of these was of commercial concerns that is maximizing the profit. The Tribunal also relied upon SEBI (Venture Capital Fund Regulations), 1996 to hold that the Trusts should be considered as juridical persons for the purpose of taxation also. It also observed that in common parlance, a common man does not consider a VCF to be a club. Period involved was from 2005-06 to 2011-12. [*ICICI Econet Internet and Technology Fund* v. *Commissioner* - Final Order No. 20372-20402/2021, dated 1 July 2021, CESTAT Bengaluru]

Non-distribution of common credit by ISD not fatal – CESTAT reiterates revenue neutrality: In a case where the assessee as an Input Service Distributor, had failed to distribute the credit to its various units regarding common input service, the CESTAT Bengaluru has allowed the appeal of the assessee. The Tribunal observed that the net effect of not distributing the credit to various units and availed by the ISD was nil as the assessee had taken single registration under GST regime for all the units working in the State of Karnataka and the unutilized credit from ER-1 Returns and ST-3 Returns was transferred to Form GST TRAN-1. Holding that the case involved revenue neutrality and that the Department had not disputed the eligibility or entitlement of credit, the Tribunal held that the

failure of the assessee to distribute the same and when the same was transitioned to GST, is only a procedural lapse which will not affect the substantive right. [*Maini Precision Products Ltd.* v. *Commissioner* – 2021 VIL 293 CESTAT BLR CE]

Refund of service tax on export of goods – Violation of provisions of another Act by supplier of goods, not fatal: The CESTAT Chennai has held that merely because the supplier of goods had committed violation of Mining and Minerals (Development and Regulation) Act, 1957, the exporter who had procured the goods cannot be put into adverse situations. The Revenue department had denied the refund of service tax under Notification No. 41/2012-S.T., terming the exports as 'illegal exports'. The Tribunal in this regard noted that while no SCN was issued to the exporter under the Customs Act, 1962, the alleged violation was by the supplier which was a different entity. It may be noted that Member (T) in its separate order while conferring with the views of the other Member and relying upon precedents under income-tax law and provisions of customs law, also observed that since taxation does not consider legality or illegality of the acts in question, conversely, if any benefit is available under the tax laws, it is available regardless of the illegality of the act. [*V.V. Minerals* v. *Commissioner* – 2021 VIL 262 CESTAT CHE ST]

Refund of service tax on export of goods – Limitation under 41/2012-ST to be counted from first day after end of quarter: In a case involving limitation in filing a claim for refund of service tax under Notification No. 41/2012-S.T., the CESTAT Delhi has held that the limitation has to be counted from the first day and after the end of the quarter. Observing that when the provisions require that only one claim has to be filed for each quarter, an assessee has to file one claim only at the end of the quarter, the Tribunal held that thus the limitation cannot be counted from the day of LEO or the last LEO in a quarter. Allowing the appeal, it observed that a harmonious reading of the provisions and also the earlier Notification No. 5/06-C.E. (N.T.) read with Notification No. 41/2007-S.T. and No. 41/2012-S.T., must be done. [*SA Impex* v. *Commissioner* – 2021 TIOL 382 CESTAT DEL]

Refund of unutilised Cenvat credit on exports – Reversal of credit in GSTR-3B is sufficient: In a case involving refund of unutilised Cenvat credit where the assessee had transitioned the credit through TRAN-1 into the GST regime and not debited the amount in Cenvat credit and service tax return, the CESTAT Bengaluru has allowed the appeal of the assessee. The Tribunal noted that under Notification No.27/2012-C.E. (N.T.) the only requirement was that the amount should be debited from the Cenvat credit account of the claimant (which was done by the assessee as per records) and that there was no requirement to debit in the service return. It also noted that the assessee while had mistakenly transitioned the credit to GST regime, it had reversed the same in GSTR-3B on its own and had not utilised the same. It also termed the mistake as a procedural lapse. [*Convance Clinical Development Pvt. Ltd.* v. *Commissioner* – 2021 VIL 284 CESTAT BLR ST]

'Convenience fee' charged for online booking of movie tickets not covered under OIDAR services: The CESTAT Delhi has held that charging of convenience fee from the customers for online booking of movie tickets is not covered under the Online Information and Database Access or Retrieval (OIDAR) services. The Tribunal in this regard noted that the dominant intention of a user (of the website) was to book a

movie ticket and not to access/retrieve data/information as any person visiting the website of the assessee to seek information about the show timings or like information does not have to make any payment. It also noted that convenience fee was charged because online booking facility saved precious time and effort of a user. The assessee's appeal was allowed observing that unless the fees is for provision of information/data, the arrangement cannot fall under OIDAR. [*PVR Ltd.* v. *Commissioner* – 2021 VIL 279 CESTAT DEL ST]

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