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Bill of Supply whether a tax invoice for issuance of GST debit/credit note?

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GST as a law has been very dynamic with amendments happening day in and day out as the legislature and the subjects learn from implementing the law to the practical aspects of the business. One of the recent amendments to the law is the amendment to sub-section (4) to Section 16 of the Central Goods & Services Tax Act, 2017 (**'CGST Act'**) which was made effective from 1 January 2021. The said amendment results in ***delinking*** the date of issuance of the debit note with the date of original / parent invoice against which a GST debit note is issued. This amendment thereby allows the recipient to take credit till September of the following financial year to which the debit note pertains.

A GST debit note is issued as per Section 34(3) of the CSGT Act which permits the issuance of GST debit note against *one or more tax invoices* in a case where the taxable value or tax charged in that tax invoice is found to be less than the taxable value or tax payable in respect of such supply.

The reading of the above provisions indicates that a **GST debit note** can be issued against one or more 'tax invoices'. A 'tax invoice' as such is issued with respect to a taxable supply which has been defined under Section 2(108) of the CGST Act to mean a *'supply of goods or services or both which is **leviable to tax** under this Act.'*

However, let us consider a scenario where a person supplied goods at say 'Nil' rate of tax by issuing 'Bill of Supply' (which is a document for making exempted supply) and thereafter realised at later date that the goods supplied earlier were in fact subjected to tax at applicable rate. At this juncture, a question arises as to whether a GST debit note can be issued against a 'Bill of supply' also (for the incremental tax amount) or would the same be limited to a 'GST tax invoice' only?

It may be noted that a 'tax invoice' has been defined at Section 2(66) of the CGST Act, as tax invoice referred to in Section 31 of the Act.

However, the term 'Bill of Supply' has not been defined under GST. But the said term has been given recognition under Section 31(3)(c) of the CGST Act to be a document to be issued ***'instead'*** of a tax invoice in case of supply of exempted goods or services or both or in case of composite supply.

Considering the above discussion, one could say that 'tax invoice' and 'Bill of Supply' are independent documents and since Section 34(3) of the Act only prescribes that a GST debit note can be issued against one or more ***tax invoice,*** therefore, a GST Debit note cannot be issued against a 'Bill of Supply' under GST.

However, attention is invited to Rule 53(1A) of the Central Goods and Services Tax Rules, 2017 (**'CGST Rules'**), which prescribes the particulars for a valid GST debit note.

The said rule at clause (g) of sub-rule (1A) prescribes that the debit note shall contain the serial number and date of the corresponding tax invoice or, as the case may be, ***bill of supply.***

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Thus, it appears that as per the Rule 53(1A), a GST debit note is also allowed to be issued with respect to a Bill of Supply.

On reading of the above provisions, a registered person is left confused as to whether a GST debit note can be issued against a 'Bill of Supply' under GST or not and whether 'Tax Invoice', for the purpose of Section 34 of the CGST Act in effect covers 'Bill of Supply' also under its purview or not.

It may further be noted that in the pre-GST regime, an invoice was issued at the time of removal of goods from the factory. Even in a case where the goods were exempted, an invoice alone was issued. Further, under the pre-GST regime a supplementary invoice could be subsequently issued in the event the tax was short discharged or not discharged at all, at the time of removal. Since there was only a single document i.e. invoice alone and it was permitted to issue a supplementary invoice against the original invoice, there existed no confusion. However, since under GST there exist separate documents for supply of exempted and taxable goods or service and the GST provision separately prescribe for issuance of 'GST debit note' against a tax invoice, there exists an ambiguity.

The CBIC and the legislature should take cognizance of the said ambiguity and clarify the stand as to whether a GST debit note can be issued against a Bill of Supply under GST.

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Goods and Services Tax (GST)

Notifications and Circulars

Rate of GST reduced on specified items for Covid-19 relief and management: As recommended by the GST Council in its 44th meeting, the rates of GST have been reduced on the specified items being used in Covid-19 relief and management. Notification No. 5/2021-Central Tax (Rate), dated 14 June 2021, issued for this purpose, includes goods like medical grade oxygen, testing kits, hand sanitizer, pulse oximeter, oxygen concentrator / generator, ventilators and few medicines. The exemption is available till 30 September 2021. Further, vide Notification No. 4/2021-Central Tax (Rate), GST rate has also been reduced on works contract service relating to structures meant for funeral, burial or cremation of deceased.

Dynamic Quick Response (QR) Code on B2C invoices clarified: As the relaxation window for implementation of Dynamic QR Code on B2C invoice is set to expire on 30 June 2021, the CBIC has issued number of clarifications to ensure uniformity in the implementation of the provisions of the law. The Circular No. 156/12/2021-GST, dated 21 June 2021 issued for this purpose clarifies that any invoice issued to a person having a UIN shall be considered as invoice issued for a B2C supply. It has also been clarified that if the payment is collected by some person authorized by the supplier on his/ her behalf, the UPI ID of such person may be provided and that such Code is not required in case the invoice is issued to a recipient located outside India, for supply of services, for which the place of supply is in India. Further, in case the invoice number is not available at time of digital display of QR Code in

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over the counter sales, unique order ID/ unique sales reference number, which is uniquely linked to the invoice issued for the said transaction, may be provided in the Code. Lastly, it has been clarified that QR code may provide only the balance amount payable in cases where a part payment is already received by advance or adjustment, etc.

43rd meeting of the GST Council – Certain clarifications and changes: The CBIC has implemented number of changes, including the one relating to relaxation of time lines in the various compliances, as recommended by the GST Council in its 43rd meeting held in May. The details of these changes are available here. Further, as recommended by the GST Council, the CBIC has on 17 June 2021 issued number of clarifications. These are enumerated below.

- Services provided to an educational institution (including *aganwadi*) by way of serving of food (catering including mid-day meals) is exempt from levy of GST irrespective of its funding from government grants or corporate donations.

- Entry 23A of Notification No. 12/2017-CT(R) does not exempt GST on the annuity (deferred payments) paid for construction of roads.

- Services provided by way of examination including entrance examination, where fee is charged for such examinations, by NBE, or similar Central or State Educational Boards, and input services relating thereto are exempt.

- Works contract service provided by way of construction such as of rope way shall fall under Entry at Sl. No. 3(xii) of Notification No. 11/2017-(CTR) and attract GST at the rate of 18%.

- Service by way of milling of wheat / paddy into flour (fortified with minerals etc. by millers or otherwise) / rice to Government/ local authority etc. for distribution of such flour or rice under PDS is exempt from GST if the value of goods in such composite supply does not exceed 25%.

- Guaranteeing of loans by Central or State Government for their undertaking or PSU is specifically exempt under Entry No. 34A of Notification No. 12/2021-Central Tax (Rate).

- Laterals / parts to be used solely or principally with sprinklers or drip irrigation system, which are classifiable under Heading 8424, would attract a GST of 12%, even if supplied separately.

Ratio decidendi

Race club liable only on commission received for service rendered through totalisator – CGST Rule 31A(3) quashed: The Karnataka High Court has held that Rule 31A(3) of CGST Rules which declares value of actionable claim (taxable value) in the form of chance to win in a horse race conducted by a race club to be 100% of the face value of the bet, is ultra vires the provisions of the CGST Act. The Court held that race club provides a totalisator service for a brief period in its fiduciary capacity by holding the amount on behalf of a punter before redistribution to the winner of a stake. The commission is the only consideration received by the race club for the supply of such service. The Court further held that making the entire bet amount received by the totalisator liable for payment of GST, is against the principle that GST can only be levied on the consideration. Lastly, noting that the petitioners were not supplying bets to the punters, it was held that GST can be levied only on the commission received. [*Bangalore Turf Club Limited* v. *State of Karnataka* – Order dated 2 June 2021 in Writ Petition No. 11168/2018 (T-RES), Karnataka High Court]

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Provisional release of goods / vehicle when no opportunity given for depositing tax and penalty before confiscation: Observing that no opportunity was given to the petitioner for depositing the tax and penalty, while confiscating the goods and vehicle, the Rajasthan High Court has held that the petitioner should be allowed to avail the provisional release of the goods and the vehicle as per Rule 140(1) of the CGST Rules, 2017, after fulfilling the conditions laid under it. Writ petition was filed against the show cause notice issued under Section 129(3) of CGST Act for seizure of goods. During the pendency of writ petition an order for demand of tax and penalty was passed by the department. Thereafter, since 14 days had already lapsed when demand order was passed, an order for confiscation of goods was passed by the department. [*Khalid* v. *State of Rajasthan & Others* – 2021 VIL 414 RAJ]

Refund claim cannot be denied due to technical glitches on GSTN portal: The Madras High Court has held that if the petitioner is eligible for refund, he cannot be denied such refund on the ground of an error which has occurred due to a glitch in the GSTN software. In this case, due to technical glitch on the GSTN portal, the petitioner's entire refund claim for making zero rated supplies (exports), while uploading, got consolidated and figured under the head SGST only instead of being under CGST, SGST and IGST. The department had restricted the refund claim to the extent of SGST and rejected the refund amounts under the heads CGST and IGST. [*Mehar Tex* v. *Commissioner* –2021 VIL 392 MAD].

Appeal – Limitation – Liberal approach to be followed during Covid: The assessee furnished a downloaded copy of order against which an appeal was filed instead of furnishing a certified copy of order along with the appeal. The appellate authority denied condonation of delay as certified copy of the order was not furnished within the period prescribed under Rule 108(3) of CGST Rules. Considering the difficulties faced by the lawyers during Covid times in applying for the certified copy of order, the Orissa High Court has held that furnishing of downloaded copy of the order would amount to substantial compliance. It also observed that the wordings of Rule 107(4) are such that the authority is not precluded from condoning a delay for a longer period. According to the Court, when there is restricted functioning of the Courts and Tribunals, a more liberal approach has to be followed in the matters of condonation of delay. [*Shree Jagannath Traders* v. *Commissioner* – 2021 VIL 454 ORI].

Composition levy – Turnover of VAT regime to be considered in computing aggregate turnover in preceding financial year: The Andhra Pradesh High Court has held that the assessee has to take the turnover declared during VAT regime into consideration for the purpose of computing the 'aggregate turnover in the preceding financial year' as per Composition levy provided under Section 10 of the CGST Act. The petitioner had considered the turnover of only GSTregime starting from 1 July 2017 and filed the returns under the composition scheme. Interpreting the phrase 'previous financial year', the Court was of the view that if intention of the legislature was to consider only the turnover of the financial year under the GST regime, then there would have been a clarification of the said words. It observed that if such a narrow interpretation is given to Section 10(1), many of the businessmen would end up paying minimum GST for the year 2017-2018 even though their turnover was on the higher side. Further, the Court also stated that the word 'preceding' appearing before the words 'financial year' could not be ignored. [*Godway Furnicrafts* v. *State of AP* – 2021 VIL 460 AP]

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No intention to evade just because validity of e-way bill not extended: The Telangana High Court has held that just by non-extension of the validity of the e-way bill by the assessee-supplier or the transporter, no presumption can be drawn that there was an intention to evade tax. The Court noted that there was no material with the authorities to conclude evasion merely on account of lapsing of time mentioned in the e-way bill. The transporter could not deliver the goods in time as got struck in a road block due to a political rally. The trolley was detained by the authorities when delivery of goods was attempted on subsequent working day. [*Satyam Shivam Papers Pvt. Ltd.* v. *Asst. Commissioner* – 2021 VIL 448 TEL]

Liaison office connecting Indian customers with foreign partners is liable as intermediary: Observing that the applicant was connecting businesses in India with business partners in Dubai which was nothing but supply of services, the Maharashtra AAR has held that the service provided by the assessee is that of an intermediary and GST is payable on the same by the appellant-assessee. The applicant had undertaken various activities like liaison activities between India office and Dubai office, attending and representing Dubai Chamber of Commerce and Industry (DCCI) UAE in various seminars, conferences and trade fairs, connecting businesses in India with business partners in UAE and *vice versa.,* and organizing events and interactions with Indian stakeholders for sharing information about Dubai. It noted that assessee had stated that it is a liaison office of its Dubai Head Office and is not acting on its own account. The Authority held that the applicant had fulfilled all the required conditions to qualify as an intermediary under Section 2(31) of the IGST Act, 2017. [In RE: *Dubai Chamber of Commerce and Industry* – 2021 VIL 224 AAR].

Medicines, implants separately billed to inpatients liable to GST: In a case involving a multi-specialty hospital providing health care services with medical professionals and also supplying medicine, implants and other supplies to their patients during their treatment as an in-patient and as outpatients, the Kerala AAR has held that the package to cover the treatment including all required medicines and other supplies for a consolidated amount would not be liable to GST. It noted that the room, medicines, implants, consumables and food supplied during the treatment of patients admitted in the hospital were naturally bundled in the ordinary course of business and the principal supply (predominant element of composite supply) was that of healthcare service. It also held that in case the medicines, implants and other items are not included in the package and are separately billed, they would attract GST at the rate applicable on each of such items. [In RE: *Malankara Orthodox Syrian Church Medical Mission Hospital* – 2021 VIL 227 AAR].

TDS under GST – Invoice when and when not to be equated to contract: The AAR Karnataka has held that TDS provisions under Section 51 of the CGST Act, 2017 are applicable for every supply of goods and services, even in the absence of contract. Examining the definition of 'contract' and 'invoice', the Authority held that each invoice shall constitute as an individual contract. It was hence held that if the total value of supply, even in the absence of contract, exceeds rupees two lakh and fifty thousand, TDS would be required to be deducted by the virtue of Section 51. However, the Authority was of the view that in case the contract is for continuous supply of goods or services and part supplies under the contract are covered in an invoice, then, invoice would not be equated to the contract. It held that here the set of invoices issued for all the supplies

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made as a consequence of the contract of supply would summate to the contract and not the individual invoice. [In RE: *Udupi Nirmiti Kendra* – 2021 TIOL 139 AAR GST].

Customs

Notifications and Circulars

IGST exemption on import of medical supplies listed under Customs Notification No. 27 and28/2021 extended till 31 August 2021: *Ad hoc* Exemption Order No. 5/2021-Cus., dated 31 May 2021 has extended the *Ad hoc* Exemption Order No. 04/2021-Cus., from 30 June 2021 to 31 August 2021. The earlier Order exempts, from the whole of IGST levy, import of certain medical supplies as specified under Notifications Nos. 27 and 28/2021-Cus., subject to certain conditions. Also see Notification No. 32/2021-Cus., dated 31 May 2021 in respect of exemption from IGST on these goods imported and donated to the Central Government or State Government or, on recommendation of State authority, to any relief agency, entity or statutory body for free distribution.

EPCG – Applications for relaxations in policy or procedures to be submitted online: The applications for seeking relaxations under Para 2.58 of the Foreign Trade Policy 2015-20 in respect of EPCG scheme would be accepted now only through online mode. Members of the trade are now required to fill in the requisite form, upload necessary documents and submit application after paying requisite fees. The deficiency letters issued by the DGFT would also be required to be relied online. As per Trade Notice No. 5/2021-22, dated 19 May 2021, the entire processing of the applications and communication of the decision of the EPCG Committee would be through online mode only.

DFIA scrips to be paperless – Transfer of DFIA scrips to be recorded online: To enable paperless transactions, transferability of DFIA is being made online and transferee can apply for ARO/Invalidation against the said DFIA Scrip online. Unless recorded on the DGFT website, the transferee will not be able to utilize the scrip. Issuance of paper copies of DFIA scrips has been discontinued from 7 June 2021. As per Trade Notice No. 6/2021-22, dated 25 May 2021, paper copies however will continue to be issued at non-EDI ports.

Export authorisation for restricted items to be issued online: With effect from 17 May 2021, all applicants seeking export authorization for restricted items must apply online by navigating on the DGFT website. Going forward, all applications for issuance, amendment, and re-validation of export authorization will be required to be submitted online. Pending applications will also be migrated to the online module. Trade Notice 03/2021-22, dated 10 May 2021 has been issued for the purpose.

Plastic and used / worn clothes recycling units in SEZs / EOUs – Revised policy guidelines issued: The SEZ division in the Ministry of Commerce & Industry, Department of Commerce, has issued revised policy guidelines with respect to plastic and used/worn clothes recycling units in SEZs/EOUs. As per the new guidelines, setting up of new units in SEZ/EOUs for worn and used clothing is not allowed and the extension / renewal of LoA of existing units will be considered for a

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period of five years by the Board of Approval. For existing plastic recycling units, extension /renewal of LoA will be considered by Board of Approval for a period of 18 months only. The Instruction dated 27 May 2021 also notes that Department of Commerce will propose suitable amendment in the SEZ Rules to provide for setting up of new units engaged in recycling of plastic as SEZ units, amendments in the Foreign Trade Policy will be proposed by the DGFT. The Instruction also talks about export obligations other than the NFE obligation.

SEZ unit by multilateral or unilateral or international agencies in International Financial Services Centre: A multilateral agency or unilateral agency or international agency notified under the United Nations (Privileges and Immunities) Act, 1947 has been allowed to set up their local or regional office in the International Financial Services Centre as an SEZ unit. As per the latest amendments in the SEZ Rules, 2006, effective from 16 June 2021, a new Rule 21A has been inserted in the SEZ Rules to prescribe for setting up of unit by multilateral or unilateral or international agencies in International Financial Services Centre. Accordingly, the application for setting up and operation of such unit must be made before the Board of Approval through the concerned Development Commissioner.

Ratio decidendi

Quantitative import restrictions – Goods imported in excess of cap are prohibited goods: In a case where only the specific restricted quantity of the commodities covered by the notifications could have been imported and that too, under a licence, the 3-Judge Bench of the Supreme Court has held that any import within the cap (e.g. 1.5 lakh MTs) under a licence is the import of restricted goods but, every import of goods in excess of the cap is not that of restricted goods but is an import of prohibited goods. Distinguishing the Court's earlier decision in the case of *Atul Automation,* the Court observed that it, in that case, had neither laid down the law that in every case of import without authorisation, the goods are to be treated as restricted and not prohibited nor that the goods so imported without authorisation are always to be released on payment of redemption fine. Further, in this case of quantitative restrictions on import of certain pulses, the Court observed that when personal business interests of importers clash with public interest, the former has to give way to the latter. It held that in such case discretion could only be for absolute confiscation with levy of penalty. [*Union of India* v. *Raj Grow Impex LLP* – 2021 TIOL 187 SC CUS LB]

Valuation – Notional transportation cost not includible in value of fuel remaining in aircraft after incoming international flight: The Larger Bench of the CESTAT has held that notional cost towards freight charges is not required to be added to the value of Aviation Turbine Fuel (**'ATF'**) remaining in the aircraft after its international flight into India. The Revenue department had added 20% to the FOB value of ATF as cost of transportation under Rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The Tribunal in this regard held that firstly there is no transportation of ATF by the airlines and secondly, only the actual cost 'paid' or 'payable' can be added to the transaction value while no cost is incurred by the airlines here. The Tribunal also noted that that there is no provision either in Section 14(1) of the Customs Act, 1962 or the Valuation Rules to add 'imputed costs' of transportation when actually no costs are incurred. [*Jet Airways (India) Limited* v. *Commissioner* – Interim Order No. 3/2021, dated 25 May 2021 in Customs Appeal No. 86898 of 2017, CESTAT Larger Bench]

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Deputy Commissioner not authorised to reject preferential duty claims and CBIC Circular No. 42/2020-Cus. bad in law: The Madras High Court has held that Deputy Commissioner was wrong in rejecting the preferential duty claims unilaterally and without assigning any reasons, as such rejection can only be done by the Principal Commissioner or Commissioner of Customs with reasons to be recorded in writing as per proviso to Section 28DA(4) of the Customs Act, 1962. The Court also noted that Section 28 DA(5) does not require the importer to furnish security for 100% of the differential duty for initiation of inquiry or launch of verification, but only as a pre-condition to release the goods. It hence was of the view that Circular 42/2020-Cus., dated 29 September 2020 under which officers were directed to initiate inquiry under Rule 5 or launch verification under Rule 6 of the CAROTAR, 2020 only if the importer furnishes 100% of the differential duty as a security, was an excess of authority and bad in law to the extent it transgresses with the statutory scheme under Section 28DA. [*Abbis International* v. *Commissioner* – 2021 TIOL 1337 HC Mad Cus].

Quantum of redemption fine and penalty – Prior knowledge about description of goods is important: Observing that the revenue could not produce any evidence that the assessee-importer had knowledge about the correct description of goods, prior to the physical examination of same, the CESTAT Chandigarh has reduced the quantum of redemption fine and penalty. The case involved misdeclaration of re-rollable scrap as heavy melting scrap. The Tribunal though observed that the goods were liable for confiscation, it reduced the redemption fine from INR 2 lakh to INR 40,000 and penalty from INR 1 lakh to INR 10,000 only. [*Devgan Mechanical Works Backside Modern Steels Ltd.* v. *Commissioner* – 2021 TIOL 330 CESTAT CHD]

Valuation – Subvention payments not to be included in transaction value: The CESTAT Delhi has held that subvention payments (True-Up payment) received by a subsidiary from the parent company in respect of losses and expenses incurred by the subsidiary have no relationship to the invoice price of imported goods. Considering that such payment had no influence on the transaction value, the Tribunal held that such payments are not includible in the transaction value of imported goods in terms of Rule 10(1) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The Tribunal in this regard also noted that the True Up payments were flowing not from the assessee-importer to the foreign supplier but the other way round and if these were to be reckoned to arrive at the transaction value, the invoice value will have to be lowered. *[Volvo Auto India Pvt. Ltd.* v. *Commissioner* – 2021 (5) TMI 867 CESTAT ND]

Recovery of sanctioned refund – Order sanctioning refund to be challenged by department: The CESTAT Kolkata, while dealing with re-opening of sanctioned refund of SAD, has held that appropriate method for Revenue to recover refund already sanctioned is by challenging the refund order under Section 128 of Customs Act, 1962. Relying on Supreme Court decision in the case of ITC Ltd., it noted that Section 128 uses expression 'any person' and hence is wide enough to allow revenue as well as assessee aggrieved by the decision or order to prefer an appeal before the Commissioner (Appeals). Allowing assesses appeal, the Tribunal held that the Revenue department having not challenged the previous order, it cannot be allowed to re-open the issue. [*S.K. Timber & Co.* v. *Commissioner* – 2021 VIL 231 CESTAT KOL CU]

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Appeal to Tribunal – Multiple appeals against multiple bills of entry (order) but single appeal against consolidated order-in original: Applying Rule 6A of the CESTAT Procedure Rules 1982, the CESTAT Ahmedabad has held that when more than one order-in-original are passed, the assessee is required to file number of appeals as many as numbers of orders-in-original. It was however held that if there were number of bills of entry but for all the bills of entry one order-in-original was given then, only one appeal will be sufficient before the Appellate Tribunal. Noting that in the present case 84 bills of entry were passed and all were challenged by filing 84 appeals before the Commissioner (Appeals), the Tribunal held that here 84 bills of entry were as good as assessment orders and the Appellant was required to file 84 different appeals. [*CMR Nikkie India Pvt. Ltd.* v. *Commissioner* – 2021 TIOL 308 CESTAT AHM]

Authorised courier agent when not liable for import of counterfeit goods: In a case of revocation of registration of authorised courier involved in imports, the CESTAT Delhi has held that action of non-receipt of KYC documents along with covering letters directly from the hands of the owners-importers but, from another person (who had confessed of misdeclaration and import of counterfeit goods) does not constitute not exercising due diligence on part of the courier agent. Rejecting department's allegation of violation of Regulation 12(1)(v) of the Courier Imports and Exports (Electronic Declaration& Processing) Regulations, 2010, the Tribunal noted that the appellant, as an authorized courier, was prohibited from opening the packages and it was impossible for the appellant or the customs officers or even for the experts to determine that the contents were counterfeit goods without opening the packages. It also noted that KYC documents were not fake and the importers were genuine. [*FLE Fast Line Express Pvt. Ltd.* v. *Commissioner* – 2021 VIL 234 CESTAT DEL CU]

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Central Excise, Service Tax and VAT

Ratio decidendi

Crushing, pulverizing, converting and packing of spices into powder form is manufacture': TheLarger Bench of the CESTAT has held that the activity of crushing, pulverizing, converting and packing of spices into powder form amounts to 'manufacture'. The question as to whether the activity would be liable to service tax under Business Auxiliary Service (**'BAS'**), was thus answered in negative. The Tribunal observed that the transformed product has its own market similar to, and yet independent of, the harvested product that is subjected to processing. Relying upon various decisions on 'manufacture', the Larger Bench observed that every aspect of 'manufacture' was thus complied with in the dispute and that the applicability of the CESTAT decision in *Jayakrishna Flour Mills (P) Ltd.* to the impugned products (spices) was beyond question. The CESTAT in this regard also distinguished CBEC Circular No. 521/17/2000-CX, dated 16 March 2000. [*Nilgiri Oil & Allied Industries* v. *Commissioner* - Interim Order No. 4-5 /2021, dated 25 May 2021, CESTAT Larger Bench]

Retrospective exemption and refund of service tax – Tax paid utilising Cenvat credit also refundable: In a case where the output service was exempted retrospectively with a rider that whatever tax was paid was to be refunded to the assessee, the CESTAT Ahmedabad has held that service tax paid through utilization of Cenvat credit should also be refunded. The case involved Section 102 of Finance Act, 1994 giving retrospective exemption to the works contract service provided by the assessee to various government departments for the period 1 April 2015 to 29 February 2016. The Tribunal noted that during the relevant period the service provided by the assessee was taxable and the assessee was legally entitled for the Cenvat Credit on the input service received from the sub-contractors. It observed that no provision which called for different treatment to tax paid using Cenvat credit and that Section 102 mandated refund of total tax paid by the assessee. It also held that refund can not be denied by invoking Rule 6 of the Cenvat Credit Rules, 2004 as the same was not applicable here.

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The Tribunal also held that date of opening of tender must be taken as a date of contract when there is no separate contract/ agreement after opening of tender and acceptance. Department's contention that the refund was deniable since the work order was dated after the cut-off date under Section 102, was thus rejected. [*Shanti Construction Co.* v. *Commissioner* - Final Order No. A/2244/2021, dated 18 June 2021, CESTAT Ahmedabad]

Cenvat credit on tower, tower material available to tele communi-cation service provider: The CESTAT Delhi has allowed Cenvat credit on tower, tower material, shelter etc. to an assessee providing telecommunication services to customers and business support services to fellow telecommunication service providers. The Commissioner had confirmed the denial of credit primarily on the ground that the subject goods being attached to earth, were immovable in nature and thus, not used for providing output services. Allowing the appeal, the Tribunal noted that the Delhi High Court in *Vodafone Mobile Services* had held that towers

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and pre-fabricated shelters form an essential ingredient in the provision of telecommunication service and hence would qualify as 'inputs' and eligible for Cenvat credit. It also noted that the jurisdictional High Court in the said decision had also considered the Bombay High Court decision in the case of *Bharti Airtel* which was relied by the department before the Tribunal here. [*Bharti Hexacom Ltd.* v. *Commissioner* – 2021 TIOL 305 CESTAT DEL]

Interest on delayed refund of revenue deposit – CESTAT directs interest @ 12%: Noting that the rate of interest varied from 6% to 18% in the notifications issued under Sections 11AA, 11BB, 11DD and 11AB of the Central Excise Act, 1944, CESTAT Allahabad has held that grant of interest @12% per annum would be appropriate in case of refund of revenue deposit. The Tribunal also noted that there is no provision in the Central Excise Act, which deals with refund of revenue deposit and so rate of interest has not been prescribed, when revenue deposit is required to be refunded. Allahabad High Court decisions in the cases of *Pace Marketing Specialities and Ebiz. Com Private Limited,* were relied upon. [*Parle Agro Pvt. Ltd.* v. *Commissioner* – 2021 VIL 214 CESTAT ALH CE]

DTA clearance by EOU – Words 'similar goods' to mean similar, same class of or same kind of goods: Observing that various judgments have given wider meaning to the word 'similar', which would mean similar, same class of or same kind of goods, the CESTAT Mumbai has allowed benefit of Notification No. 23/2003-CE. The department had alleged violation of provisions of para 6.8 of the Foreign Trade Policy as items are dissimilar in properties and characteristics and value of goods sold in DTA was much lower than that of exported goods. The Tribunal for this purpose noted that the manufacturing activity was same for both type of goods and that the similarity of the goods was established beyond reasonable doubt by the test report conducted for the subsequent period. It was also of the view that differentiation between the goods on the basis of physical characteristics or the price was wrong. The difference in value was held as inconsequential. [*BR Steel Products Pvt. Ltd.* v. *Commissioner* – 2021 VIL 223 CESTAT MUM CE]

Cenvat credit not deniable for gap in statute – CESTAT notes non-mention of specific document in case of high sea sales: The CESTAT Delhi has allowed Cenvat credit of service tax paid on port charges, to the assessee, in the case where they had purchased the goods from high sea seller and some of the invoices for port services etc. were in the name of high sea seller. The Tribunal for this purpose noted that the assessee had paid for such services and the Bill of Entry also mentioned the name of the original importer (high sea seller). Further noting that no specific documents were mentioned in the Rules in case of subsequent sale on high sea sale basis, the Tribunal held that if the Cenvat credit is available under the scheme of the Act, read with Rules 3, 2(l) and 2(k), service tax credit cannot be denied for some gap left in the statute. [*Mammon Concast Pvt. Ltd.* v. *Commissioner* - Final Order No. 51578/2021, dated 17 June 2021, CESTAT Delhi]

Domestic supply under international competitive bidding – Compliance of procedures prescribed under Customs notification not required: The CESTAT Mumbai has allowed the benefit of exemption to indigenously manufactured goods under notification issued under Central Excise Act, 1944, in a case where the same was denied for not being in compliance with the conditions

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prescribed in parallel notification issued under Customs Act, 1962. The Tribunal in this regard noted that the denial of benefit was not predicated on threshold eligibility of 'international competitive bidding' but on the procedural pre-requisites that were additionally prescribed in the customs notification. The Tribunal was of the view that a manufacturer, supplying goods against an exemption notification, poses lesser risk than an importer in case of recovery of duty foregone in the event of misuse and hence the procedural prescriptions stipulated for exemption from customs duty were intended to neutralize that additional risk. It held that to insist on compliance by a domestic manufacturer with impossible, and uncontemplated, prescriptions is to insinuate barriers to eligibility beyond that envisaged by the authority. [*Kirloskar Brothers Ltd.* v. *Commissioner* - Final Order No. A/86426/2021, dated 18 June 2021, CESTAT Mumbai]

Refund of Cenvat credit on exports – Credit reversal in GSTR-3B correct: In a case involving refund of Cenvat credit of service tax due to exports, the CESTAT Bengaluru has held that the credit reversed in GSTR-3B tantamount to not taking credit. The Commissioner (Appeals) had denied the refund on the ground that credit reversal in GSTR-3B pertains to GST credit and not Cenvat credit. The assessee had carried forward the balance of Cenvat credit as available on 30 June 2017 in the TRAN-1 under GST and debited the amount claimed as refund in the GSTR3B for the period December 2017. Noting that the assessee had reversed the credit in the GSTR-3B, but there was only a delay in debiting the same, the Tribunal held that the delay was procedural delay and will not disentitle the refund. [*Chariot International Pvt. Ltd.* v. *Commissioner* - Final Order No. 20169/2021, dated 17 June 2021,CESTAT Bengaluru]

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