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Aircraft lease transaction – Not a lease of life

By **Anupama Ravindran**

Considering that nowadays airlines industry is almost always in the news for one reason or another, this may be the best time to highlight one of the issues being faced by this industry.

As everyone may be aware, a little more that 80% of the commercial aircrafts are leased and the lease is mostly from foreign vendors. It is noticed that Indian lessors in this field are almost negligible. The Indian commercial airline industry takes aircrafts on lease from foreign vendors, where the lease agreement usually also covers engine, landing gear, auxiliary power unit and maintenance / replacement / refurbishment clauses. It may also be noted that since the aircraft industry runs on very tight margins, they cannot afford an extended downtime of the aircraft. Appreciating the business models in the aircraft industry, the Finance Ministry has also always been supportive.

The issue highlighted in this article has more to do with the implementation rather than the intent of the legislature.

Lease of aircraft

Sl. No. 547A of Notification No. 50/2017-Cus., dated 30-06-2017 provides for exemption from IGST levied under Section 3(7) of the Customs Tariff Act, 1975 for aircrafts, aircraft engines and other aircraft parts imported into India under a transaction covered by item 1(b) or 5(f) of Schedule II of the Central Goods and Services Tax Act, 2017, subject to certain conditions. The conditions for availing exemption ffrom IGST under Section 3(7) of the Customs Tariff Act include execution of a bond binding the importer to pay IGST on import of aircraft on lease basis, and to re-export within three months from date of expiry of lease period. The notification provides for exemption to import of aircrafts and parts imported under either transfer of right in goods without transfer of title or transfer of right to use any goods for any purpose for cash or deferred payment. That is, the exemption is provided to import of aircrafts, aircraft engines, and other aircraft parts which are under lease.

The relevant part of the Notification is provided below for ease of reference:

Sl. No.	Chapter/ Heading	Description of goods	Standard rate	IGST	Condition No.
547 A	88 or any other chapter	Aircrafts, aircraft engines and other aircraft parts imported into India under a transaction covered by item 1(b) or 5(f) of Schedule II of the CGST Act, 2017	-	Nil	102

However, Basic Customs Duty (BCD) is not exempted as per the same serial number. BCD exemption can be sought under Sl. No. 538 or 545, or certain other serial numbers, depending on whether aircrafts are being imported or parts of aircrafts are being imported. Further, conditions imposed for availing exemption under the said serial numbers, if any, must be complied with.

It may be noted that as per the provisions, it is recognized that the transaction under Sl. No. 547A is a service transaction, and hence duties levied under Section 3(7) of the Customs Tariff Act which are imposable on import of goods are exempted, provided IGST is paid on the import of lease service. In that case, BCD should also be exempted under the same serial number, since BCD is also imposed on import of goods.

The aircraft industry is at present required to seek exemption under other serial numbers and adhere to other conditions. That is, though exemption is available for duties levied under Section 3(7) of Customs Tariff Act because the law recognizes the transaction as a service, for exemption from basic customs duty the transaction is treated as import of goods. The same transaction is painted with a different brush – once to colour it as goods, and another time to colour it as a service.

Ignoring the aforesaid issue, it may be noted that when leased aircrafts are imported into the country, the specific identification numbers for critical components of the aircraft including the aircraft engine / landing gear / auxiliary power unit are noted in the bill of entry while extending / availing exemption under the said notification.

Lease agreements generally extend to maintenance of the aircraft, and parts including engine / landing gear/ auxiliary power units. That is, under such agreements, aircrafts along with relevant parts are flown out of India for maintenance. Instead of spending precious time on repairing the required parts, the leasing companies usually replace the parts with already serviced parts to reduce the downtime of aircrafts. The aircrafts are thus brought back with the replaced engines / landing gear / auxiliary power units.

The issue arises when the aircrafts with the replaced parts are flown back to India. Although Sl. No. 547A allows for exemption to aircraft engines under lease, it will be appreciated that at the time of first import under exemption, the imported aircrafts and the engine part numbers, landing gear part number, and auxiliary power unit part number are recorded in the bill of entry. The replaced parts do not come under a separate lease agreement. However, at the customs port, the officers contend that either the parts as shown in original import documents are repaired and returned for claiming the IGST exemption, or exemption is not available on the replaced parts.

Therefore, duty is demanded on the import of the replaced engines / landing gear / auxiliary power units. The importer is back to the basics, to avail the exemption against a serial number other than 547A and treat the same as an import of goods after adhering to certain conditions. If no condition can be adhered to, then the importer can avail exemption under Sl. No. 545, making effective rate of BCD as 2.5%, with no exemption available for duties imposed under Section 3(7) of the Customs Tariff Act.

However, cash strapped airlines can ill-afford cash flow to this extent. It is also doubted whether the legislative intent was to collect duty on the replaced engines. Minor correction in line with the legislative intent will go a long way in easing stress on the airlines businesses.

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Goods and Services Tax (GST)

Notifications and Circulars

39th Meeting of the GST Council – Highlights: The GST Council has in its 39th Meeting held on 14-3-2020 taken many major decisions in respect of both GST rates and those involving changes in law and procedures. Some of the important recommendations of the Council are highlighted below.

- Mobile phones and specified parts – GST rates to be increased from 12% to 18%.
- Matches (both handmade and others) to be taxed @ 12%.
- Maintenance, Repair and Overhaul (MRO) services in respect of aircraft to be taxed @ 5% with full ITC. Further, the place of supply of B2B MRO services will be changed to the location of recipient.
- Interest for delay in payment of GST to be charged on the net cash tax liability with effect from 1-7-2017. GST law will be amended retrospectively.
- E-invoicing and QR Code implementation to be postponed to 1-10-2020. Notification Nos. 13 and 14/2020-Central Tax, both dated 23-3-2020 have been issued in this regard.
- Insurance company, banking company, financial institution, non-banking financial institution, GTA, passenger transportation service, etc., to be exempted from issuing e-invoices or capturing dynamic QR code. Notification Nos. 13 and 14/2020-Central Tax, both dated 23-3-2020 have been issued in this regard.
- Existing system of GSTR-1 and GSTR-3B to continue till September, 2020. Notification Nos. 27, 28 and 29/2020-Central Tax, both dated 23-3-2020 have been issued for the purpose.
- GSTR-1 for 2019-20 to be waived for specified taxpayers. Notification No. 12/2020-Central Tax, dated 23-3-2020 has been issued in this regard.
- Due date for filing GSTR-9 (Annual Return) and GSTR-9C (Reconciliation Statement) for FY 2018-19 to be extended to 30-6-2020 from 31-3-2020. Notification No. 15/2020-Central Tax, dated 23-3-2020 has been issued for the purpose.
- Furnishing of GSTR-9C for the FY 2018-19, for taxpayers having aggregate turnover below Rs. 5 crores to be relaxed.
- Late fees not to be levied for delayed filing of GSTR-9/GSTR-9C for FY 2017-18 and 2018-19 for taxpayers with aggregate turnover less than Rs. 2 crores.
- Restrictions to be imposed on passing of the ITC in case of new GST registrations, before physical verification of premises and Financial KYC of the registered person.
- Application for revocation of cancellation of registration can be filled up to 30-6-2020, where registrations have been cancelled till 14-03-2020.
- Bunching of refund claims across financial years to be allowed to facilitate exporters.
- Exemptions from IGST and Cess on imports made under Advance Authorisation / EPCG / EOU schemes to be extended up to 31-03-2021.
- Special procedure to be prescribed for corporate debtors under the provisions of the

IBC, 2016 who are undergoing the corporate insolvency resolution process, so as to enable them to comply with the provisions of GST laws during the CIRP period. Notification No. 11/2020-Central Tax, dated 23-3-2020 has been issued in this regard.

- E-Wallet scheme to be finalized up to 31-03-2021.
- Procedure for reversal of ITC in respect of capital goods partly used for affecting taxable supplies and partly for exempt supplies under Rule 43(1)(c), to be prescribed. Central Goods and Services Tax Rules, 2017 will be amended in this regard with effect from 1-4-2020.
- Ceiling to be fixed for the value of the export supply for the purpose of calculation of refund on zero rated supplies. CGST Rules, 2017 have been amended in this regard.
- CGST Rules amended to allow for sanction of refund in both cash and credit in case of excess payment of tax.
- Recovery of refund to be made on export of goods where export proceeds are not realized within the time prescribed under FEMA. CGST Rules, 2017 have been amended for this purpose.
- 'Know Your Supplier' facility to be introduced to enable registered person to have some basic information about the suppliers.

Apportionment of ITC in case of business reorganisation: CBIC has clarified that for apportionment of ITC pursuant to a demerger under Rule 41(1) of the CGST Rules, the value of assets of the new units should be taken at the State level (at the level of distinct person) and not at the all-India level. Clarifying on various other issues, Circular No. 133/03/2020-GST, dated 23-3-2020 also states that the transferor is required to file FORM GST ITC-02 only in those States where both transferor and transferee are registered. In respect of the formula prescribed under Rule 41(1), the circular states that the same is applicable for all forms of business re-organization that results in partial transfer of business assets along with liabilities and that it must be applied to the total amount of unutilized ITC of the transferor, i.e. the sum of CGST, SGST/UTGST and IGST credit. According to the circular, however, the transferor will be at liberty to determine the amount to be transferred under each tax head (IGST, CGST, SGST/UTGST) within this total amount. Further, while apportionment formula is to be applied on the ITC balance of the transferor as available in electronic credit ledger on the date of filing of FORM GST ITC-02 by the transferor, the relevant date to calculate the ratio of value of assets should be the "appointed date of demerger".

Special procedure prescribed for corporate debtors undergoing CIRP under IBC where management is being undertaken by IRP/RP: CBIC has prescribed special procedure under Section 148 of the Central Goods and Services Tax Act, 2017 for the corporate debtors who are undergoing Corporate Insolvency Resolution Process (CIRP) under the provisions of the Insolvency and Bankruptcy Code and where the management of the affairs is being undertaken by the interim resolution professional or resolution professional. The said class of persons, with effect from the date of appointment of IRP / RP, will be treated as a distinct person of the corporate debtor, and will be liable to take a new registration in each of the States or Union territories where the corporate debtor was registered earlier. According to Notification No. 11/2020-Central Tax, dated 21-3-2020 the new registration must be taken within 30 days of the appointment of the IRP/RP. The notification also prescribes procedure for filing of returns and for availing ITC. It may be noted that Circular No. 134/04/2020-GST, also issued on 23-3-2020 clarifies on various issues in this regard.

Foreign airlines exempted from furnishing Form GSTR-9C: Foreign company which is an airlines company covered under the notification issued under Section 381(1) of the Companies Act, 2013 and who have complied with the Rule 4(2) of the Companies (Registration of Foreign Companies) Rules, 2014, has been exempted from furnishing reconciliation statement in Form GSTR-9C. According to Notification No. 9/2020-Central Tax, dated 16-3-2020, this exemption is available subject to condition of submission of statement of receipts and payments for the financial year in respect of its Indian business operations, duly authenticated by a practising Chartered Accountant in India for each GSTIN by the 30th September of the year succeeding the financial year.

Appeal to Appellate Tribunal – Limitation: Taking note of the Central Goods and Services Tax (Ninth Removal of Difficulties) Order, 2019, dated 3-12-2019, the CBIC has clarified that as of now, the prescribed time limit to make application to appellate tribunal will be counted from the date on which President or the State President enters office. Advising the appellate authorities to dispose all pending appeals expeditiously without waiting for the constitution of the Appellate Tribunal, the Circular No. 132/2/2020-GST, dated 18-3-2020 states that the appellate authority, while passing order, may mention in the preamble that appeal may be made to the appellate tribunal whenever it is constituted within three months from the President or the State President enters office.

Ratio decidendi

Anti-profiteering – Computation of profiteered amount – Delhi High Court stays NAA Orders: Observing that *prima facie* the method adopted for computation of profiteered amount requires consideration, the Delhi High Court has by separate orders stayed two orders of the National Anti-Profiteering Authority. The Court also directed the authorities to restrain from initiating any penalty proceedings against the petitioner. It observed that for the period prior to reduction of GST rate from 12% to nil, i.e., for the period before 27-7-2018, the DGAP had computed the base price on average basis, however, for the period after the GST rate became nil w.e.f. 27-7-2018, the base price was worked out item by item. The Court also recorded that in respect of several items sold by the petitioner, after the reduction of GST rate to nil, the price had actually fell, however, while computing the profiteered amount, such cases were excluded from consideration. The matter will now be listed before the Court on 24-9-2020. [*Johnson & Johnson Pvt. Ltd.* v. *Union of India* – Orders dated 18-2-2020 and 4-3-2020 in W.P.(C) 1780/2020 and W.P.(C) 2490/2020, Delhi High Court]

TRAN-1 – Non-filing of Form Tran-1 by 27-12-2017 not fatal – Supreme Court maintains Punjab & Haryana High Court Order: The Supreme Court has dismissed the Special Leave Petition filed by the department against the decision of the Punjab & Haryana High Court in the case *Adfert Technologies v. UoI* [*Refer, November 2019 issue of Tax Amicus*]. Observing that there was no intention to deny carry forward of unutilized credit of duty/tax already paid, on the ground of time limit, the High Court had in its impugned Order directed the Revenue department to allow petitioners to file or revise incorrect TRAN-1 either electronically or manually before 30-11-2019. Reiterating the findings in the Gujarat High Court and Delhi High Court decisions, the Punjab & Haryana High Court had observed that department was at liberty to verify genuineness of claim of petitioner, but nobody shall be denied to carry-forward legitimate claim of Cenvat credit / ITC on the

ground of non-filing of TRAN-I by 27-12-2017. [*Union of India* v. *Adfert Technologies Pvt. Ltd.* – 2020 VIL 10 SC]

TRAN-1 – CGST Rule 117 is procedural in nature: Gujarat High Court has declared Rule 117 of the CGST Rules, 2017, for the purpose of claiming transitional credit, as procedural in nature. The Court was of the view that when the co-ordinate Bench had already declared clause (iv) of sub-section (3) of Section 140 as unconstitutional, there is no hesitation to declare Rule 117 of the CGST Rules, 2017, for the purpose of claiming transitional credit, as procedural in nature. It held that the said rule should not be construed as a mandatory provision. The assessee-respondent had tried to upload form GST TRAN-1, but it could not file on account of technical glitches in terms of poor network connectivity and other technical difficulties at common portal, and the Court, observing that Cenvat credit is indefeasible, had earlier (in the judgement sought to be reviewed) directed the department to permit the assessee to allow filing declaration form in GST TRAN-1 and GST TRAN-2. [*Nodal Officer* v. *Goods and Services Tax Council* – 2020 VIL 95 GUJ]

No detention on allegation of mis-classification of goods: In a case of *bona fide* miscalculation as to whether the goods would be exigible to GST at the rate of 12% or 28%, Kerala High Court has held that in case of a *bona fide* dispute with regard to the classification between a transitor of the goods and the squad officer, the squad officer may intercept the goods and detain them for the purpose of preparing the relevant papers for effective transmission to the assessing officers and nothing beyond. Quashing the detention of goods, the Court relied on Gujarat High Court decision in the case *Synergy Fertichem Pvt. Ltd. v. State of Gujarat.* The issue involved detention of carbonated fruit drinks alleging mis-classification. While the squad officer was of the view that goods are classifiable under sub-heading 2202 10, the assessee pleaded classification under TI 2202 99 20. [*Daily Fresh Fruits India Pvt. Ltd.* v. *Assistant State Tax Officer* – 2020 TIOL 535 HC KERALA GST]

No detention of vehicle for alleged 'wrong destination': Telangana High Court has set aside the detention of goods and vehicle on the allegation of 'wrong destination'. According to the Court, this is not a ground to detain the vehicle carrying the goods or levy tax or penalty. It was held that the fact that the vehicle was found at another place does not automatically lead to any presumption that there was an intention on the part of the assessee-petitioner to sell the goods at the local market evading GST. The Court held that it was presumed that there was possibility of a local sale, and that a mere possibility cannot clothe the authorities to detain the goods. It was also of the view that when the IGST was already paid, the goods cannot be treated as having escaped tax and fresh tax and penalty cannot be imposed on the petitioner. Further, considering the fact that petitioner could not challenge detention and demand (due to certain other obligations) and paid the amount due to economic duress, it was held that the petitioner cannot be blamed for paying the same without protest, when he had no choice but to pay it. The amount collected was directed to be refunded with interest @ 6%. [*Commercial Steel Company* v. *Asstt. Commissioner* – 2020 VIL 116 TEL]

Area based exemption – No compulsion to grant GST exemption for residual period: In a case where assessee was enjoying area-based exemption (in respect of excise duty) till 1-7-2017 when GST was introduced, the Delhi High Court has held that the authorities cannot be compelled to grant exemption from payment of GST to the petitioner from 1-7-2017 for the balance residual period of 10 years. The Court was of the view that the petitioner has no vested right to be

entitled to budgetary support of entire CGST and IGST, instead of 58% and 29% respectively as under the Budgetary Support Scheme. It noted that the industrial policy of the government to grant area-based exemption has undergone complete change and consequently, the exemption granted under the central excise exemption notification giving effect to the said policy has also lost its relevance and is no longer in force. Report of the Task Force on GST was also noted for the purpose. The High Court also observed that merely because the Government has acknowledged the difficulties and introduced Budgetary Support Scheme, it cannot be said that the petitioners, as a matter of right, are entitled to insist that the support should be on the entire fiscal benefits as originally envisaged under the 2003 policy. Further, while nothing irrational or arbitrary was found with respect to partial tax budgetary support, plea of promissory estoppel was also held as not maintainable. [*Hero Motocorp Ltd.* v. *Union of India* – 2020 TIOL 530 HC DEL GST]

Advance Ruling – Issue relating to determination of place of supply, covered: Kerala High Court has held that the issue relating to determination of place of supply would also come within the ambit of the larger of issue of "determination of liability to pay tax on any goods or services or both" as envisaged in clause (e) of Section 97(2) of the CGST Act, 2017. View taken by the AAR that they do not have jurisdiction as the said issue is not expressly provided in Section 97(2), was held to be wrong and faulty. The Court in this regard observed that the Parliament in its wisdom has decided to mandate such a provision as in clause (e) of Section 97(2), whereby the applicant is empowered to seek advance ruling even on the said larger issue of determination of liability to pay tax on goods or services or both. [*Sutherland Mortgage Services Inc.* v. *Principal Commissioner* – 2020 VIL 102 KER]

Cancellation of registration – Continuous default of 6 months in filing of returns mandatory at time of passing order: Taking note of the fact that as on the date of issuance of order of cancellation of registration, the petitioner had only 5 months of continuous default and not the mandatory 6 months continuous default (in filing of returns), which is the essential jurisdictional fact required for invoking the power of cancellation of the registration under Section 29(2)(c) of the CGST Act, the Kerala High Court has set aside the order cancelling registration. The assessee had filed the return for one month on the date the order cancelling registration was passed. The Court however observed that the authority was not at fault for passing the cancellation order as it was not aware that the petitioner had filed the return. The Court however observed that requirement of 6 months' continuous period should be fulfilled both at the time of issuance of the abovesaid notice in terms of the proviso to Section 29(2) of the CGST Act read with Section 22, but also at the stage of passing the final order cancelling the registration as per Section 29(2)(c). [*Phoenix Rubbers* v. *Commercial Tax Officer* – 2020 TIOL 554 HC KERALA GST]

Provisional attachment – CGST Rule 159(5) providing for filing of objections within 7 days is directory: In a case involving provisional attachment of bank accounts, the Delhi High Court has held that the period of 7 days prescribed in Rule 159(5) of the CGST Rules, 2017 is a directory and not a mandatory period. The said sub-rule provides for filing of objection to the provisional assessment to the effect that the property attached was or is not liable to attachment. Observing that no consequence is prescribed either in the CGST Act or in the Rules to say that if the objections are not preferred within 7 days, they shall not be entertained, the Court held that objections cannot be rejected on

the ground of limitation if they are not filed within 7 days. Supreme Court decision in the case of *Sambha Ji v. Gangabai* [2009 (240) ELT 161 (SC)] was relied upon. [*RR India Pvt. Ltd.* v. *Union of India* – 2020 TIOL 562 HC DEL GST]

No GST on chilling and packing of raw milk – TRU Letter dated 9-8-2018 not in consonance with provisions of notification: Gujarat High Court has held that milk chilling and packing service provided by the contractors to the assessee-dairies are exempted by virtue of Serial No.24 of the Table to Notification No.11/2017-Central Tax (Rate). The Court in this regard quashed the letter/Circular F No.354/292/2018-TRU, dated 9-8-2018 issued by the Government of India through the Tax Research Unit, which had clarified to the contrary. The Court was of the view that interpretation given by the authorities to the activities of chilling and packing of milk in said Circular was not in consonance with the provisions contained in Notification No.11/2017-Central Tax (Rate). The Court noted that support services were not provided to chilled and packed milk, but support services of storage and packing were provided to raw milk which was an 'agricultural produce'. It also noted that sub-clause (e) of clause (i) to the Explanation under Heading 9986, under which chilling, storage and packing of raw milk would fall, did not require processes to be carried out at an agricultural farm. [*Gujarat Co-operative Milk Marketing Federation LTD.* v. *Union of India* – 2020 TIOL 456 HC AHM GST]

No GST on mobilisation advance received prior to implementation of GST towards supply of Works Contract Service: AAR Tamil Nadu has held that mobilisation advance to the extent received prior to the implementation of GST towards supply of Works Contract service is not to be subjected to GST as per the provisions of Section 142(11)(b) of the CGST Act 2017. The Authority was also of the view that transitional provisions under Section 142(11)(c) are not applicable to the case at hand as assessee had paid only service tax and no VAT during the period prior to introduction of GST on the said amount. The applicant had received the mobilisation advance which is 5% of the contract value, to mobilise materials, labour, etc., for the execution of works. The amount was received prior to introduction of GST but part of it was transitioned into the GST regime and was to be adjusted by the applicant-assessee post implementation of GST. The tax invoice was also issued according to the service tax provisions in force then, though VAT was not paid then and was to be paid later at the time of issuance of running invoices. [In RE: *Shapoorji Pallonji and Company Private Limited* – 2020 VIL 53 AAR]

GST applicable on transfer of title of title in moulds used for manufacturing goods supplied: The applicant entered into an agreement to supply certain automotive parts and moulds to an Indian buyer and placed an order for manufacturing said parts and moulds on a foreign supplier. The moulds manufactured by the foreign supplier were disposed as waste after being used for manufacturing the parts and the same were not imported into India. The foreign supplier raised two separate invoices for supply of parts and moulds. Similarly, the applicant raised separate invoices on the Indian buyer. The advance ruling was sought on whether GST will be applicable on the transfer of title in moulds from applicant to Indian buyer. The Tamil Nadu Advance Ruling Authority relied on Section 7(1), 7(1A) and Sl. No. 1(a) of Schedule II to the CGST Act, 2017 to hold that there was transfer in title of moulds for a consideration and the supply was in the course of business. GST was held applicable on transfer of title in moulds to the India buyer. [In RE: *Automative Components Technology India Pvt. Ltd*. – 2020 VIL 49 AAR]

ITC available on buses and not cars hired for transportation of employees: The applicant entered into an agreement for hiring of buses and cars for transportation of employees to its factory. Advance ruling was sought on whether the applicant was eligible to take ITC of GST charged by the transporter. The AAR *vide* Order dated 11-7-2018 held that the applicant was not eligible to take ITC of such GST as per restriction on 'rent a cab' service specified in Section 17(5)(b)(iii) of the CGST Act, 2017. The Haryana Appellate Authority for Advance Ruling referred to Section 17(5) as effective prior to 1-2-2019 and post that date, that is enactment of CGST (Amendment) Act, 2018, and to the Allahabad High Court case of *Anil Kumar Agnihotri* wherein it was held that under the taxing statute, there is no distinction between renting or hiring. It held that the applicant was eligible to avail ITC on hiring of buses post enactment of CGST (Amendment) Act, 2018 as the seating capacity of buses was more than 13 persons. However, it was held that the applicant was not eligible to avail ITC on hiring of cars prior to as well as post enactment of CGST (Amendment) Act, 2018. [In RE: *YKK India Private Limited* – 2020 VIL 09 AAAR]

Lapse of accumulated ITC due to inverted duty structure: Advance ruling was sought on whether the meaning of word 'lapse' in Notification No. 20/2018- Central Tax (Rate), dated 26-7-2018 would mean lapse for refund or lapse for utilization of ITC for payment of output tax liability. The Uttarakhand Authority for Advance Ruling in this regard referred to Notification No. 5/2017-Central Tax (Rate) which provides that in case of inverted duty structure, no refund of accumulated ITC in respect of specified inputs will be available. The said Notification was amended *vide* NN 20/2018 to include the Proviso (ii) which states that the accumulated ITC in respect of certain specified goods lying unutilised in balance, after payment of tax for and up to the month of July, 2018, on the inward supplies received up to 31-7-2018, shall lapse. Observing that the proviso has to be read with the principal part of the notification, the Authority was of the view that the proviso seeks to lapse only such ITC, which was the subject matter of principal notification, i.e., accumulated credit on account of inverted duty structure in respect of notified goods. [In RE: *Uttaranchal Filament (India)* - 2020 VIL 48 AAR]

Association of apartment owners liable to GST on contributions received from members: Karnataka Appellate Authority for Advance Ruling has held that appellant, an association of apartment owners, receiving contributions from its members in excess of Rs.7500 per month per member in respect of various activities undertaken by them is liable to GST. The Appellate Authority observed that the money collected by the applicant from its members was used to procure services and goods from a third party and provide the benefits of such goods and services to the members of the association. Accordingly, it was held that the individual apartment owners who are members of the association were the beneficiaries and the contributions made by them will be the consideration and the same will be liable to GST. Supreme Court's decision in the case of *Calcutta Club Ltd.* was distinguished. Upholding the AAR Order, the AAAR further held that a member who contributed an amount which was more than Rs 7500/-, will not be eligible for the exemption under sl. No. 77 of Notification No. 12/2017-Central Tax (Rate) and the entire contribution amount will be liable to be taxed. [In RE: *Vaishnavi Splendour Homeowners Welfare Association* – 2020 VIL 07 AAAR]

Printing under agreement with foreign entity when material delivered to Indian entity, is not exports: The applicant entered into an agreement with a foreign entity for printing

booklets as per content provided by foreign entity. The applicant arranged physical inputs like paper, ink and other physical inputs, printed the content and bound the printed material into booklets and delivered the booklets to the recipient in India. The advance ruling was sought on whether the activities undertaken by procuring orders from a foreign buyer to print texts and thereafter deliver them to various places in India was liable to GST or the same would 'export'. The West Bengal Authority for Advance Rulings referred to Circular No. 11/11/2017-GST dated 20/10/2017 and observed that the activity undertaken by the applicant would be considered as services by way of printing of the goods falling under Chapter 48 and 49 and classifiable under SAC 9989. Further, the place of supply of the printed booklets will be the place at which the printed booklets were delivered. Furthermore, to determine the 'recipient' of such printing service, the Authority referred to Section 2(93) of the CGST Act, 2017 defining 'recipient' and held that the person who received the supply in India will be considered as the recipient, being inseparable from the foreign buyer. Such supplies were held not as export of services within the meaning of Section 2(6) of the IGST Act, 2017. [In RE: *Swapna Printing Works Private Limited* – 2020 VIL 62 AAR]

Selling of space/time for advertisement in print media – GST liability: Uttarakhand Authority for Advance Ruling has held that selling of space/time for advertisement in print media is classifiable under SAC 9983 and attracts GST at the rate of 5% under Serial No. 21 of Notification No. 11/2017-CT(R). It also held that in case the advertising company/ agency sells unit of space in print media to client and designing/ composing is being done without charging separately in the bill for designing, the applicant is making composite supply, wherein principal supply is 'selling of space in print media'. Accordingly, it was held that the said supply will attract GST at the rate of 5%. The AAR was also of the view that 'selling of space for advertisement in print media' will not be a "pure service" and will not be eligible for exemption under Notification No. 12/2017-CT(R). [In RE: *Harmilap Media Pvt Ltd*. – 2020 VIL 55 AAR]

Customs

Notifications, Circulars, Public Notices and Press Releases

Mandatory RFID Sealing for goods transported for deposit or removal from warehouse, postponed: The CBIC had previously prescribed regulations with respect to RFID sealing of containerized export cargo vide Circular No. 26/2017-Cus. dated 1-7-2017 and subsequent related circulars. It has now been decided to extend the RFID sealing regulations for transport of goods for deposit in a warehouse as well as removal therefrom. According to Circular No. 10/2020, dated 7-2-2020, the importer or owner of goods will be required to use RFID anti-tamper one-time-locks (RFID OTL) in all cases where the Warehouse (Custody & Handling of Goods) Regulations, 2016, the Special Warehouse (Custody & Handling of

Goods) Regulations, 2016, Warehoused Goods (Removal) Regulations 2016 and Manufacture and Other Operations in Warehouse (no. 2) Regulations, 2019 prescribe affixation of a 'One Time Lock'. The list of vendors from which such RFID OTL should be sourced is available on the website of CBIC. It may however be noted that implementation of Circular No. 10/2020-Cus. has been deferred till 1st of May, 2020 vide Circular No. 16/2020-Cus., dated 16-3-2020.

All-India implementation of automated clearance of Bills of Entry: The CBIC, vide Circular No. 05/2020 dated 27th January 2020, had implemented automated clearance facility in the Indian Customs EDI System (ICES) on pilot basis for Chennai Custom House and Jawaharlal Nehru Custom House (Mumbai). The automated clearance facility provides for automatic electronic clearance to Bill(s) of Entry on completion of Customs Compliance Verification (CCV) and payment of duty by the importer. The Board has now decided to extend the automated clearance facility on pan-India basis at all Customs EDI locations where RMS is enabled and functional. According to Circular No. 15/2020-Cus., dated 28-2-2020, the facility is available with effect from 5-3-2020.

Transportation of Goods (Through Foreign Territory), Regulations, 2020 notified: The Transportation of Goods (Through Foreign Territory), Regulations, 2020 have been notified by the CBIC. These Regulations supersede the Transportation of Goods (Through Foreign Territory) Regulations, 1965. The 2020 Regulations now apply to movement of goods from one part of India to another through Bangladesh under the Agreement for use of Chattogram and Mongla ports and the Protocol on Inland Water Transit and Trade between Bangladesh and India. The Regulations also provide for movement of goods from one part of India to another through land route which lies partly over the territory of a foreign country. Notification No. 16/2020-Cus. (N.T.) and Circular No. 14/2020-Cus., both dated 21-2-2020 have been issued for the purpose.

Relief in Average Export Obligation under the EPCG Scheme to exporters of specified sectors: Para 5.19 of FTP-Handbook of Procedures provides for relief to exporters pertaining to sectors or product groups whose total exports have declined by more than 5% in comparison to exports of previous years. In case such reduction in total exports has taken place, the said para provides for reduction in Average Export Obligation, under the EPCG Scheme, in proportion to the decline in exports. In accordance with the terms of Para 5.19 of HBP, the DGFT has notified HS Code wise products where reduction in excess of 5% has taken place for the financial year 2018-19 as compared to financial year 2017-18. As per Policy Circular No. 31/2015-20, dated 26-2-2020 issued for the purpose, the DGFT has directed Regional Authorities to re-fix the Annual Average Export Obligation for EPCG Authorisations for the year 2018-19 in accordance with the export decline percentage mentioned in the Circular.

Export restrictions for specified Active Pharmaceutical Ingredients and formulations made from these APIs: Ministry of Commerce and Industry has restricted export of specified Active Pharmaceutical Ingredients (APIs) and formulations made from these APIs. The export restriction has come into effect from 3rd of March 2020 and will be in force till further orders. Notification No. 50/2015-20, dated 3-3-2020 in this regard amends Chapters 29 and 30 of the

2nd Schedule to the ITC(HS) Export Policy 2018. It may be noted that some 13 APIs including paracetamol, tinidazole, metronidazole, vitamin B1, B6 and B12, etc., are covered in this restriction.

COVID-19 effect – List of certain personal protection equipment and certain medical equipment freely exportable/prohibited revised: Ophthalmic instruments and appliances under sub-heading 901850 (except medical goggles), surgical blades, disposable non-woven shoe covers, specified breathing appliances, gas masks with chemical absorbent, HDPE or plastic tarpaulin, PVC conveyor belt and biopsy punch, are freely exportable. Notification No. 48/2015-20, dated 25-2-2020 in this regard amends the earlier notification issued on 8-2-2020 which allowed free export of only surgical or disposable masks (2/3 ply) and all gloves (except NBR gloves). Personal protection equipment including clothing and masks were made prohibited for export on 31st of January by Notification No. 44/2015-20, dated 31-1-2020. However, it may be noted that as per the latest developments, now surgical/disposable masks (2/3 ply) have been prohibited from export along with ventilators and certain textile raw material for masks and coveralls. Notification No. 52/2015-20, dated 19-3-2020 has been issued for these prohibitions.

SCOMET items – Proforma of undertaking in form of legal agreement and of application and end-use certificate for implementation of GAICT, notified: The proforma of undertaking in the form of a legal agreement has been notified to ensure the monitoring of return of SCOMET items allowed to be exported for the purpose of repair/replacement/demo/ display/exhibition/tender/RFP/RFQ/NIT. As per DGFT Public Notice No. 63/2015-20, dated 18-2-2020, the undertaking is to be filed by the applicant exporters, duly signed in ink and stamped by the authorized signatory of the company and submitted along with the online application with DGFT. Further, DGFT *vide* Public Notice No. 65/2015-20, dated 17-3-2020 has notified proforma of application and end-use certificate for implementation of Global Authorisation for Intra-Company Transfers (GAICT) of SCOMET items/software/technology.

Metallic waste and scrap – Specified imports through Katapulli port allowed: Import of metallic waste and scrap is subject to pre-shipment inspection certificate (PSIC) from the country of origin. However, such imports from safe countries/regions, i.e., USA, UK, Canada, News Zealand, Australia and EU do not require PSIC. Such imports can now be facilitated through the Katapulli Port also. Consequently, total number of sea ports for imports of metallic scrap under Para 2.54 of Handbook of Procedures have increased from 15 to 16. DGFT Public Notice 64/2015-20, dated 19-2-2020 issued in this regard amends Para 2.54(d)(v)(iv) of the FTP-Handbook of Procedure for this purpose.

Remission of Duties and Taxes on Exported Products (RoDTEP) – Union Cabinet approves scheme: The Union Cabinet has on 13th of March 2020 given its approval for introducing the Scheme for Remission of Duties and Taxes on Exported Products (RoDTEP) under which a mechanism would be created for reimbursement of taxes / duties / levies, at the Central, State and local level, which are currently not being refunded under any other mechanism but which are incurred in the process of manufacture and distribution of exported products. Reimbursement under the RoDTEP Scheme will cover certain

taxes/duties/levies which are outside GST and are not refunded for exports presently, such as, VAT on fuel used in transportation, mandi tax, duty on electricity used during manufacturing, etc. According to the Press Release issued by Cabinet Committee on Economic Affairs (CCEA), the rebate would be claimed as a percentage of FOB value of exports.

Ratio decidendi

Valuation – Sponsorship and endorsement expenses borne by importer when not includible: CESTAT New Delhi has held that the sponsorship and endorsement expenses paid by the Indian importer to various athletes and players in India are not liable to be included in the assessable value of the goods imported by the importer. The department's appeal which invoked Rule 10(1)(e) of the Customs Valuation (Determination of Value of Imported Goods) Rules 2007 for inclusion of said expenses was hence dismissed. Earlier, the Commissioner had found that the payments made by importer to sports personalities / associations were not made as a condition of sale to satisfy any obligation of exporter. Absence of an enforceable legal right under the License Agreement (between Adidas India and Adidas Germany) that would compel the buyer to incur such expenditure, was also noted to hold that requirement set out in Rule 10(1)(e) was not satisfied. The Tribunal in this regard also noted that any payment made by a buyer to a third party on his own account, even as a condition of sale of the imported goods in terms of any clause of the agreement between the buyer and the seller, cannot be added to the value of the imported goods since such payment was not made to satisfy an obligation of the seller. It was also observed that according to Note to Rule 3 of Customs Valuation Rules, the activities undertaken by the buyer on his own account, other than those for which an adjustment is provided in Rule 10, are not to be considered as an indirect payment to the seller even though they may be regarded as of benefit to the seller. [*Commissioner* v. *Adidas India Marketing Pvt. Ltd.* – 2020 VIL 124 CESTAT DEL CU]

Valuation – Buying commission and notional high sea sales charges: CESTAT Ahmedabad has held that neither the amount of Rs. 17/- per MT (miscellaneous charges) paid by the Government of India to the STE was includible in the assessable value on which the appellant-importer was required to pay duty, nor 2% notional high sea sale commission is includible. Department's contention that since the STE imported urea independently on commercial basis and then sold it to the Government of India on High Sea Sale basis, from whom assessee-importer bought the goods, the relationship between STE and Government of India cannot be treated as between a principal and agent, was rejected by the Tribunal observing that goods were imported by STE on behalf of GoI, who had also deducted TDS considering the amount paid as commission. Fact that urea can only be imported through canalising agencies was noted while holding that the amount paid was in fact 'buying commission', which is not includible. Supreme Court decision in the case of *Hyderabad Industries* was distinguished and Rule 10(1)(e) of the Customs Valuation Rules was held as not applicable. Notional high sea sales commission of 2% was also held as not includible during the period after amendment of Section 14 of the Customs Act in 2007. [*Indian Farmers Fertilizers Co-operative Limited* v. *Principal Commissioner* – 2020 VIL 104 CESTAT AHM CU]

Refund of SAD when duty originally paid using scrips: Observing that there is no restriction in Notification No. 102/2007-Cus., providing for refund of SAD, to pay duty by

utilisation of duty paying scrip, CESTAT New Delhi has held that Public Notice dated 18-4-2013 has no application for rejection of refund claim of SAD paid by utilisation of such scrips. Department's contention that the law laid down by the Delhi High Court in the case of *Allen Diesel India Pvt. Ltd.* was not a good law as the decision which had relied upon the said case was stayed by the Supreme Court, was rejected by the Tribunal observing that order does not lose its legality unless the same is set aside. [*Gravita India Limited* v. *Commissioner* – 2020 VIL 107 CESTAT DEL CU]

Interest on delayed refund of auction proceeds: Madras High Court has directed payment of interest on the delayed refund of proceeds of the auction to the foreign exporter, in a case where the importer had abandoned the goods. The Court though noted that provisions of Sections 27 and 27A of Customs Act, 1962 were not applicable as the amount involved was not duty, it nevertheless ordered for payment of interest applying rate of interest as prescribed under notifications issued under Section 27A. It observed that the government has rationalised rates which would not result in any loss to the government. Department's plea that petitioner should be relegated to work out his remedy in a civil court, was also rejected by the Court observing that there were no disputed questions of fact that need to be established after trial. [*Sunchan Trading Company* v. *Commissioner* – 2020 TIOL 451 HC MAD CUS]

Reference to High Court – Calling for statement from Tribunal not mandatory: Larger Bench of the Supreme Court has held that the High Court has a discretion on the facts of each case, to direct the Tribunal to refer to the High Court any question of law arising from Tribunal's order. Considering that the first word used in Section 130A(4) of the Customs Act, 1962 was 'if', the Court was of the view that High Court has a discretion on the facts of each case either to do so or not to do so. It was held that there was nothing in the language of Section 130A which mandatorily obliges the High Court to call for a statement from the Tribunal before deciding any such application. Division Bench decision in the case of *Commissioner v. Central Manufacturing Tech. Institute*, was hence overruled. [*Commissioner* v. *Adani Exports Ltd.* – 2020 TIOL 61 SC CUS LB]

Valuation – Invoice value when cannot be negated: Observing that onus lies on the Revenue department to prove undervaluation, which it had failed to do since it did not show any contemporaneous import data of identical or similar items or NIDB data to indicate undervaluation, CESTAT New Delhi has held that the invoice value is required be accepted. The Tribunal also noted that there was no allegation or finding that the buyer and seller were related or that there was any extra payment made to the supplier beyond the normal authorized banking channels. It was held that merely based on some emails, the transaction value cannot be disputed and negated without any cogent material. The Tribunal also observed that Director of the assessee was not examined by the adjudication authority before placing reliance on his statements, and no copy of the emails on which the Department sought to rely was made as relied-upon documents. [*H S Chadha* v. *Commissioner* – 2020 TIOL 275 CESTAT DEL]

Drawback and DEPB benefit on goods job-worked in EOU and exported from there: In a case where the assessee in Domestic Tariff Area got the job work of converting yarn into denim fabrics through 100% EOU unit and the said goods were exported out of India, the Division Bench of the Madras High Court has held that Circular Nos. 74/1999-Cus., dated 05-11-1999 and 31/2000-Cus., dated 20-4-2000 could not have restricted or denied the benefit of Drawback

or DEPB in such cases. Dismissing the intra-Court appeal of the Revenue, the Court observed that such Circulars came in direct conflict with clear statutory provisions of law or Import-Export Policy having statutory character. Division Bench Judgments in the case of *L.T. Karle & Co.* [2007 (207) ELT 358 (Mad.)] and Karnataka High Court decision in the case of *Karle International* [2012 (281) ELT 486 (Kar.)], were relied upon. [*CBEC* v. *K.G. Denim Limited* – 2020 VIL 130 MAD CU]

Valuation - Department to prove undervaluation by evidence/information on comparable imports: CESTAT Chennai has held that that when undervaluation is alleged against the importer, the Department has to prove the same by evidence or information about comparable imports. Further, the Tribunal was of the view that if the department relies on declaration made in the exporting country, it has to show how such declaration was procured. It was held that if the department cannot establish as to how the declaration in exporting country was procured, the said information cannot be relied upon as evidence. Reliance in this regard was placed on Supreme Court decision in the case of *South India Television P. Ltd.* [2007 (214) ELT 3 (SC)]. [*Auto Creators* v. *Commissioner* – 2020 TIOL 420 CESTAT MAD]

Central Excise, Service Tax and VAT

Ratio decidendi

Delayed payment of service tax – Cenvat credit not deniable invoking Cenvat Rule 9(1)(bb): CESTAT Bangalore has held that delayed payment of service tax cannot be the basis to deny Cenvat credit by invoking the provisions of Rule 9(1)(bb) of the Cenvat Credit Rules, 2004. The Tribunal was also of the view that delayed payment of service tax voluntarily did not amount to suppression of fact with intent to evade payment of tax and hence denial of credit by invoking Rule 9(1)(bb) was not tenable in law. Allowing the appeals, the Tribunal also observed that once the payment of service tax and availment of credit resulted in revenue neutral situation, then the exception created by Rule 9(1)(bb) was not applicable to the facts of the present case where assessee had availed credit on delayed payment of service tax. [*Bagalkot Cement and Industries Ltd.* v. *Commissioner* – 2020 TIOL 429 CESTAT BANG]

Refund – Limitation under Central Excise Section 11B not applicable for restoration of Cenvat credit: Madras High Court has held that limitation prescribed under Section 11B of the Central Excise Act, 1944 would not be applicable when instead of claiming the refund in cash, the assessee merely claimed restoration of Cenvat credit. Relying on judgements of High Courts of Madras, Allahabad and Calcutta, the Court observed that limitation under Section 11B was not applicable when only restoration of claim was only by way of reversal of that debit entry only upon returning of invoices and when the vendors had not availed any Cenvat credit. The High Court was also of the view that merely because the assessee laid its claim of refund by moving an application in prescribed Form under Rule 127 of the Central Excise Rules, being a procedural requirement of the law, the substantive right of assessee cannot be defeated. Fact that the assessee could itself credit the Cenvat account, if

the goods were received back within the time frame of 180 days under Rule 4(5)(a)(iii) of the Cenvat Credit Rules, 2004, was also noted. [*Hwashin Automative India Pvt. Ltd.* v. *Deputy Commissioner* – 2020 VIL 97 MAD CE]

Tamil Nadu VAT – ITC available even when final goods cleared to SEZ outside the State: In a case where goods were cleared to a unit in Special Economic Zone outside the State of Tamil Nadu, the Madras High Court has allowed proportionate input tax credit on the inputs used in the manufacture of such goods. The Court was of the view that if Section 19(5) of the TNVAT Act, 2006, restricting the ITC, is applied plainly, credit cannot be denied on inputs merely because inputs were used in the manufacture of goods and such manufactured goods were sold to a buyer without payment of tax under Section 8(6) of the CST Act, 1956. It noted that unless there is a specific restriction imposed under the Act, credit cannot be denied. The Court also observed that such sale was not an exempted sale within the meaning of Section 15 of the TNVAT Act and neither exempted under 4th Schedule of the TNVAT Act nor exempted under a notification of the State Government. [*Simpsons and Company Ltd.* v. *Deputy Commissioner* – 2020 TIOL 455 HC MAD VAT]

Refund of unutilised Cenvat credit on exports – Reversal of credit in GSTR-3B sufficient compliance: CESTAT Chennai has held that subsequent reversal of credit by the assessee in its GSTR-3B return is a sufficient compliance with condition at paragraph 2(h) of Notification No. 27/2012-CE (N.T.), dated 18-6-2012 in respect of refund of unutilised credit in case of exports. Relying upon number of earlier decisions, the Tribunal observed that with the introduction of GST there was a change in the scenario and there was also no provision in the ACES system to debit the refund amount. The period involved was from April, 2017 to June, 2017 and the refund claim was made in June, 2018 and by such time GST had been implemented and filing of ST-3 was not required. Denial of refund for the reasons of a premises being unregistered, was also held as not sustainable. [*MSYS Tech India Pvt. Ltd.* v. *Commissioner* – 2020 TIOL 458 CESTAT MAD]

No penalty under Section 78 when tax paid prior to SCN though on audit objection: Madras High Court has held that payment of the service tax with interest by the assessee, not on his own or suo motu but on the basis of the audit objection *viz.,* on the basis of the determination by an auditor of the Department would not take out the case of the assessee from the ambit and scope of Section 73(3) of the Finance Act, 1994. Setting aside the penalty under Section 78, the Court observed that audit objection raised by the Audit Officer was also ascertainment of tax by a Central Excise Officer within the meaning of Section 73(3). The Court also held that since the assessee had complied with the terms of Section 73(3) [by payment of tax and interest before SCN] and would not fall within the mischief of Section 73(4), it would not attract penalty under Section 78. [*Bright Marketing Company* v. *Commissioner* – 2020 VIL 58 MAD ST]

Taxability of service is required to be examined at the time when same is provided: CESTAT Allahabad has held that services of providing mud and spreading the same, provided in relation to agriculture, was exempted and that subsequent action by the owner of the land had no relation to the activities done by the appellant prior to the said conversion. The Adjudicating Authority had held that since the agricultural land was subsequently converted into commercial land, the activity undertaken by the assessee prior to the said conversion would become taxable subsequent to conversion of the land. The Tribunal was of the view that the taxability of the service was required to be examined at the

time when the same was provided. [*Assotech Limited* v. *Commissioner* – 2020 VIL 38 CESTAT ALH ST]

Job work – Notification No. 8/2005-S.T. pari materia to Notification No. 214/86-C.E.: CESTAT Ahmedabad has held that merely because the assessee had used their own powder coating chemicals and the same was not supplied by the client, it did not mean the client had not supplied the raw material. Allowing benefit of Notification No. 8/2005-ST, the Tribunal observed that Notification No. 8/2005-ST was more or less *pari materia* to the Central Excise Notification No. 214/86-C.E., and that Courts in number of cases had allowed benefit of Central Excise notification where it has been held that even if some small part of raw material not supplied by the client was used by the job worker, the activity cannot be taken away from the purview of job work. The Tribunal also observed that the whole purpose of the notification will be defeated as in majority of cases a small part of the consumables / raw materials are used for carrying out any job work. [*Sachin Metal Coats* v. *Commissioner* – 2020 VIL 58 CESTAT AHM ST]

No unjust enrichment in refund of MOT charges: CESTAT Ahmedabad has held that in case involving refund of MOT charges, provisions of Section 11B of the Central Excise Act, 1944 will not be applicable. Provisions of unjust enrichment were hence held not applicable. The Tribunal was of the view that the MOT charges have nothing to do with sale of goods as it is the expenditure for supervision of export of goods which is not charged to the buyers of the goods exported. Tribunal's Order in the case of *Indicon Copier Services*, dealing with refund of penalty, was relied upon. [*Kadillac Chemicals Pvt. Ltd.* v. *Commissioner* – 2020 TIOL 477 CESTAT AHM]

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