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Topsy-turvy state of taxation on distribution of electricity

By **Gagan Gugnani**

Electricity was always intended to be kept outside the scope of GST. However, recently the sector is facing various disputes from the department alleging huge GST liability on various transaction such as open-access charges levied by electricity transmission or distribution utility (TRANSCOs/DISCOMs) for transmission or distribution of electricity, deposit work undertaken by DISCOMs on the request of customer for distribution of electricity, capacity charges levied by Generating Companies for sale of electricity and charges levied by Load Despatch Centre for transmission of electricity, etc.

The present article attempts to discuss the dispute on the scope of distribution of electricity services by DISCOMs. The issue was ignited in GST when CBIC issued a circular in the month of March 2018 stating that specified services provided by DISCOMs shall attract GST liability. Recently, the Rajasthan High Court in the case of *Jodhpur Vidyut Vitran Nigam Ltd.*,[1] relying upon decision rendered by the Gujarat High Court in the case of *Torrent Power Ltd.*,[2] quashed the circular and held that such services are exempted from GST.

Let us analyse the precise issue and the reasoning given by the High Courts while quashing the circular.

At the outset, it is to be noted that the power to levy tax on the consumption or sale of electricity has been conferred to State Government *vide* S. No. 53 of List II of Seventh Schedule of the Constitution of India. For example, in Delhi, electricity tax is levied under the Delhi Municipal Corporation Act, 1957 and the DMC [Assessment and Collection of Tax on the Consumption, Sale or Supply of Electricity] Bye Laws, 1962.

Now, coming to provisions under GST law, supply of electrical energy has been exempted by Entry 104 of Notification No. 2/2017-Central Tax (Rate), dated 28 June 2017 ('**Goods Exemption Notification**'). Further, supply of transmission or distribution of electricity by TRANSCOs/DISCOMs has been exempted by Entry 25 of Notification No. 12/2017-Central Tax (Rate), dated 28 June 2017 ('**Services Exemption Notification**').

It is a well settled by various case law that electricity qualifies to be goods[3]. Accordingly, supply of electrical energy has been exempted under Goods Exemption Notification. However, in addition to exempting electricity as goods, the government extended exemption to transmission and distribution services provided by TRANSCOs/DISCOMs.

Therefore, it is pertinent to understand as to what constitutes distribution of electricity services by DISCOMs.

We may mention that neither GST law nor Electricity Act, 2003 ('**Electricity Act**') defines distribution or distribution of electricity services. The Electricity Act though defines 'distribution licensee' to mean a licensee authorised to

[1] 2021 VIL 95 RAJ
[2] 2019 (1) TMI 1092 - Gujarat High Court

[3] *Madhya Pradesh Electricity Board Jabalpur* [2002 TIOL 226 SC] and *ICC Reality (India) Pvt. Ltd*. [2013 (32) STR 427]

operate and maintain a distribution system for supplying electricity to the consumers in his area of supply. Further, 'distribution system' has been defined to mean the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers.

We may also make a reference to Circular[4] issued in earlier regime which clarified that it is a general practice among TRANSCO/DISCOM to install electricity meters at the premises of the consumers, to measure the amount of electricity consumed by them and 'hire charges' are collected periodically. Supply of electricity meters for hire to the consumers being an essential activity having direct and close nexus with transmission and distribution of electricity, the same is covered by the exemption for transmission and distribution of electricity, extended under Notification No. 11/2010-ST, dated 27 February 2010 and/ or 32/2010-ST, dated 22 June 2010.

As a corollary to this, any activity having direct and close nexus with distribution of electricity, i.e. for sale of electricity should be exempted under distribution of electricity services. In other words, the activity of distribution of electricity is not a single activity but is rather a bundle of activities which collectively constitute distribution of electricity. Thus, charges for activities such as connection of electricity, rental charges of meter, meter testing fee, etc. being intrinsically linked to distribution of electricity should be covered under distribution services by DISCOMs.

However, CBIC issued a Circular[5] in 2018 stating that service by way of transmission or distribution of electricity by an electricity transmission or distribution utility is exempt from GST under Notification No. 12/2017-CT (R), Sl. No. 25. The other services such as,

(i) Application fee for releasing connection of electricity;
(ii) Rental charges against metering equipment;
(iii) Testing fee for meters/ transformers, capacitors etc.;
(iv) Labour charges from customers for shifting of meters or shifting of service lines;
(v) charges for duplicate bill;

provided by DISCOMS to consumer are taxable.

This naturally raises a doubt in the mind of taxpayers as to what makes the department shift its stand from the earlier circular issued in 2010.

The DISCOMs challenged the validity of the 2018 circular in light of proceedings initiated by department due to above circular. In the case of *Torrent Power (supra),* the Court struck down the 2018 circular as being *ultra vires* the provisions of Section 8 of the CGST Act (Composite and Mixed Supplies) as well as Notification No.12/2017-CT (R), Serial No.25, observing that the transmission and distribution of electricity cannot be done without the help of electric line, electric plant and electric meter, and nor can the related services be used for any purpose other than for transmission and distribution of electricity. Accordingly, where the services are naturally bundled in the ordinary course of business and ***the single service which gives such bundle its essential character is exempt from tax***, the entire bundle will have to be treated as provision of such single service.

[4] Circular No. 131/13/2010, dated 7 December 2020
[5] Circular No. 34/8/2018-GST, dated 1 March 2018

Relying upon above judgement, the Rajasthan High Court in the case of *Jodhpur Vidyut Vitran Nigam Ltd.* quashed Para 4(1) of the Circular dated 1 March 2018. The Court observed that simple reading of exemption notification leaves no room for ambiguity that entire package of services namely transmission or distribution of electricity has been exempted. Attempt of chipping out some of the services, out of the complete package and treating them to be taxable is not only arbitrary and unreasonable but such exercise is also violative of provisions of Section 8 of the CGST Act.

We may also discuss the backdrop in which the courts considered that services such as hiring of meter, connection fees, etc. are incidental to principal supply of distribution services. In authors' view, the analogy drawn by the High Court appears to be incorrect to the extent the sale of electricity by DISCOMs has been assumed to be distribution services despite the fact that it qualifies as sale of electricity i.e. sale of goods and with that incorrect assumption, the specified services have been held to be incidental to principal supply of distribution services. It is also interesting to note that exemption entry for supply of electrical energy under Goods Exemption Notification was not highlighted before the Gujarat High Court either by the petitioner nor by the department.

But one may contend that such services are distribution services in themselves and the service exemption entry intended to cover only these services. Further, it can be contended that such services are incidental to supply of electrical energy, i.e. supply of goods by DISCOMs.

Further, the Court in the case of *Torrent Power (supra)* has relied upon Circular issued in 2010 which was in respect of exemption entry under service tax law. It can be contended that the scope of earlier exemption entry was wider in comparison to that of exemption entry under GST law. This is for the reason that Notification No. 11/2010-ST exempted any taxable service provided to any person, by a distribution licencee, a distribution franchisee, or any other person by whatever name called, authorized to distribute power under the Electricity Act, 2003 (36 of 2003), for distribution of electricity, from the whole of service tax. However, the present notification under GST law exempts distribution of electricity services by DISCOMs. But the same may be counter-argued stating that the distribution of electricity services can be equated with services provided to consumer for distribution of electricity and both exemption notifications intended to cover the same activities.

As it is said, tax complexity itself is a kind of tax, the same is true for distribution of electricity by DISCOMs. Despite the fact that their supplies were intended to be exempt from GST, absence of clear provisions and the approach of department of disputing tax on clearly intended exempted supplies has led to topsy-turvy for DISCOMs. The decision of *Torrent Power (supra)* has also been challenged by the department before the Supreme Court. The judiciary is expected to resolve the above issue and various other issues faced by this sector in respect of the exemption entries.

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Goods and Services Tax (GST)

Notifications and Circulars

E-invoicing mandatory for taxpayers having aggregate turnover exceeding INR 50 crore: A registered person (except specified person) having an aggregate turnover in a financial year exceeding INR 50 crore in any preceding financial year from 2017-18 onwards will be required to comply with Rule 48(4) of the CGST Rules, 2017 with effect from 1 April 2021. Rule 48(4) provides for preparation of invoice after obtaining an Invoice Reference Number by uploading information on the Common GST Electronic Portal. It may be noted that at present taxpayers whose aggregate turnover exceeds INR 100 crore are only liable to comply with said provisions. Notification No. 5/2021-Central Tax, dated 8 March 2021 will amend Notification No. 13/2020-Central Tax, with effect from 1 April 2021, for this purpose.

GSTR-9/9C for FY 2019-20 – Due dates extended: The due date of furnishing of GSTR-9/9C for the FY 2019-2020 has been extended from 28 February 2021 to 31 March 2021. Notification No. 95/2020-Central Tax has been amended for this purpose by Notification No. 4/2021-Central Tax, dated 28 February 2021.

Refund on exports/deemed exports clarified: Observing that there is no restriction under Rule 89(1) of the CGST Rules, 2017 on recipient of deemed export supply, claiming refund of tax paid on such deemed export supply, on availment of ITC on the tax paid on such supply, the Central Board of Indirect Taxes and Customs ('**CBIC**') has amended its earlier Circular No. 125/44/2019-GST, dated 18 November 2019 which provided for such restrictions. Further, the 2019 circular has been amended to extend the relaxation provided for filing refund claims where the taxpayer has inadvertently entered the details of export of services or zero-rated supplies to a Special Economic Zone Unit/Developer in table 3.1(a) instead of table 3.1(b) of Form GSTR-3B, till 31 March 2021. The relaxation was earlier available only till 30 June 2019. CBIC Circular No. 147/03/2021-GST, dated 12 March 2021, issued for the purpose, also clarifies that for the purpose of Rule 89(4), the value of export/ zero rated supply of goods to be included while calculating 'adjusted total turnover' will be the same as being determined as per the amended definition of 'Turnover of zero-rated supply of goods' in the said sub-rule.

Ratio decidendi

Refund cannot be withheld without assigning reasons as prescribed in Section 54(11) and Rule 92: Allahabad High Court has held that the order withholding the refund can be passed only if the prerequisites of recording of the opinion in terms of the provisions, i.e. Section 54(11) of the Central Goods and Services Tax Act, 2017 read with Rule 92 of the Central Goods and Services Tax Rules, 2017, is found present in a particular case. On facts of the case, the Court observed that the decision to withhold the refund did not assign any reason on which basis the Principal Commissioner had arrived at his opinion that the refund claimed by the petitioner is likely to adversely affect the revenue in the investigation (which is said to be pending) because of some material indicating some malfeasance or fraud said to have been committed by the assessee. [*Bushrah Export House* v. *UOI & Ors* - 2021 VIL 134 ALH]

Input tax credit not deniable on account of mismatch in GSTIN when forms yet to be notified: In a case involving a mistake in the form GSTR-1, due to which ITC was being denied to the recipient of the goods of the assessee, the Madras High Court has reiterated that the assessee should not be mulcted with any liability on account of the *bona fide* human error. The Court noted that had the requisite statutory Forms (form GSTR-1A and GSTR-2) been notified, the mismatch would have been notified by the assessee or its recipient earlier. It noted that the Revenue department did not dispute the position that goods had reached the intended recipient. Court's earlier decision in the case of *Sun Dye Chemical* [2020 VIL 523 MAD] was relied on. The Assessing Officer was directed to enable amendment to GSTR-1 with all consequences thereto. [*Pentacle Plant Machineries Pvt. Ltd.* v. *Office of the GST Council & Ors* – 2021 TIOL 604 HC MAD GST]

Rectification of GSTR-3B when wrong data inadvertently uploaded – Unnecessary litigation on account of technicalities: Relying on the Delhi High Court decision in the case of *Bharti Airtel Ltd.* v. *Union of India* [2020 VIL 197 DEL], the Gujarat High Court has permitted the assessee-writ petitioner to rectify form GSTR-1. The petitioner had inadvertently uploaded the wrong data (entries of another company/firm). Further, the Court directed the department not to burden the petitioner with the payment of late fees as he was dragged into unnecessary litigation on account of technicalities. It may be noted that the High Court in its decision also stated that it hoped and trusted that the writ applicant may not have to come back to the Court on any further technicalities that the Department is in the habit of raising, and thereby giving result to unnecessary litigation. [*Deepak Print* v. *Union of India* – 2021 TIOL 591 HC AHM GST]

Transition of accumulated credit of Tax Deducted at Source under VAT: The Madras High Court has allowed the transition into the GST regime the accumulated credit of Tax Deducted at Source ('**TDS**') under Tamil Nadu VAT. The Court in this regard held that once any deduction is made towards anticipated tax liability it would assume the character of tax and will not change or fluctuate depending on whether it is held as credit or whether it is an adjustment against tax liability. Department's argument that accumulated TDS does not bear the character of tax and TDS being a machinery provision and a tentative one, is distinct from Input Tax Credit, was thus rejected. Allowing the transition of the said amount under Section 140 of the CGST Act, 2017, the Court also observed that the amount collected/deducted was captured in the returns of turnover filed under the erstwhile TNVAT regime. [*DMR Constructions* v. *Assistant Commissioner* – 2021 VIL 208 MAD]

Prosecution – Default bail – Condition for deposit of 50% amount cannot be imposed: The Gujarat High Court has held that while considering the case for default bail of the applicant, whether condition cannot be imposed for depositing 50% of the amount for which prosecution was launched. The Court was of the view that on expiry of the statutory period to complete investigation, an indefeasible right is created in favour of the accused person entitling him to default bail once the accused applies for the same and shows his willingness to furnish bail. It held that if any other condition is imposed, it will be beyond the jurisdiction of the Court. Supreme Court decision in the case of *Saravanan* v. *State* [(2020) 9 SCC 101} was relied upon. [*Neeraj Ramkumar Tiwari* v. *State of Gujarat* – 2021 VIL 218 GUJ]

Hearing opportunity while determining tax liability – Specific request by assessee not mandatory: The Madras High Court has held

that it is only in cases where the explanation offered by the assessee is accepted that there is no necessity for personal hearing. According to the Court, in all other cases, it is incumbent upon the revenue department to extend an opportunity of personal hearing to the assessee. Department's contention that in the absence of a specific request for personal hearing, there is no necessity for extending the opportunity *per se*, was thus rejected by the Court. Allowing the writ petition, the Court noted that a general provision relating to the procedure to be followed in determination of tax at Section 75(4) of the CGST Act contemplates that an opportunity of personal hearing shall be granted in all cases where a specific request is received, or where the officer contemplates adverse decision against the assessee. [*B.M. Patel & Co.* v. *State Tax Officer* – 2021 VIL 181 MAD]

Order passed on date of notice, without granting hearing, is incorrect: Observing that the Order passed on date of notice, without granting hearing, suffered from gross irregularity, the Tripura High Court has set aside the Order of the State Tax Authorities demanding GST and penalty. The Order was issued in a case where the assessee-writ petitioner had by mistake declared a shorter distance and consequently an e-way bill for smaller duration was generated. The Court noted that the Inspector of State Tax had issued a notice of personal hearing making it returnable on some other day, however, long before that, on the date on which he had issued the notice, a separate order confirming the demand of tax with penalty was passed. According to the Court, this was wholly impermissible since the authority did not treat the order as a tentative demand but as a mandatory demand. Department's plea of availability of statutory appeal was rejected. [*Tirthamoyee Aluminium Products* v. *State of Tripura & Others* – 2021 VIL 201 TRI]

Development of land for further sale as plot is taxable: The Uttarakhand Appellate AAR has held that developing the purchased land with infrastructure such as pipelines, sewage lines and drainage system as per the requirement of approved planning authority and further selling such developed land units as plots to the customers is taxable. The authority observed that the applicant would not sale the land in its original form, rather certain construction and developmental activities would be undertaken on land which would change the very character of the land and would lead to substantial increase in the sale price of the land. Accordingly, it was held that the activity proposed to be undertaken by the applicant cannot be considered as sale of land alone and would be taxable under the GST Law. The dispute was before AAAR as members of AAR had different views. [In RE: *Abhishek Darak* – 2021 VIL 06 AAAR]

Supply of operation and maintenance of sewage treatment plant to undertaking of State Government when taxable: The Uttarakhand AAR has declined exemption under Notification No. 2/2018-Central Tax (Rate) as amending Notification No. 12/2017-Central Tax (Rate) to supply of operation and maintenance of sewage treatment plant to an undertaking of the State Government. The Authority observed that all the three conditions namely, nature of supply, recipient of supply and category of services, were required to be satisfied simultaneously. On a perusal of the contract entered between applicant and Uttarakhand PeyJal Nigam, the authority observed that the applicant had tried to artificially split the contract to reduce the value of the supply of goods in the total contract value and hence the value of supply of goods could not be held to be less than 25% of the contract value. It was also held that since the main supply was not exempted from GST, the inward supplies received for the specified main supply of services

would also not be exempted. [In RE: *GDCL-EMIT JV* – 2021 VIL 138 AAR]

Liaison Office when not liable to GST: The Karnataka AAR has held that a Liaison Office, which is not allowed to undertake any business activity in India or enter into any business contracts in its own name and also not allowed to earn any income in India either by way of commission/fee or any renumeration, as per RBI conditions, is not liable to GST. The Authority was of the view that the inward remittance received from the Head Office for maintenance of the office cannot be termed as a 'consideration' and accordingly, said activity would not be a 'supply' by the virtue of Section 7(1)(a) of the CGST Act, 2017. Further, it was held that the LO could at best be regarded as a geographical extension of the HO and was not altogether a different person and accordingly, LO and HO cannot be deemed to be related persons and would not be covered under the scope of clause 2 of Schedule I of the CGST Act. [In RE: *Fraunhofer-Gesellschaft ZurForderung der angewandtenForschunge.V* – 2021 VIL 11 AAAR]

Printing of content supplied by customer on material owned by assessee, is composite supply of services: The Tamil Nadu Appellate AAR has held that the activity of the printing of content as provided by the customer on PVC material and supply of such printed trade advertisement is supply of services and not goods. It was held that the said supply would qualify to be a composite supply wherein principal activity was the printing services as the write up of the purchase orders indicated that the customers desired the print of the content in a particular media and not the PVC material owned by the applicant. The applicant was engaged in the printing of trade advertisements such as banners. The Authority noted that the supply cannot be called as simple 'supply of goods', when the seller do not have the whole proprietary right on the finished product. [In RE: *Macro Media Digital Imaging Private limited* – 2021 VIL 12 AAAR]

Customs

Notifications and Circulars

DRI investigated cases – Jurisdictional Commissionerates to issue SCNs under Section 28: The CBIC has clarified that all the fresh SCNs under Section 28 of the Customs Act, 1962 in respect of cases presently being investigated by DRI are required to be issued by jurisdictional Commissionerates from where imports have taken place. Instruction No. 4/2021-Cus, dated 17 March 2021 clarifying so, also states that the implications of the Supreme Court judgement in the case of *Canon India* are under active examination in the Board. It may be noted that the Apex Court in the said judgement has held that DRI officer is not the proper officer to issue SCN under Section 28(4).

Import authorisations for restricted goods – Applications to be filed online: The DGFT has introduced a new online module for filing of electronic, paperless applications for import authorisations with effect from 22 March 2021. Accordingly, all applications for import authorisations will need to be submitted online and authorisations will be issued by DGFT Headquarters. Applications for revalidation or amendment of authorisations issued after said cut off date will also be required to be submitted electronically to the DGFT HQ. Trade Notice No. 47/2020-21, dated 23 March 2021, issued for the purpose, also clarifies that applications for revalidation or amendment of import authorisations issued prior to 22 March may be submitted to the concerned RA who may amend such authorisation manually as per the earlier procedure.

Online module introduced for adjudication, appeal and review proceedings under Foreign Trade (D&R) Act and Rules: The DGFT has implemented an online module for adjudication, appeal and review proceedings under the Foreign Trade (Development and Regulation) Act, 1992 and the Foreign Trade (Regulation) Rules, 1993. As per Trade Notice No. 44/2015-20, dated 1 March 2021, all proceedings including service of notice, reply to notice, notices for personal hearing, passing of orders, etc. will be done online. Personal hearings will be conducted through video conferencing or through physical hearings. The Trade Notice provides for a transitional period upto 31 March 2021 in case of appeals and hence appellants can file the appeal manually also till this date. However, consequent proceedings will only be through online module.

Rebate of State Levies (RoSL) – Last date notified for applications for shipping bill before 1 October 2017: The DGFT has notified 31 December 2021 as the last date for filing applications containing shipping bills with LEO date before 1 October 2017. Para 4.97(j) of the Handbook of Procedures Vol. 1 has been amended by DGFT Public Notice No. 43/2015-20, dated 17 March 2021 for this purpose.

Ratio decidendi

DRI officer not 'the' proper officer to issue show cause notice under Customs Section 28(4): The 3-Judge Bench of the Supreme Court has held that Directorate of Revenue Intelligence ('**DRI**') has no authority in law to issue a show cause notice under Section 28(4) of the Customs Act, 1962 for recovery of duties allegedly not levied or paid when the goods were cleared for import by a Deputy Commissioner of Customs who decided that the goods were exempted. Referring to the provisions of Section 28(4), the Court observed that the obvious intention of the legislature was to confer the power to recover such duties not on any proper officer but only on 'the proper officer'. The Court in this regard was also of the view that there is no inherent power to review in any authority and that the DRI officer is not even a proper officer under Section 28. Notification No. 40/2012-Cus. (N.T.) was termed as ill founded by the Court while it observed that it does not confer any powers on any authority to entrust any functions to officers. [*Canon India Private Limited* v. *Commissioner* – Judgement dated 9 March 2021 in Civil Appeal No. 1827 of 2018 and Ors., Supreme Court]

Suspension of customs clearance of alleged IPR infringing goods when not permissible beyond 14 days: The Bombay High Court has held that the assertion that remedies under Section 53 of the Copyright Act, 1957 and Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 ('**IPR Rules**') framed under the Customs Act, 1962, are independent of

each other, is fallible. The dispute involved suspension of the clearance of the imported goods alleged to be infringing the copyright in the artwork in the 'TR' mark. The Court also rejected the contention that the provisions of the Copyright Act will have to be read dehors the IPR Rules. Going through the provisions of the Copyright Act as amended in 2012 and the Copyright Rules, 2013, the High Court observed that the Customs authorities acted beyond jurisdiction by detaining the consignment beyond the prescribed period of 14 days. It observed that the person giving the notice of system alert under Section 53(1) of the Copyright Act had failed to produce a court order of restraint. [*NBU Bearings Pvt. Ltd. & Anr.* v. *Union of India & Ors.* – Judgement dated 12 March 2021 in Writ Petition (L) No. 3371 of 2021, Bombay High Court]

Conversion of shipping bills – CBIC Circular No. 36/2010-Cus., is ultra vires Customs Section 149: The Gujarat High Court has held that CBIC Circular No. 36/2010-Cus., dated 23 September 2010, to the extent of para 3(a) which prescribes a time limit of 3 months for request for conversion of shipping bills, is *ultra vires* Articles 14 and 19(1)(g) of the Constitution of India as also *ultra vires* Section 149 of the Customs Act, 1962. The exporter's request for conversion of EPCG shipping bills into EPCG-Drawback shipping bills was earlier rejected by the Customs authorities citing the limitation prescribed in the said circular. The Delhi High Court decision in the case of *Terra Films Pvt. Ltd.* was distinguished by the Court here as that decision involved conversion and fixing of brand rate of drawback while the present case dealt with conversion and drawback at All Industry Rate. The Court was of the view that hence no verification whatsoever of the goods or any examination of the exported goods is required at present and the amendment of shipping bills by converting them into drawback shipping bills was possible on the basis of the documentary evidence. [*Mahalaxmi Rubtech Ltd.* v. *Union of India* – 2021 TIOL 538 HC AHM CUS]

SEIS – DGFT Policy Circulars restricting benefit only to net foreign exchange are *ultra vires* FTP 2015-20: The Bombay High Court has held that DGFT's Policy Circular Nos. 6/2018, dated 22 May 2018 and 8/2018, dated 21 June 2018, in so far as they seek to add and amend the provisions of the Foreign Trade Policy 2015-20 by inserting additional conditions to curtail the rights / benefits of the service provider, are *ultra vires* the Foreign Trade Policy for 2015-20. As per the said circulars, service providers like the Port Trusts cannot claim benefits under Service Exports from India Scheme ('**SEIS**') to the extent of free foreign exchange earnings (or INR payments as allowed under the scheme) simply routed through them. The Court observed that by virtue of the two circulars, modification and alteration of provisions of Para 3.08(c) of the FTP 2015-20 were made and the rights of independent foreign exchange earner for the purposes of FTP 2015-20 and its consequential SEIS benefits in conformity with para 3.08(d) of the FTP, were curbed. Allowing the writ petition, the Court also noted that the assessee (steamer agent) had paid service tax on the gross amount and that it was wrong to say that the petitioner-assessee was appointed only as agent to pay to the actual service provider. [*Atlantic Shipping Pvt. Ltd.* v. *Union of India* – 2021 TIOL 582 HC MUM CUS]

Central Excise, Service Tax and VAT

Ratio decidendi

Incentives received by travel agents from airlines and CRS companies not liable under Business Auxiliary Services: The Larger Bench of CESTAT has held that the target-based incentives and the Central Reservation System ('**CRS**') commission received from airlines and CRS companies respectively, by the air travel agents, is not liable to service tax under the category of Business Auxiliary Services ('**BAS**'). The Tribunal in this regard held that air travel agents were promoting their own businesses and not that of airlines or CRS companies. Further, relying on the Supreme Court decision in the case of *Intercontinental Consultancy and Technocrats*, the 3-Member Bench of Tribunal observed that incentives in the present case were based on general performance of the service provider and were not related to any particular transaction of service, while 'consideration', which is taxable under Section 67 of the Finance Act, 1994 should be transaction specific. [*Kafila Hospitality & Travels Pvt. Ltd.* v. *Commissioner* – Interim Order No. 4/2021, dated 18 March 2021, CESTAT Mumbai]

Relays used only for railway signalling equipment classifiable under Heading 8608 – Supreme Court relies on 'sole or principal user test': The 3-Judge Bench of the Supreme Court has held that 'relays' used only as railway signalling equipment would fall under Heading 8608 as claimed by the assessee and not under Tariff Item No. 8536 90 of the Central Excise Tariff, 1985 as claimed by the Department. Chapter 85 covers electrical apparatus while Chapter 86 covers Railway or tramway locomotives, rolling stock and parts thereof. According to the Court, invocation of Note 2(f) of Section XVII (excluding certain 'parts' from Chapter 86), overlooking the 'sole or principal user test' indicated in Note 3 of the said Section was not justified. It was held that those parts which are suitable for use solely or principally with an article in Chapter 86 cannot be taken to a different Chapter as the same would negate the very object of group classification. Allowing assessee's appeal, the Apex Court was also of the view that there is fundamental fallacy in the department's reliance on Rule 3(a) of the General Rules for the Interpretation, after concluding that by virtue of Note 2(f) of Section XVII, 'relays' are not even classifiable under Chapter Heading 8608. [*Westinghouse Saxby Farmer Ltd.* v. *Commissioner* – Judgement dated 8 March 2021 in Civil Appeal No. 37 of 2009, Supreme Court]

Sabka Vishwas (LDR) Scheme – Initiation of enquiry after 30 June 2019 not fatal for filing declaration under voluntary disclosure category: The Bombay High Court has held that an enquiry or investigation or audit initiated post 30 June 2019 would not act as a bar to filing of declaration under the voluntary disclosure category of Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019. The Court was of the view that if clauses (e) and (f) of Section 125 of the Finance (No.2) Act, 2019 are to be read in a harmonious manner then logically it follows that the enquiry or investigation or audit referred to in clause (f) (i) would necessarily have to be initiated on or before 30 June 2019, i.e. before the cut-off date of the scheme. Question No. 39 and the answer thereto in the FAQs released by the CBIC was also relied for this purpose. The department had earlier rejected the declaration

under the Scheme as the same was filed after the enquiry was initiated against the assessee in December 2019. [*New India Civil Erectors Pvt. Ltd.* v. *Union of India* – 2021 TIOL 618 HC MUM ST]

It may be noted that Punjab & Haryana High Court has also, in a similar case, held that when the scheme came into force w.e.f. 1 September 2019, any enquiry / audit / investigation initiated after aforesaid date cannot make any person ineligible because period running from 1 September 2019 to 31 December 2019 is meant for filing application and any event occurring after 1 September 2019 cannot make any person eligible or ineligible. The Court relied upon CBIC Circulars dated 29 October 2019 and 12 December 2021 allowing filing of declaration in cases in various cases. [*Pro Sportify Private Limited* v. *Principal Commissioner* – 2021 VIL 178 P&H ST]

Sabka Vishwas (LDR) Scheme – Remand by Tribunal brings assessee to stage of SCN again – Declaration can be filed in litigation category: In a case where the appeal was finally heard by the CESTAT on 10 May 2019 but, by order dated 8 November 2019, CESTAT set aside the order-in-original and remanded the matter back to the original authority for a fresh decision, the Bombay High Court has set aside the rejection of the declaration filed under the litigation category in Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019. According to the Court, the petitioner-assessee was reverted back to the stage of show cause notice since the adjudication order was set aside by the Tribunal. The Court was of the view that if petitioner was at the stage of show cause notice with no fresh adjudication order then certainly it would be eligible to file declaration under the litigation category. [*Morde Foods Pvt. Ltd.* v. *Union of India* – 2021 TIOL 572 HC MUM CX]

Sabka Vishwas (LDR) Scheme – 'Quantification' means determination of duty liability by department: In a case where the petitioner was issued summons by the Anti-Evasion, Central Excise & Service Tax, the Delhi High Court has found merit in the plea of the Revenue department that unilateral quantification by the petitioner by writing the letter/communication to the department cannot render the assessee eligible for Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019. The Court was of the view that such admission in itself would not rendered the petitioner eligible under the Scheme. It observed that in the category of cases where investigation or audit was continuing as on the introduction of SVLDRS, the benefit of the scheme would be available to only such cases, where, during investigation, the department quantifies the amount and not *vice versa*. According to the Court, the quantification of the amount in question can only mean to be a duty liability which has been determined by the department. [*Karan Singh* v. *Designated Committee* – 2021 VIL 203 DEL ST]

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