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Customs in-bond manufacturing – Old scheme with new prospects

By **Saurabh Malpani**

With export promotion schemes like Export Oriented Units ('**EOU**'), Special Economic Zones ('**SEZ**') and Export Promotion Capital Goods ('**EPCG**') being held by a Panel of the WTO to be inconsistent with the Agreement on Subsidies and Countervailing Measures, the thrust of Government of India has now shifted to age old scheme of duty deferment and manufacturing in customs bonded warehouse which was always available under the Customs Act, 1962 and erstwhile Sea Customs Act, 1878. Since last year, Central Board of Indirect Taxes and Customs ('**CBIC**') has been issuing new regulations, circulars and FAQ's to bring more clarity under the said schemes. Apart from export-oriented units, the scheme is also being pushed for units having domestic sales but with the use of imported raw material or plant and machinery. This article is intended to make a case for shifting to such scheme.

Easy conversion:

- The existing factory / unit of the applicant can be converted into a custom bonded warehouse along with in-bond manufacturing permission vide a single application to be made to the jurisdictional Customs authorities.
- There is no criteria of minimum investment or minimum floor area for conversion into such scheme.

Less administrative burden:

- Unlike EOU and SEZ schemes, the administrative burden of getting Letter of Approval, Green card, commencement certificate, etc., are not required in the warehousing scheme.
- There are no pre-approved import and export items unlike other FTP/SEZ schemes. Any item of import and export can be added *suo moto* by the unit at a later stage (however input-output has to be informed to Customs for new finished goods).
- The licence for bonded warehouse as well as the permission to manufacture are valid until surrendered or cancelled. There is no requirement of renewal of licence/permission.
- Though there is a requirement to maintain records as specified in Circular No. 34/2019-Cus., dated 1 October 2019, however, there is ease of business since no periodical returns are required to be filed with the department.

No export obligation or NFE obligation:

- No specified export sales are required to be achieved under this scheme. There is no requirement to achieve positive foreign exchange. Thus, it is not restricted to export-oriented units only. The said scheme can also be availed by units having domestic sales as major proportion of turnover. If such domestic units want to use imported capital goods but make only domestic sales, the import duties on such capital goods are deferred till the date of clearance from warehouse. However, a note of caution: there is no depreciation

available on capital goods when a unit de-bonds from the scheme. Hence, the capital goods are to be used in the warehouse till destruction or export the same after use to get remission from payment of duty, otherwise there can be full duty liability if cleared into Domestic Tariff Area ('**DTA**') at a later stage.

- A warehousing unit can make DTA sales at any point of time using the imported inputs, unlike advance authorization scheme wherein DTA sales can be undertaken only after completion of specified export obligation. The import duties on such imported inputs used in the manufactured resultant product are deferred till the date of clearance from warehouse. Further, no interest liability arises when the duties are paid at the time of home clearance / ex-bonding of the capital goods or raw materials incorporated in the resultant products.

Solves problem of credit accumulation:

- Recently, all companies that had availed advance authorization or EOU scheme are facing enquiries from Customs and GST authorities regarding violation of Rule 96(10) of the Central Goods and Services Tax Rules, 2017. The said rule bars claiming refund of IGST paid on export goods if inputs or capital goods, as the case may be, are imported without payment of GST. This rule is to prevent companies from liquidating accumulated credit pertaining to domestic purchases from same or other business activity of the said company. It is pertinent to note that export of finished goods which are manufactured in custom bonded warehouse from the use of imported inputs or capital goods are not restricted under Rule 96(10) from claiming refund of IGST paid on such exports. Hence, converting into this scheme can also resolve the issue of credit accumulation faced by many units currently under FTP/SEZ schemes.
- Given the history of Rule 96(10), there should be clarity from the government that Rule 96(10) would not be retrospectively amended to include a bonded warehouse within its ambit.

Job work allowed (to and from):

- Recently, Circular No. 48/2020-Cus., dated 27 October 2020 has been issued by CBIC to clarify that such units are allowed to perform job work for DTA units. This enables capacity utilization. Such facility is not available to SEZ or EOU unit wherein it is provided that SEZ/EOU can undertake job work only for DTA unit who wants to export goods and not for DTA unit who wants to do domestic sales.
- It is also clarified that such units under warehousing scheme can send inputs to DTA units and carry out job work from them (for export sales as well as DTA sales).

The fear of customs control has been keeping many units away from bonded warehousing scheme. However, recent relaxations and clarity, would surely go a long way in creating alternatives to FTP/SEZ schemes. Still, there is lack of clarity on conversion from EOU/SEZ/EPCG/AA schemes into Warehousing scheme. Let's hope that the government brings a mechanism wherein no duties are required to be paid on imported capital goods and raw material on conversion into warehousing scheme, and depreciation is allowed on clearance of capital goods for home consumption.

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Goods and Services Tax (GST)

Notifications and Circulars

E-invoice threshold lowered to INR 100 crore from 1 January 2021: E-invoicing provisions would be applicable, with effect from 1 January 2021, to taxpayers whose aggregate turnover exceeds INR 100 crores in any preceding Financial Year from 2017-18 onwards. It may be noted that the Government had earlier proposed to apply the said provisions in respect of such assessees with effect from 1 October 2020 but had enhanced the threshold to INR 500 crore by Notification No. 61/2020-Central Tax. It seems that the process has now stabilised after certain relaxations were introduced for the month of October 2020. The threshold will hence be lowered to the original level from 1 January 2021. Notification No. 88/2020-Central Tax, dated 10 November 2020 amends Notification No. 13/2020-Central Tax for this purpose.

Quarterly Return Monthly Payment Scheme introduced for specified taxpayers: The CBIC has introduced an optional scheme, effective from 1 January 2020, for quarterly filing of returns (GSTR-3B) and monthly payment of tax by taxpayers with aggregate turnover up to INR 5 crores. Notifications Nos. 81, 82, 84 and 85/2020-Central Tax and Circular No. 143/13/2020-GST, all dated 10 November 2020 have been issued for the purpose. Certain aspects of the scheme are highlighted below.

- Registered person required to furnish Form GSTR-3B and having an aggregate turnover of up to INR 5 crore in the preceding financial year, is eligible.
- Scheme can be opted-in and opted-out for any quarter from the first day of second month of preceding quarter to the last day of the first month of the quarter.
- No requirement is there to exercise the option every quarter.
- Distinct persons have the option to avail the Scheme for one or more GSTINs.
- Quarterly filing of GSTR-1 but, option available for Invoice Furnishing Facility ('**IFF**'), to furnish the details of outward supplies (to a registered person), for each of the first and second months of a quarter, between the 1st and 13th day of the succeeding month.
- Details of invoices furnished using IFF in the first two months are not required to be furnished again in Form GSTR-1.
- Monthly payment of tax by 25th of next month, for first two months of the quarter.
- Option available to pay tax either by fixed sum method or self-assessment method.
- Form GSTR-3B to be quarterly filed by 22nd or 24th day of the month succeeding the quarter.
- No interest liability when system calculated amount (fixed sum method) and the entire liability for the quarter are deposited by the due date.
- Late fee will not be applicable for the delay in payment of tax in first two months of the quarter.

Ratio decidendi

Interest on delayed payment – Proviso to Section 50 of CGST Act is effective from 1 July 2017: The Madras High Court has held that the Proviso to Section 50 of the Central Goods and Services Tax Act, 2017 ('**CGST Act**') is retrospective in operation notwithstanding the

notification which brings it into effect from 1 September 2020. Thus, interest is leviable, with effect from 1 July 2017, only on that portion of the output GST liability which is discharged belatedly by way of cash. The Court observed that interest is intended to compensate the revenue for loss of capital and there is no loss here as the revenue is in possession of the credit which is as good as cash. It also observed that where a Proviso is designed to eliminate unintended and prejudicial consequences which would cause hardship to a party, it should be seen to be remedial and one that mitigates the prejudice caused from inception. It also noted that the entire controversy was settled by the CBIC *vide* its Circular in F. No. CBIC 20/01/08/2019-GST, dated 18 September 2020 where the Board has reiterated that the said amendment is intended to be retrospective. [*Maansarovar Motors Private Limited and Ors.* v. *Assistant Commissioner* – Judgment dated 29 September 2020 in W.P. Nos. 28437, 29998, 31081 of 2019 and Ors., Madras High Court]

Error in GSTR-1 not to deprive ITC to recipient, in the absence of matching mechanism: The Madras High Court has held that in the absence of enabling mechanism (GSTR-2A and GSTR-1A) as contemplated under the statute, assessees should not be prejudiced from availing the credit in case of error in GSTR-1 by seller. The petitioner had, while reporting outward supplies in GSTR-1, inadvertently reported them as inter-state sales instead of intra-state sales, during the period August 2017 to December 2017. The error was noticed later when the recipient of credit approached the supplier. A writ petition was filed since request for amendment in GSTR-1 filed was rejected on the ground that amendment cannot be granted in GSTR-1 after 31 March 2019 as per Notification 71/2018-Central Tax. The Court permitted the petitioner to re-submit the annexures to Form GSTR-3B with the correct distribution of credit, observing that as per Section 39(1) of the CGST Act, any mismatch between Form GSTR-1 and Form GSTR-2A is to be declared by the recipient by way of a tabulation in Form GSTR-1A, and that the said forms were yet to be notified. [*Sun Dye Chem* v. *Assistant Commissioner* – 2020 VIL 523 MAD]

Detention of goods during transit – Nature of contravention and presence of intention to evade are important: In a case involving transit sale and direct delivery to job worker, when the goods were detained because as per the e-way bill the goods were destined for a different location, the Telangana High Court has directed the department to refund with interest, the amount paid under protest to get the goods and vehicle released. It noted that once the vehicle driver had the correct tax invoice and e-way bill (after transit sale), it would have complied with the provisions of CGST Act, 2017. The High Court also held that in detention cases department should closely look at the nature of contravention and as to whether there is intention to evade. Holding departmental action as arbitrary, the Court relied upon the Gujarat High Court decision in the case of *Synergy Fertichem Pvt. Ltd.* and CBIC Circular in F. No. 20/16/03/2017-GST. [*Sree Rama Steels* v. *Deputy State Tax Officer* – 2020 TIOL 1899 HC TELANGANA GST]

Provisional attachment of bank account during pendency of search proceedings under Section 67 – Supreme Court stays the Gujarat High Court decision: The Supreme Court has stayed the Gujarat High Court decision in the case of *Kushal Ltd.* v. *Union of India*, wherein the High Court had set aside the provisional attachment of the bank account of the assessee observing that there was absence of pendency of any proceedings under Section 62, 63, 64, 67, 73 or 74 of the CGST Act, 2017. Observing that search proceedings were

conducted on 27 September 2018 with subsequent visit by the department on 1 April 2019 and that there was no search thereafter, the High Court had held that therefore the search proceedings had ended. The High Court was of the opinion that pursuant to the search, inquiry or other proceedings may have been undertaken, however, such inquiry or other proceedings were not under Section 67 and hence, it cannot be said that any proceedings were pending under Section 67. [*Union of India* v. *Kushal Ltd.* – Order dated 16 November 2020 in SLP No. 10070/2020, Supreme Court]

Registration – Permanent registration when must relate back to date of provisional registration: The Kerala High Court has held that the permanent registration must relate back to the date of the provisional registration, in case no formal order cancelling the provisional registration is communicated to the assessee in terms of the CGST Act and the CGST Rules. The Court directed the department to amend the registration certificate so as to make it valid from 1 July 2017 to enable the assessee to upload the returns for the period covered and to pay the tax as well as claim input tax credit. [*Madhav Motors* v. *State Tax Officer* – 2020 VIL 538 KER]

Restaurant service – GST liability on supply of beverages, cigarettes to customers and free food to employees: The Authority for Advance Rulings ('**AAR**') Tamil Nadu has held that supply of beverages by a restaurant is a composite supply of services (beverages are normally supplied by the restaurants and therefore, is naturally bundled with the restaurant service) and is taxable @ 18%. However, in respect of supply of cigarettes, the Authority was of the view that such supply is a mixed supply (cigarettes are not normally supplied by the restaurants and therefore, is not naturally bundled with restaurant service) and is taxable @ 28%. The Authority also held that the supply of free food to employees would be liable to GST as the employees were related person and supply of free food to related persons was envisaged as supply of service in Para 2 to Schedule I of the CGST Act, 2017. [In RE: *Mfar Hotels & Resorts Pvt. Ltd.* – 2020 VIL 296 AAR]

Penal interest is exempt from GST – CBIC Circular No. 102/21/2019-GST is clarificatory: Rectifying its earlier Order, the Maharashtra Appellate AAR has held that the penal interest which is in the nature of interest on loans charged by the assessee from its customers, is exempt from GST. The Authority noted that Circular No. CBEC-102/21/2019-GST dated 28 June 2019 provided that the transaction of levy of additional/penal interest not falls within the ambit of Entry 5(e) of Schedule II of the CGST Act, 2017 which provides that agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act shall be treated as supply of services. It held that such levies are in the nature of 'interest' as covered by the Notification No. 12/2017-Central Tax (Rate). Further, it was held that Departmental Circular was clarificatory in nature and would be deemed to be existing even at the time of passing the AAAR Ruling on 14 March 2019. [In RE: *Bajaj Finance Limited* – 2020 TIOL 64 AAAR]

Solid waste management service provided by local authority is exempt: The AAR Tamil Nadu has held that the service of 'Solid waste management - Revamping of existing dumped garbage in compost yards by bio-mining process' provided by the entity formed by the State Government is exempt under Sl. No. 3 of Notification No. 12/2017-Central Tax (Rate). It noted that the service was in the nature of pure services provided by a local authority in relation to any function entrusted to a Municipality under Article 243W of the Constitution *viz.* public health, sanitation conservancy and solid waste

management. It also observed that the applicant entity qualified to be a local authority in terms of Section 2(69) of the CGST Act. The activity of removal of waste following the norms set under Solid Waste Management Rules, 2016 and reclamation of land, was held as classifiable under the Group 99943. [In RE: *Zigma Global Environ Solutions Private Limited* – 2020 VIL 309 AAR]

Reimbursement of expenses by Indian subsidiary company to its foreign holding company when liable: The Tamil Nadu AAR has held that service provided by foreign holding company having an arrangement with a bank to provide credit cards to its employees, including employees of its Indian subsidiary, is covered under the ambit of 'supply' under Section 7(1)(a) of the CGST Act. The Authority noted that the card, which was the property of the holding company and could be revoked by them at any time, was used by the employees for business travel and the expenses were reimbursed by the applicant (Indian subsidiary) to the holding company. The Indian subsidiary was held liable to pay GST under reverse charge mechanism. [In RE: *ICU Medical LLP* – 2020 VIL 288 AAR]

Supply of printed answer booklets classifiable under Heading 4802: The AAR Rajasthan has held that supply of printed answer booklets/copies to educational institutions, where the raw material is obtained by the printer who also printed customer's logo, is a composite supply consisting of two taxable supplies ('printed booklets' and 'printing service'), with supply of goods being the principal supply and activity of printing logo, name, etc., is only ancillary. The goods were held to be classifiable under Heading 4802 of Customs Tariff Act, 1975 covering note books, exercise book, etc. where the predominant activity is its use for writing and printing is merely incidental or ancillary. CBIC Circular No. 1057/06/2017-CX, dated 7 July 2017 was relied. GST was held payable @ 12%. [In RE: *Markk Business Private Limited* – 2020 VIL 312 AAR]

Service by co-operative housing society is liable to GST – GST provisions different from service tax and income tax laws: The AAAR Maharashtra has held that the services provided by co-operative housing society, which collected contributions from its members and used the same to discharge its functions as enumerated in its bye laws, is liable to GST. Observing that the contributions collected by the applicant were solely for the purpose of maintenance of the property of the society which was held collectively by all its members, it was held that the applicant/society was providing services to its members against consideration in the form of contributions. Further, observing that provisions under GST were different as compared to service tax, the AAR distinguished the Supreme Court judgement in the case of *Calcutta Club*. It also noted that the definition of 'business' under GST law was much wider than that provided under income tax. It was held that the activities carried out would amount to 'supply' in terms of Section 7(1)(a) of the CGST Act, 2017. [In RE: *Apsara Co-operative Housing Society Ltd*. – 2020 TIOL 65 AAAR]

Taxability of sale of developed land – AAR refers question to AAAR: The AAR Uttarakhand has referred the question of taxability of the activity of development and sale of land under GST, to the Appellate AAR. There was difference of opinion among the Members on the question involved. While one Member was of the view that since applicant is going to undertake substantial development of the land before giving it out for sale to the end customers, these development activities are covered in

paragraph 5(b) of Schedule II to the CGST Act, 2017, and therefore the sale of developed land will be treated as supply of service and would be thus taxable, according to the other Member, sale of developed plot cannot fall under paragraph 5(b) of Schedule II as there will be no contractual relationship between the applicant and the end customer. [In RE: *Abhishek Darak* – 2020 VIL 303 AAR]

EU VAT – Input VAT credit when third party also benefited by expenditure: The Court of Justice of the European Union has held that when the expenditure incurred by a taxable person (a property developer), in respect of advertising costs, administrative costs and estate agents' commission, in connection with the sale of apartments, also benefits a third party (the land owner), it does not preclude that taxable person from deducting in full the input VAT paid on expenditure. The Court however observed that such benefit is available only if there is a direct and immediate link between that expenditure and the taxable person's economic activity and the benefit to the third party is ancillary to the taxable person's business purposes. The same was also held true in the case where the expenditure does not relate to the taxable person's general overheads but constituted costs attributable to particular output transactions. The Court however also noted that the fact that it is possible for the taxable person to pass on, to the third party, a part of the expenditure incurred, supports the conclusion that that part of the expenditure relates to the transaction carried out by the third party. [*Vos Aannemingen BVBA* v. *Belgische Staat* – Judgement dated 1 October 2020 in Case C-405/19, Court of Justice of the European Union]

Customs

Notifications and Circulars

Manufacture and other operations in warehouse – Job work clarified: The CBIC has clarified on various issues relating to job work for the unit working under the scheme of Manufacturing and Other Operations in Warehouse ('**MOOW Scheme**') under Section 65 of the Customs Act, 1962. The CBIC Circular No. 48/2020-Cus., dated 27 October 2020 also clarifies various issues in case where the job work activity is done by a unit working under the MOOW Scheme, for other units.

Job work for unit working under the MOOW Scheme

- GST provisions need to be followed in respect of procedures and time lines.
- Imported goods to be first deposited in premises before sending for job work.
- Only inputs can be sent out for job work.
- Capital goods can be sent out for repair after permission of bond officer.
- Moulds, jigs, tools, fixtures, tackles, instruments, hangers, patterns and

drawings can be sent out for exclusive use by the job worker for concerned unit.

- For removal of goods from job worker's premises, Regulations 14 and 15 of the Manufacture and Other Operations in Warehouse (No. 2) Regulations, 2019 to be followed. Date of removal from job workers premises will deemed to be the date of removal from warehouse.
- Scrap, waste and remnants generated during job work to be either returned to MOOW Scheme unit or cleared from job work unit on payment of duty.
- In case of any violation, the goods will be deemed to be cleared for home consumption on the date of clearance for job work.

Job work by MOOW Scheme unit

- MOOW Scheme unit, being a GST registered unit, can do job work for others.
- If imported inputs are used in job work, duty is required to be paid by filing Ex-bond Bill of Entry, only when job worked goods are returned to principal.
- No duty payable if job worked goods exported from premises of MOOW Scheme unit.

The Circular also states that MOOW Scheme unit can source capital goods and inputs from Special Economic Zones and Free Trade and Warehousing Zones.

Contactless delivery of international courier consignments: Owing to COVID-19 pandemic, CBIC has allowed authorized couriers to deliver international courier consignments *via* One Time Password ('**OTP**') based model. Under the OTP based model, consignees will receive OTP on their registered mobile number. The OTP received by the consignee, will be validated by the authorised courier operator electronically at the time of delivery and upon successful validation, the shipment will be delivered as per the instructions of the consignee. However, it may be noted that as per Circular No. 47/2020-Cus., dated 20 October 2020, the OTP based validation is only an alternative means of obtaining proof of delivery and the authorized courier operators can take proof of delivery either by OTP or physical signatures. The CBIC has instructed the authorized courier operators to maintain the data relating to generation and validation of OTP for a period of five years.

Samples preferably to be tested in Central Revenue Control Laboratories: The CBIC has decided to expand the scope of sample testing undertaken in Central Revenues Control Laboratories ('**CRCL**')). Accordingly, it has been prescribed that henceforth, CRCL will deal with all customs samples related to Drug Controller, FSSAI and Textile Committee. In case the nearest CRCL does not have the required facility to test a particular commodity or parameter, the appropriate customs field formation will be required to refer such case to the nearest government laboratory where such facility is available. Further, the CRCL have been instructed to refer sample testing to nearest CDSCO, FSSAI approved laboratories or Textile Committee whenever they are not in a position to carry out a test. The details pertaining to mapping of various such laboratories with the requisite ports are mentioned in Annexure-A of the Circular No. 46/2020-Cus., dated 15 October 2020.

Exemption to import of durable containers – Clarification: CBIC has reiterated that containers that are durable, capable of being re-used multiple times and capable of being identified at the time of re-export, would be eligible for the benefit of exemption from customs duty under Notification No. 104/94-Cus., subject to fulfilment of other conditions of the said

notification. Circular No. 51/2020-Cus., dated 20 November 2020 also prescribes various procedures in case of temporary imports and eventual re-exports for durable containers which do not conform to the standard marine container dimensions.

Faceless assessment – CBIC introduces measures for timely assessment: Observing that prompt and timely assessment of Bills of Entry and clearance of imported consignments are key objectives of *Turant* Customs and the Faceless assessment, the CBIC has introduced continuous assessment of goods on Saturdays and Sundays. According to Circular No. 45/2020-Cus., dated 12 October 2020, CBIC has decided to make all Saturdays (except second Saturday) as working day for all the faceless assessment groups across the country. Further, the CBIC has requested National Assessment Centres to monitor clearance of time-sensitive/ urgent consignments along with the DG systems. It has been clarified that the statutory compliances would only be checked during the Customs Compliance Verification stage at the port of import and the Appraising Officer will not keep pending such consignments for assessment. The Circular further enlists situations where, depending on the nature of the product and the fulfilment of certain other conditions, the First Check and Second Check will be undertaken by the faceless assessment group officers. In addition, guidelines with respect to re-assessment of Bill of Entry under faceless assessment regime have also been laid down.

Ratio decidendi

Integrated tax and compensation cess are not included in the phrase 'duty of customs' for purposes of customs notification: Observing that the phrase 'duty of customs' refers to the 'duty' as defined under Section 2(15) of the Customs Act, 1962 which is leviable under Section 12(1) thereof, the CESTAT New Delhi has held that any other duty or tax which is not levied under the Customs Act, 1962 is not to be treated as 'duty of customs' for the purposes of customs notifications. Noting that the integrated tax is levied and collected under Section 5 of the Integrated Goods and Services Tax Act, 2017, and that Section 3(7) of the Customs Tariff Act, 1975 merely provides the manner of its collection in case of import/re-import, it held that integrated tax cannot be considered as 'duty of customs' for the purpose of customs notification. On facts, the Tribunal allowed exemption from integrated tax and compensation cess in case of re-imports (after repair) of aircrafts and parts under Notification No. 45/2017-Cus. [*Interglobe Aviation Ltd.* v. *Commissioner* – Final Order No. 51226-51571/2020, dated 2 November 2020, CESTAT New Delhi]

Amendment in Bills of Entry – Scope of words 'in existence' in proviso to Customs Section 149: The Madras High Court has held that proviso to Section 149 of the Customs Act, 1962 provides an opportunity to be extended to an assessee to produce such documents that were 'in existence' at the stipulated time, that would serve to establish the error sought to be amended. The Court rejected the contention of the department that the phrase should be read as 'available' with the Department and it is only if the documents relied upon by the petitioner seeking amendment were, in fact, 'on record' that such amendment could even be considered. The writ petition filed by the assessee was allowed by setting aside the rejection of the request for amendment of Bills of Entry. [*Hewlett Packard Enterprise India Private Limited* v. *Joint Commissioner* - 2020 (10) TMI 970 - Madras High Court]

TED payment by mistake – No provision for refund – Government cannot unduly retain amount: The Kerala High Court has held that even if inadvertently certain amount has been paid in a case where there is no provision in the Foreign Trade Policy for refund, the Government cannot unduly retain the amount. The case involved payment of Terminal Excise duty, after availing Cenvat credit, by the assessee-EOU while making certain clearances to another EOU. The High Court observed that the appellate authority ought to have examined the matter in the background that it is a welfare State and the Department/ Government do not indulge into profit making. The appellate authority was directed to decide the appeal afresh. [*Carlo Technical Plastics Pvt. Ltd.* v. *Union of India* – 2020 VIL 554 KER CU]

Demand – Benefit of Customs Section 28(2) available only to cases covered under Section 28(1): The Madras High Court has held that the benefit under Section 28(2) of the Customs Act, 1962 is available only in the case of a 'regular' assessment contemplated under Section 28(1). The Court was of the view that only the remittance of duty and interest as referred to in sub-section (1) is addressed in Section 28(2). It observed that there was explicit exclusion in Section 28(1) of cases of collusion, wilful mis-statement or suppression of facts and that Section 28(2) made reference to the duty and interest computed in terms of Section 28(1), that is, in cases where there is no allegation of collusion, mis-statement or suppression of facts. The placement of Section 28(2) was also noted for the purpose. The petitioner had plead that since the differential duty along with interest had been remitted, the show-cause notice ought not to have been issued at all. [*Maruvur Arasi Logistics Pvt. Ltd.* v. *Commissioner* – 2020 TIOL 1779 HC MAD CUS]

Target Plus Scheme – Non-submission of BRC is not covered under 'pending government dues': The Bombay High Court has held that non-submission of Bank Realization Certificate ('**BRC**') after receipt of foreign currency/ remittance on successful completion of an export cannot be construed to be a 'due', more so a 'pending government due'. The Court allowed the writ petition directing grant of additional benefit of duty credit scrips under the Target Plus scheme of the Foreign Trade Policy. It dismissed the department's contention that there were dues pertaining to non-submission of BRC. Relying upon the Supreme Court decision in the case of *Reliance Industries*, the Court observed that the amount due must be first quantified by following the due process and it should be payable to the government and subsisting i.e., not paid. [*Ram Ratna International* v. *Union of India* – 2020 TIOL 1831 HC MUM CUS]

Power to arrest a person by a Customs Officer is statutory in character: The Gujarat High Court has held that when any person is arrested by a Customs officer, in exercise of his powers under Section 104 of the Customs Act, 1962, the officer is not obliged in law to comply with the provisions of Sections 154 to 157 of the Code of Criminal Procedure, 1973. Analysing various precedents, the Court also held that the Customs/DRI Officers are not Police Officers and, therefore, are not obliged in law to register FIR against the person arrested in respect of an offence under Sections 133 to 135 of the Customs Act. The High Court was also of the view that where a Customs Officer arrests a person for holding an inquiry, there is no formal accusation of an offence and that the arrest and detention are only for holding effective inquiry under Sections 107 and 108 of the Customs Act. It also noted that the power to arrest a person by a Customs Officer is statutory in character and

should not be interfered with. [*Sundeep Mahendrakumar Sanghavi* v. *Union of India* – Judgement dated 4 August 2020 in R/Special Civil Application No. 8669 of 2020, Gujarat High Court]

Penalty imposable even when wrong drawback code mentioned inadvertently: The Madras High Court has held that the petitioner's inadvertence of wrongly quoting the drawback code for export of the goods, which was thereafter rectified by the petitioner, would still amount to misclassification. It was held that a mere plea of 'inadvertence' may not absolve the petitioner from such liability. Holding such an act was an attempt to export the goods improperly, since it would have led to excess drawback, the Court was of the view that penalty was correctly imposed under Section 114 of the Customs Act, 1962. [*R.S. Graphics* v. *The Revisionary Authority* - 2020 (11) TMI 87 - Madras High Court]

Central Excise, Service Tax and VAT

Ratio decidendi

Reversal of proportionate Cenvat credit – 'Total Cenvat credit' under Rule 6(3A) not covers credit of services used exclusively for taxable output: The CESTAT New Delhi has held that the phrase 'total Cenvat credit taken on input services', provided in the formula under Rule 6(3A)(b)(ii) of the Cenvat Credit Rules, 2004, should include only credit of common input services used in taxable and exempted services, and not the services used exclusively in rendering taxable output service as contended by the department. The Tribunal observed that it is clear from a conjoint reading of sub-rules (1), (2) and (3) of Rule 6 that the total Cenvat credit for the purpose of the formula under Rule 6(3A) is only total Cenvat credit of common input service used for exempted as well as taxable services. Amendment made in Rule 6(3A) by Notification dated 1 March 2016 which was also clarified by the Tax Research Unit to apply retrospectively, was relied upon. [*E-Connect Solutions (P) Ltd.* v. *Commissioner* – 2020 VIL 509 CESTAT DEL ST]

Sabka Vishwas (LDR) Scheme – Rectification of mistake in declaration by assessee: In a case where the assessee had mistakenly filed the declaration under Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 under the category of 'voluntary disclosure' instead of 'litigation', the Delhi High Court has directed the department to rectify the declaration and consider it as one filed under the 'litigation' category. The Court noted that the petitioner's mistake was not only a procedural/clerical error that was apparent on the face of the record but was of an inadvertent nature not deliberately made to claim any undue benefit. It noted that the petitioner by making a declaration under the wrong category stood to gain nothing. It was also held that Section 128 of the Finance (No.2) Act, 2019 does

not state that an error/mistake apparent on the face of the record that can be rectified has to be committed by the Designated Committee only. [*Bhawna Malhotra* v. *Union of India* – 2020 VIL 533 DEL CE]

Sabka Vishwas (LDR) Scheme – Declarant cannot be put in worse condition: In a dispute involving quantification of 'tax dues' for the purpose of filing declaration under the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019, the Bombay High Court has held that a declarant who seeks benefit under the scheme cannot be put in a worse off condition than he was before making declaration under the scheme. The Court rejected the department's contention that since the adjudication order, lowering the demand, was set aside by the CESTAT (on appeal by the assessee) while remanding the matter for decision afresh, it is only the show cause notice that survived and the original demand would be relevant for computation of 'tax dues'. The High Court was of the view that since the figures in the order-in-original were accepted by the department (no appeal was filed by department before CESTAT against such order), those figures would be material and not the figures mentioned in the SCN. [*Jyoti Plastic Works Pvt. Ltd.* v. *Union of India* – 2020 TIOL 1874 HC MUM CX]

Renting out space for displaying names is Renting of Immovable Property service: The CESTAT New Delhi has held that the activity of rented out space to SEZ units, by the appellant-SEZ developer, for displaying their names for identification purpose, for which the developer charged signage charges, would be classifiable under renting of immovable property services and not sale of space or time for advertisement services. The Tribunal was of the view that permission by the appellant to the lessee to put its name would not mean that the appellant had provided space to display, advertise or showcase any product or service. The demand of service tax was set aside by the Tribunal while it also observed that the service was used by the SEZ units for their authorised operations and would be exempt under the provisions of the SEZ Act, 2005. Relying on the Telangana and Andhra Pradesh High Court decision in the case of *GMR Aerospace Engineering Limited,* it was also held that when the services rendered by an SEZ developer were fully exempt from service tax in terms of the provisions of the SEZ Act, the condition of exemption by way of refund imposed under the notification issued under the Finance Act, 1994 would be inconsistent. [*DLF Assets Pvt. Ltd.* v. *Commissioner* – 2020 TIOL 1554 CESTAT DEL]

Incineration is not liable to service tax under 'cleaning activity': The CESTAT New Delhi has held that the process of incineration, involving the burning of hazardous waste up to a certain temperature and then disposing off the ash to the statutory landfill site, is not covered under the scope of 'cleaning activity' under Section 65(24b) of the Finance Act, 1994. Relying on the dictionary meanings of the terms 'incineration' and 'exterminate', the Tribunal was of the view that the activity of incineration of hazardous waste is not covered under 'exterminating' of objects, in the definition of 'cleaning activity'. It also noted that taxable service of 'cleaning' would include only those services wherein the cleaning activity is undertaken at the premises of the service recipient. CBEC Circular dated 13 July 2007, stating that incineration of waste is not taxable under business auxiliary service or any other taxable service, was also relied upon. The demand was set aside also observing that the audit objection, which formed the basis of show cause notice, had been dropped. [*Continental Petroleum Ltd.* v. *Commissioner* – 2020 TIOL 1608 CESTAT DEL]

Cenvat credit on services availed to fulfil statutory obligation – CESTAT Mumbai refers matter to Larger Bench: Disagreeing with the CESTAT Larger Bench decision in the case of *South India Bank*, the Mumbai Bench of the CESTAT has referred to the President, for referring to the Larger Bench, the question as to whether the Cenvat credit of the service tax paid on the services availed to fulfil a statutory obligation, should be admissible even if the services availed do not otherwise qualify to be input services as defined under Rule 2(k) of the Cenvat Credit Rules, 2004. The disputes before the Tribunal involved admissibility of Cenvat credit of the service tax paid on the insurance premium paid to Deposit Insurance Credit Guarantee Corporation ('**DICGC**') and of the tax paid on the commission paid to the brokers for underwriting the government securities, etc. Observing that the DICGC insures only deposits and not the lending, the CESTAT stated that the 'business of banking' was not insured by the DCIGC as the actual risk to banking business lies in the lending and not in the deposits. It was of the view that the scheme mitigates the risk faced by the depositor while making the deposits with the bank and not the risk which the bank or banking business incurs. The Supreme Court decision in the case of *Dilip Kumar and Co*., favouring the strict interpretation of the fiscal statue, was relied upon. [*Bank of America* v. *Principal Commissioner* – 2020 TIOL 1614 CESTAT MUM]

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