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Articles

Charges for delayed payment – Can they escape from valuation!

By **Jagannadh Grandhi and Satish Gandla**

Does every charge paid for delayed payment of any amount form part of the value of supply was the question we encountered while analysing Section 15(2)(d) of the Central Goods and Services Tax Act, 2017 ('**CGST Act**').

Section 15(2)(d) provides that interest or late fee or penalty ('**additional charges**') for delayed payment of any consideration for any supply would be included in the value of the supply. Section 15(2) starts with the sentence 'the value of supply shall include'. The value of supply as per Section 15(1) is the price actually paid or payable (i.e., consideration) for the supply of goods or services or both. From a combined reading of both sections, it can be understood that only interest/penalty/late fee charged because of delayed payment of consideration form part of the value and not such additional charges for delayed payment of any other amounts which are not the consideration of such supply.

It is pertinent to note that supply of services by way of extending deposits, loans or advances (financial services) in so far as the consideration is represented by way of interest or discount is exempted *vide* Notification No. 9/2017-Integrated Tax (Rate), dated 28-6-2017.

In the opinion of the authors, Section 15(2)(d) does not cover all scenarios where additional charges are paid. The authors' attempt to highlight in this article a few such uncovered scenarios.

The first scenario is in respect of ruling given by the Andhra Pradesh Authority for Advance Ruling ('**AAR**') in the case of *Ushabala Chits Private Limited*[1] (*viz.*, foreman). The AAR has held that the additional charges *viz.*, interest/penalty collected from the subscribers by the foreman for delayed payment of instalment amounts is includible in the value of foreman commission (*viz.*, supply of financial and related services, under Section 15(2)(d) by opining that the instalment amount is not an actionable claim.

As is known the foreman commission is the consideration/value for the supply of financial and related services provided by foreman [in chit funds] whereas interest/penalty collected from defaulter is for the delay in the payment of instalment amount. It appears to us that the interest/penalty, which is collected on the delayed instalment amount and not on the foreman commission, shall not be included in the transaction value (*viz.*, foreman commission) for the supply of financial and related services.

Another scenario is in respect of ruling given by the Madhya Pradesh AAR in the case of *Indo Thai Securities Limited*[2]**.** The AAR has held that the additional charges *viz.*, interest/penalty collected from the customers by the stock broker because of delayed payment of cost of securities and brokerage is includible in the value of supply of stock broking services. It was opined that the additional amount being charged on delay of payment by whatever named called should be includible in the value of supply by virtue of Section 15(2)(d).

[1] 2020-VIL-205-AAR
[2] 2019-VIL-268-AAR

However, the brokerage is the only consideration/value for the supply of stock broking services provided to the customer whereas the cost of securities is towards the amounts incurred by the stock broker for purchase of securities on behalf of the customers, which is not a consideration for the supply of stock broking services to the customer. Thus, it appears that what is includible in the value of supply in terms of Section 15(2)(d) is only that portion of interest charged on the delayed payment of brokerage amount and not the interest on delayed payment of cost of securities.

In the above ruling, the Authority has made a reference to the Office Memorandum ('**OM**') dated 05-09-2017 issued by the GST Policy Wing (F.No. 349/40/2017-GST Para 2(iii)) for inclusion of interest in taxable value of supply. In the said OM, it was clarified that if the facility of temporary funding extended to clients forms part of the contract between the broker and client, then interest earned on such an activity shall be included in the value of supply. Further, it was clarified that if the said facility is provided as a loan to client then, interest on such service is not liable to GST as per Notification No. 9/2017-ITR.

Further, Circular No. 102//21/2019-GST, dated 28-06-2019 has clarified regarding applicability of GST on additional/ penal interest. In case of sale of mobile phone (sold for consideration 'X') with an option to pay in instalments by charging an additional amount ('Y') over and above the sale price of mobile (*viz.*, case 1 in the Circular), it was clarified that additional/ penal interest charged on account of delay in payment of instalment amount (*viz.*, X & Y) is includible in the value of supply of mobile phone.

In the light of the above, the department appears to be of the view that the value of supply of goods/services would include the following:

(a) Consideration agreed for supply of goods/service (*viz.*, X).

(b) In case where funding is arranged by supplier to recipient of above consideration by charging an additional amount (Y) over and above consideration of supply of goods/service, such additional amount (*viz.*, Y).

(c) Additional charges (*viz.*, interest/late fee/penalty) on delayed payment of above amounts (*viz.*, X & Y); and

(d) Additional charges on delayed payment of amounts other than consideration ('Z') but that are paid under contract for supply of such goods/service.

It is pertinent to note that a contract may contain multiple supplies (*viz.*, taxable, exempt or non-supplies) and mere inclusion of such supplies in a single contract does not always amount to one single supply. In such a case, the nature of arrangement under the contract becomes relevant to ascertain whether the supplies agreed under the contract are interdependent (*viz.*, composite or mixed supplies) or individual supplies.

Based on the terms and conditions of contract, it is possible to take a view that the additional amount (*viz.*, Y) charged for extending short term funding of consideration of a supply (*viz.*, case (b) above) is a separate supply of financial service (i.e., extension of loan by charging additional amount as interest on such loan) from supply of goods/service and hence, is not includible in the value of supply of goods/service. Consequently, such additional

amount can be said to be exempt from GST *vide* Notification No. 9/2017-ITR.

As regards additional charges collected on delayed payment of any amount other than consideration/value of supply (*viz.*, Z) under a contract for supply of goods/service (*viz.*, case (d) above), it is possible to say that the same shall not be included in the value of taxable supply of goods/service since it is not charged on delayed payment of consideration of taxable supply as enumerated in Section 15(2) but charged on an amount other than consideration of supply.

As regards case (c) above, it is important to note Australian Ruling GSTR 2000/19 which provides that where an amount (*viz.*, consideration (i.e., X) for a supply) is required to be paid by a specified date, but an additional charge is paid if the primary amount is not paid by the due date, such additional charge is consideration for the supply of an interest in a credit arrangement and, as such, is consideration for a separate supply of financial service and not forms part of value of earlier supply. The true character of the arrangement shall be determined having regard to the terms of the agreement and other relevant circumstances.

Therefore, it is possible to take a view that the interest/late fee/penalty charged for delayed payment of consideration/value of supply is a separate supply of financial services. However, this view would be prone to litigation on account of specific inclusion of such payments under Section 15(2)(d) which provides that the interest/penalty/late fee paid for delayed payment of consideration (*viz.*, X) would form part of the value of the main supply.

From the above advance rulings, OM and Circular, it is apparent that the departmental authorities would try to include any additional charges by whatever name called (*viz.*, interest/penalty/late fee) received by the supplier from the recipient for delayed payment of consideration/any other amounts payable under a contract of supply in the value of taxable supply under such contract, in terms of Section 15(2)(d). Therefore, the above view of AARs need to be tested before the Courts considering the observations made *supra*. In the opinion of the authors, the additional charges paid on delayed payment of any amount other than consideration shall not be leviable to GST.

Further, the Department may dispute that the penal interest charged for the delayed payment of any amount under a contract shall be treated as a supply of service in terms of Paragraph 5(e) of Schedule II of the CGST Act, 2017 i.e., agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act.

In this regard, attention is drawn to the ruling given in case of *Bajaj Finance Limited*[3], wherein the Maharashtra Appellate AAR has rectified its earlier order by holding that the penal interest charged by the Applicant from customers for the delayed payment of EMI does not fall within the ambit of Paragraph 5(e) of Schedule II of the CGST Act but would be exempt from GST in terms of Notification No. 9/2017-ITR. The same has been held so by placing reliance on Paragraph 6 of the Circular No. 102//21/2019-GST which have clarified that transaction of levy of additional / penal interest does not fall within the ambit of Paragraph 5(e) of Schedule II of the CGST Act as such levy of additional / penal interest satisfies the definition of 'interest' as contained in Notification No. 9/2017-ITR. Thus, it can be argued in such cases also that the penal interest charged for delayed payments shall be exempt from GST.

[3] 2020-VIL-56-AAAR

Though the above referred instances are relating to the specific industries *viz.*, chit fund, financial and stock broking sectors, the explanation and observations made above would equally apply to other sectors as well. The tax payers may relook into the nature of payments under contracts to see if such additional charges fall within or outside Section 15(2)(d).

Thus, another Pandora box is waiting for the tax payers to explore as to whether 'charges for delayed payments could escape from valuation!'.

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Goods and Services Tax (GST)

Notifications and Circulars

Goods and Services Tax (GST) – Relaxations effective October 2020: Central Board of Indirect Taxes and Customs ('**CBIC**') has on 30-09-2020 issued number of notifications to relax or defer certain GST provisions. Some of the important changes include deferment of annual returns for FY 2018-19, relaxation in e-invoicing provisions for a month, deferment of dynamic QR Code for B2C transactions, and extension of exemption to service of transportation of export goods by aircraft/vessel.

- ***Annual returns for FY 2018-19 deferred***: Due date of GSTR-9/ GSTR-9C for the Financial Year 2018-19 has been once again extended. As per Notification No. 69/2020–CT, dated 30-09-2020 which amends Notification No. 41/2020-Central Tax, these returns for FY 2018-19 can now be filed till 31-10-2020.
- ***E-invoice relaxed for one month***: Provisions relating to e-invoicing are effective from 01-10-2020 in respect of specified taxpayers for B2B transactions, though certain relaxations from implementation of said provisions have also been notified, subject to certain conditions. According to Notification No. 70/2020-Central Tax, dated 30-09-2020, the taxpayers whose aggregate turnover exceeds INR 500 crores in any preceding Financial Year from 2017-18 onwards are required to comply with e-invoice provisions. Further, the e-invoice provisions are applicable in case of exports also. Amendments have been made for this purpose in Notification No. 13/2020-Central Tax.

It may be noted that as Press Release dated 30-09-2020, in case of invoices raised during October, 2020, if Invoice Reference Number ('**IRN**') is obtained from the Invoice Reference Portal ('**IRP**') within 30 days of date of invoice then such invoices will be deemed valid, and penalty leviable under Section 122 of the CGST Act, 2017 will be waived. The press release illustrates that e.g., invoice dated

03-10-2020 is issued without obtaining IRN but IRN is obtained on or before 02-11-2020 then Rule 48(4) is deemed complied. It may be however be noted that this relaxation is applicable only for invoices raised in the month of October 2020, and no such relaxation would be available for the invoices issued from 01-11-2020. Notification No. 73/2020-Central Tax, dated 01-10-2020 has also been issued for the purpose.

- ***Dynamic QR Code for B2C transactions deferred*:** Taxpayers whose aggregate turnover exceeds INR 500 crores in any preceding financial year from 2017-18 onwards are required to comply with B2C Dynamic QR Code. The CBIC has now extended the date of applicability of these provisions from 01-10-2020 to 01-12-2020.
- ***Exemption for service of transportation of export goods by an aircraft/vessel, extended*:** Service of transportation of goods by an aircraft or vessel from a customs station of clearance in India to a place outside India, was exempted till 30-09-2020. The said exemption has now been extended till 30-09-2021. Amendments in this regard have been made in Notification No. 12/2017-Cental Tax (Rate) by Notification No. 4/2020-Central Tax (Rate). Consequential amendments have also been made in notifications relating to Integrated GST and Union Territory GST.

Cumulative reconciliation of ITC under Rule 36(4) clarified: CBIC has issued clarifications in respect of implementation of provisions of Rule 36(4) of the Central Goods and Services Tax Rules, 2017 ('**CGST Rules, 2017**') for the months of February to August 2020. According to Circular No. 142/12/2020-GST, dated 09-10-2020, the cumulative amount of Input Tax Credit ('**ITC**') availed for the said months in Form GSTR-3B should not exceed 110% of the cumulative value of the eligible credit available in respect of invoices or debit notes, the details of which have been uploaded by the suppliers, till the due date of furnishing of the statements in Form GSTR-1 for the month of September, 2020. The Circular also notes that availability of 110% of the cumulative value of the eligible credit available does not mean that the total credit can exceed the tax amount as reflected in the total invoices. Further, the Circular explains by way of illustration the manner of cumulative reconciliation for the said months in terms of the provisions.

GSTR-1 and GSTR-3B – Due dates prescribed for period October 2020 to March 2021: CBIC has prescribed the due dates for submission of Forms GSTR-1 and GSTR-3B for the period from October 2020 till March 2021. Accordingly, while registered persons having aggregate turnover of more than INR 1.5 crore will be required to furnish monthly GSTR-1 by 11th of the succeeding month, those with turnover up to INR 1.5 crore will have to furnish the said return quarterly by 13th of the month succeeding the quarter. GSTR-3B must be furnished by 20th of succeeding month by taxpayers having turnover more than INR 5 crore. Taxpayers having turnover up to INR 5 crore will have to furnish GSTR-3B by 22nd of next month if they are in western, central and southern India. Those located in northern and eastern India can furnish the said return by 24th of next month.

Number of digits of HSN Codes required in invoices increased: As recommended by the GST Council in its 42nd meeting, the CBIC has increased number of digits of HSN Code that would be required to be mentioned in invoices by taxpayers. With effect from 01-04-2021, the taxpayers with aggregate turnover more than INR 5 crore will be required to mention 6 digits of the

HSN Code in the tax invoice. It may be noted that those with up to INR 5 crore turnover while required to mention 4 digits of the Code for supplies to registered person, will be exempted from such requirement when supplying to unregistered persons. Notification No. 78/2020-Central Tax, dated 15-10-2020 amends Notification No. 12/2017-Central Tax for this purpose. First proviso to Rule 46 of the CGST Rules, 2017 has also been amended.

Ratio decidendi

Transition of Cenvat credit of Education Cesses and Krishi Kalyan Cess in GST regime not available: The Division Bench of the Madras High Court has held that transition of accumulated unutilised Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess into the GST regime is not permissible. Allowing department's intra-Court appeal against the single-Judge decision which allowed the benefit, the Court held that the assessee is not entitled to carry forward unutilised credit of Cesses for utilisation against the output GST liability under the provisions of Section 140 of the CGST Act, 2017. It held that the Court by any intendment or implication cannot include the three Cesses within 'Eligible Duties and Taxes' or 'Eligible Duties' as Explanations 1 and 2 to Section 140, and that sub-section (8) are not excluded from effect of Explanation 3. The High Court was also of the view that merely carry forward of unutilised credit in electronic ledger will not entitle the assessee to utilise same against output GST liability. It also noted that the 3 Cesses were not subsumed in the GST law. [*Assistant Commissioner* v. *Sutherland Global Services Private Limited* – Judgement dated 16-10-2020 in Writ Appeal No. 53 of 2020, Madras High Court]

Payment of tax in installments during COVID-19 situation: The Kerala High Court has allowed the petitioner to discharge the tax liability inclusive of interest and late fee thereon in equal successive monthly installments in view of financial difficulties faced by his business during COVID-19 pandemic situation. The department was directed to accept the belated return filed by the petitioner for the period from February, 2020 to April, 2020, without insisting on payment of the admitted tax declared therein. The petitioner was permitted to discharge the tax liability, inclusive of any interest and late fee thereon, in equal successive monthly instalments commencing from 15-11-2020 and culminating on 15-08-2021. [*Malayalam Motors Pvt. Ltd.* v. *The Assistant State Tax officer* – 2020 VIL 496 Ker]

Transportation of goods to different place of business in same State other than the address mentioned in invoice and e-way bill does not automatically attract GST and penalty: Telangana High court has held that it cannot be said that the petitioner by transporting goods to additional place of business instead of principal place of business in the same State has indulged in an illegal activity as it would merely amount to stock transfer involving no element of supply of goods or services. The goods were transported from corporate office in Tamil Nadu to one of its depot in State of Telangana, however the e-way bill contained the address of a different depot in State of Telangana. The department was directed to refund the sum collected towards GST and penalty with interest. [*Same Deutzfahir India P. Ltd.* v. *State of Telangana* – 2020 VIL 467 TEL]

Supply by duty-free shops to outbound passengers constitutes exports: The Kerala High Court has allowed refund of unutilised ITC in a case involving sale of duty-free goods from Duty Free Shops at the departure area of the airport. The Court was of the view that in terms of

Section 16(1) of the Integrated Goods and Services Tax Act, 2017 ('**IGST Act**'), such sale becomes a zero-rated supply and the assessee-seller is eligible for the refund of ITC. It noted that the duty-free shops were situated at international airports which were beyond the customs frontiers of India and hence when any transaction takes place outside the Customs frontier it is said to have taken place outside India. Section 2(11) of the Customs Act, 1962 read with Article 286 of the Constitution of India were relied upon to hold that supply by the duty-free shops to the outbound passenger constitutes exports by the DFS. [*CIAL Duty Free and Retail Services Ltd.* v. *Union of India* – 2020 VIL 463 KER]

Notional interest on security deposit in relation to renting service includible in value of supply if it influences same: The Karnataka AAR has held that the notional interest on the security deposit in the case of provision of Renting of Immoveable Property service shall be included in the total income from rental only if it influences the value of supply of said service, i.e. the monthly rent. The AAR noted that the notional interest earned was in respect of supply of the said service, and that there existed a nexus between security deposit taken and the rent charged, though no data was furnished to decide whether actually the notional interest influenced the monthly rental amount. Further, relying upon Section 15 of the CGST Act, 2017, the AAR held that property tax and other statutory levies are not deductible from the value of taxable supply of Renting of Immovable Property service. [In RE: *Midcon Polymers Pvt. Ltd.* – 2020 VIL 278 AAR]

Reclaiming reusable sand from waste sand is manufacture and not job-work: The Maharashtra AAR has held that activity of reclaiming reusable sand from the waste sand, having no commercial value, received from foundry industries, is not job work but 'manufacture'. The Authority noted that applicant was processing waste sand *vide* heat treatment and various other set of small procedures using its own consumables and bringing into existence a fresh new finished usable product which was a distinct commodity having a different name, character and use as compared to the input and had a commercial value. Further, observing that value of raw material received from customers was nil while value of own material and labour used by the assessee contributed to the value of finished goods, it held that the activity was not job work and the assessee was not job worker. Lastly, observing that the new product was a movable property, qualifying as 'goods', it held that activity was a supply of goods. [In RE: *Kolhapur Foundry and Engineering Cluster* – 2020 TIOL 263 AAR GST]

No ITC on service of installation of lifts provided to cooperative housing society: The Maharashtra Appellate Authority for Advance Rulings ('**AAAR**') has upheld the AAR Ruling denying ITC to the co-operative housing society in respect to the amount paid for replacement of existing lifts. The AAR had held that lift would become a part of the building once it was erected, installed and commissioned and would be construed as immovable property, and hence ITC in respect of the same would be restricted as per Section 17(5)(d) of the CGST Act, 2017. The AAAR observed that since the lifts would be construed as an integral part of the building, the same would be excluded from the definition of 'plant and machinery'. Further, the Appellate Authority also rejected the contention that the assessee was providing works contract services to the members of the society after receiving same from the lift contractor and therefore in terms of Section 17(5)(c) were eligible for the ITC

on input services provided by the lift contractor, which were the works contract services. It noted that the society itself was not a works contract service provider nor was it in the business of providing such services. [In RE: *Las Palmas Co-op Housing Society* – 2020 VIL 59 AAAR]

Sale of Transferable Development Rights liable to GST under Real Estate services: The Maharashtra AAAR has held that GST is leviable on sale of Transferable Development Rights ('**TDR**')/ Floor Space Index ('**FSI**') received as a consideration for surrendering the joint rights in lands. Examining the definition of 'goods' and 'services', it was held that the transfer of TDR made for a consideration in the course or furtherance of business would be a supply of service and taxable as per the provisions of CGST Act, 2017. The AAAR specifically clarified that the levy of tax in case of TDR was not on land and any transaction relating to sale of TDR would not be considered as sale of land. It noted that the tax was levied on the benefit arising out of the land, which was supply of service. The Appellate Authority also held that TDR was not covered under the definition of 'money' provided in the CGST Act, 2017. The said service was held to be covered under Heading 9972 as 'real estate services' attracting GST at 18%. [In RE: *Vilas Chandanmal Gandhi* – 2020 VIL 55 AAAR]

Ireland VAT – Word 'beverage' covers dry goods – Supreme Court clarifies on principles of strict construction of statute: The Supreme Court of Ireland has agreed with the judgement of the Court of Appeal where it was held that though 'beverage' must in the normal meaning of the word, be in a drinkable form, the Second Schedule to the Value Added Tax Act, 1972 covered dry goods sold in packet form. It observed that the word 'beverage' would be easily, naturally and readily understood as referring to leaf tea or coffee beans or indeed instant coffee. The Court noted that it would not be surprising to see the sign over a supermarket aisle in which tea, coffee and cocoa was being sold use the word 'beverages'. The tea and coffee sold by the assessee (takeaway restaurant) were however held to be covered under Sixth Schedule and liable to VAT at intermediate rate.

Regarding interpretation of statute, the Court stated that principle of strict construction is, like many other principles of statutory interpretation, a principle derived from the presumed intention of the legislature, which is not to be assumed to seek to impose a penalty other than by clear language. The Court was of the view that the approach should sit comfortably with other presumptions as to legislative behaviour, such as the presumption that legislation is presumed to have some object in view which it has sought to achieve. It held that a literal approach should not descend into an obdurate resistance to the statutory object, disguised as adherence to grammatical precision. [*Bookfinders Ltd.* v. *Revenue Commissioners* – Judgement dated 29-09-2020 in S:AP:IE:2019:000131, Supreme Court of Ireland]

Customs

Notifications and Circulars

Advance authorisations – Date of submission of documents for EO fulfilment extended: The Directorate General of Foreign Trade ('**DGFT**') has extended the last date for submission of documents for Export Obligation ('**EO**') fulfilment to 31-12-2020 in cases where the EO fulfilment period is expiring or has expired between 01-02-2020 and 31-10-2020. A new Para 4.44(g) has been inserted in Handbook of Procedures 2015-20, for this purpose, by DGFT Public Notice No. 26/2015-20, dated 16-10-2020.

Steel Import Monitoring System – Compulsory registration of all goods falling under Chapters 72, 73 and 86 of ITC (HS): Import under all HS Codes of Chapters 72, 73 and 86 of ITC (HS), 2017 shall now require compulsory registration under Steel Import Monitoring System ('**SIMS**'). DGFT Notification No. 33/2015-20, dated 28-09-2020 amends Policy Condition in Chapters 72, 73 and 86 of the Schedule-I to the ITC (HS), for this purpose. Further, according to DGFT Public Notice No. 19/2015-20, also dated 28-09-2020, implementation date in respect of the additional Codes now covered under SIMS by this notification, is 16-10-2020. It may be noted that *vide* DGFT Notification No. 17/2015-20, dated 05-09-2019 the import policy of some 284 specified Codes under said Chapters of the ITC (HS) was already changed from 'free' to 'free subject to compulsory registration under SIMS'. The latest notification now extends the SIMS requirement to import of all other goods under these Chapters.

Deemed exports – Duty drawback on steel supplied through distributors/dealers: Steel manufacturers can now claim duty drawback in respect of supplies against Advance Authorisation, on steel supplied through service centres / distributors / dealers / stock yards. Sub-para 7.07(iv) has been inserted in Chapter 7 of the Foreign Trade Policy 2015-20 by Notification No. 35/2015-20, dated 01-10-2020.

Rebate of State Levies on export of garments and made-ups Scheme notified under scrip mechanism: The DGFT has notified the procedure for application and issuance of scrips under the Scheme for Rebate of State Levies ('**RoSL**'). The RoSL scrips would be available for export of garments and made-ups exported by shipping bills prior to 07-03-2019 which have been transmitted from the ICEGATE server to DGFT server and for which the exporters have not received any RoSL amount. DGFT Public Notice No. 25/2015-20, dated 13-10-2020 inserted Para 4.97 and 4.98 in the Handbook of Procedures for this purpose. Consequently, the CBIC has also issued Notifications Nos. 38/2020-Cus. and 07/2020-C.E., both dated 21-10-2020, for conditional exemption from whole of Customs duty including additional duty and Central Excise duty, respectively, when such scrips are used.

LED products imports – Random sampling to be done: A new policy condition has been added in Chapters 85 and 94 in Schedule I to the ITC (HS), 2017 to provide for random sampling of LED products and control gear for LED products notified under Electronics and Information Technology Goods (Requirement of Compulsory Registration) Order, 2012. The selected samples will be tested in BIS recognised laboratories for

testing of limited defined non-destructive safety parameters as specified under the relevant IS for the product. Only those consignments where the random selected samples have complied with the requirements of the IS will be cleared. Those samples which do not adhere to the IS will either be sent back or destroyed at cost of the importer. DGFT Notification No. 32/2015-20, dated 17-09-2020 has been issued for the purpose.

Import of air conditioners with refrigerants prohibited: The import policy of air conditioners with refrigerants, falling under ITC HS Code 84151010 and 84151090 has been amended from 'Free' to 'prohibited'. DGFT Notification No. 41/2015-2020, dated 15-10-2020 amends import policy of said items for this purpose.

Recently CESTAT Mumbai has rejected the department's plea of non-availability of Notification No. 85/2004-Cus. (Sl. No. 49) exempting all goods under Tariff Item 84151010. The goods in question were either 'wall' mounted 'split' units performing dual functions of heating and cooling or were 'ceiling mounted' or 'ducted'. The Tribunal in its Order dated 11-09-2020 in the case of International Aircon Pvt. Ltd. v. Commissioner noted that in the Explanatory Notes to the Harmonized System of Nomenclature pertaining to sub-heading 841510, there was no qualifying characteristic that restricts the adoption thereof to 'cooling facility' alone, and that there was no capacity qualification included either therein.

Ratio decidendi

Rate of duty to be taken as on the date and time of presentation of bill of entry – Time of issue of notification also important: Observing that the self-assessment was carried out based on the rate of duty which prevailed at the time of presentation of the bill of entry, the Supreme Court has upheld the High Court's Orders which set aside re-assessments by the Customs department due to a notification issued at a later time, on the date of presenting of bill of entry, enhancing the rate of duty. The contentions that the notification issued at 20:46:58 hours on 16-02-2019 was effective from 0000 hours on that day, and that two different rates of duty could not be applicable on the same date, were thus rejected. The Court observed that notification issued under Section 8A of Customs Tariff Act, 1975 operates only prospectively and cannot displace the rate of duty applicable when the bill of entry was presented. Section 5(3) of the General Clauses Act, 1897 was also held to be not applicable by the Court while it relied upon Section 13 of the Information Technology Act. [*Union of India* v. *G S Chatha Rice Mills & Anr.* – Judgement dated 23-09-2020 in Civil Appeal No 3249 of 2020 and Ors., Supreme Court]

Prohibited goods can be provisionally released under Customs Section 110A: The Bombay High Court has held that Section 110A of the Customs Act, 1962 does not impose any limitation that the goods categorized as 'prohibited goods' under Section 2(33) cannot be subjected to provisional release under Section 110A. Noting that the words 'goods, documents and things seized' in Section 110A were expressions of general import without any qualifications and / or were not accompanied by any qualifying words, it held that hence no restriction can be read into the said expressions which was not contemplated by the statute. The petitioner had requested for provisional release of the vehicle seized by the Customs alleging it to be a second-hand vehicle, around 50-60 years old, and thus in violation of the Import Policy. The petitioner had claimed that the vehicle was a brand new one. [*Sidharth Vijay Shah* v. *Union of India* – 2020 TIOL 1547 HC MUM CUS]

Jt. DGFT has no power to review his own orders under FTDR Section 16 – Limitation of 2 years for review notice to start from date of order to be reviewed: Observing that once the Jt. DGFT issued the EPCG licence and the Export Obligation Discharge Certificate, he becomes *functus officio*, the Madras High Court has held that such an order can be reviewed only by the Director General under Section 16 of the Foreign Trade (Development and Regulation) Act, 1992. The notice issued by the Jt. DGFT was held without jurisdiction and contrary to statutory provisions. On the issue of limitation, the High Court held that in terms of Section 16, the two-year period for issuance of notice for regularisation will commence from the date of the decision or order which is sought to be reviewed and not the date of demand notices as argued by the Department. [*Simplex Infrastructures Ltd.* v. *Union of India and Ors*. – 2020 VIL 446 MAD CU]

Provisional release order must contain reasons and indicate application of mind: The CESTAT New Delhi has held that the order for provisional release of the goods passed by the Commissioner under Section 110A of the Customs Act, 1962 must indicate application of mind and contain reasons for passing the order. The Tribunal noted that the office had put up a note indicating the value of bond and the value of bank guarantee/security before the Commissioner who merely signed it. It also noted that even this note was not supplied with the provisional release order to the importer. Observing that the owner of the goods was required to be apprised of the reasons culminating to provisional release order, it held that the procedure adopted in the present case did not satisfy the requirement of Section 110A. [*Rudras Overseas* v. *Commissioner* - 2020 (10) TMI 70 - CESTAT New Delhi]

Valuation – Procedure for rejection of transaction value: Observing that the proper officer did not ask the importer to furnish any information in a case where he had reason to doubt the truth or accuracy of the declared value of imported goods, CESTAT New Delhi has held that the rejection of the transaction value was arbitrary. Reliance in this regard was placed on Rule 3 read with Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. It held that rejection of transaction value of second-hand machinery/capital goods based on the valuation done by the Chartered Engineer was not in accordance with the general principles of valuation. [*Champion Photostat Industrial Corporation* v. *Commissioner* - 2020 (9) TMI 661 - CESTAT NEW DELHI]

Durability and not repeated use important for Notification No. 104/94-Cus. – Benefit available to flexi tank container. The CESTAT Ahmedabad has held that the benefit of Notification No. 104/94-Cus. cannot be denied on the basis that imported containers were not for repeated use. The Tribunal was of the view that the criterion to be checked for availing benefit of the said notification was whether the container in itself was durable in nature or not. On facts of the case, flexi tank containers imported by the assessee were held to be durable containers eligible for benefit of said notification. [*Commissioner* v. *JR Roadlines Pvt. Ltd.* - 2020 (9) TMI 856 - CESTAT Ahmedabad]

Central Excise, Service Tax and VAT

Ratio decidendi

Sabka Vishwas Scheme – Amount in arrears – Deposits to be adjusted after determination of amount payable: The Madras High Court has held that for cases falling under 'Amount in arrears' category under the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019, the deposits should be adjusted after the determination of the amount payable. Department's contention that the sum paid was to be deducted first and the amount payable was to be computed thereafter, as endorsed by CBIC Circular bearing F. No. 867/78/2019-CX-8, dated 25-09-2019, was thus rejected. The Court was of the view that Section 124(2) shows that calculation of relief for all the categories set out in Section 124(1) must uniformly be done at the stage of calculating amount payable and that otherwise, the proviso to Section 124(2) will be rendered otiose. The Court however dismissed the petition filed by the assessee, as it observed that the payment made by the petitioner was made voluntarily towards tax liability and hence does not qualify as either deposit or pre-deposit. [*Solamalai Automobiles Pvt. Ltd.* v. *The Designated Committee* – WP (MD) No. 8227 of 2020, decided on 14-09-2020, Madras High Court]

BAS – Trade discount not liable to service tax even if named as 'commission': In a case where the assessee had deducted 11% from the export invoice and had mentioned it as deduction under the head commission, CESTAT Ahmedabad has held that the same is not liable to service tax under Business Auxiliary service ('**BAS**') and taxable under reverse charge mechanism. It was held that since there was transaction of sale and purchase between the assessee-exporter and buyer of the goods, whatever value was shown in the invoice was a sale value and the deduction was a discount given by the exporter to the foreign buyer. It also noted that the heading of column in the bank realisation certificate was 'commission/ discount paid to foreign buyer, agent'. Absence of any evidence to show that there was a commission agent in the transaction and any amount of commission was paid to such person, was also noted by the Tribunal while it held that trade discount even though in the name of commission, cannot be considered as commission paid towards commission agent service. [*Laxmi Exports* v. *Commissioner* - Final Order No. A/11247-11251/2020, dated 22-09-2020, CESTAT Ahmedabad]

Cenvat credit of services received at port – Words 'at the port' are part of the phrase 'upto the place of removal': CESTAT New Delhi has allowed Cenvat credit on CHA, C&F, testing, sampling etc., services received by the assessee at port premises in relation to export of their goods. The period involved was from April 2008 to September 2008. The Department had denied the credit contending that post 01-04-2008, the credit was available only on services which were availed till the goods reach the port, as the word 'upto' means 'to' and cannot mean 'at' or 'in' the port. The Tribunal however observed that in case of export of goods the property in goods passed from exporter to the buyer only after the shipping bill is filed and Let Export Order is issued. Noting that both these activities happen only at the port, i.e. inside the port and not at the port gate, it held that the port as such gets included in the word 'upto' and the words 'at the port' are part of the phrase 'upto the place of removal'. Sections 23 and 39 of the Sale of Goods Act, 1930 and the definition of 'place of

removal' in Section 4 of the Central Excise Act, 1944, were also relied upon. [*Hindustan Zinc Ltd.* v. *Commissioner* - Final Order No. 50852/2020, dated 08-10-2020, CESTAT New Delhi]

No service tax on obligation to contribute to capital of joint venture: The CESTAT Mumbai has held that the fulfilment of obligation to contribute to the capital of the joint venture is beyond the scope of taxation under the Finance Act, 1994 as it does not amount to consideration. Allowing assessee's appeal, the Tribunal held that the demand confirmed on employee benefit expenses booked as manpower cost in deploying personnel for operations, was not on the consideration for rendering of a service, as performance of such obligations was intended to serve itself. Department had raised demand of service tax in the dispute involving joint operation agreement under production sharing contract, terming it as a joint venture and hence liable under Explanation (3) to Section 65B(44) of the Finance Act, 1994 read with CBEC Circular No. 179/5/2014-ST, dated 24-09-2014. The Tribunal however held that reliance on the circular was misplaced in the context of service rendered by the appellant (constituent of joint venture). It noted that the 'joint operations' does not render service, within the meaning of Section 65B(44) as there is no beneficiary outside the production sharing contract, to which 'joint operations' is subordinated. [*BG Exploration & Production India Ltd.* v. *Commissioner* – 2020 VIL 433 CESTAT MUM ST]

EOU – DTA clearance at nil duty whether covered under 'appropriate rate of duty' – Issue referred to Larger Bench: The CESTAT Mumbai has referred to the Tribunal's Larger Bench the question as to whether the term 'appropriate rate of duty' used in the exemption Notifications Nos. 1/95-C.E. and 22/03-C.E. pertaining to domestic procurement of raw materials and consumables and Notifications Nos. 53/97-Cus. 52/03-Cus. pertaining to imported raw materials and consumables, by the EOU, will cover the case where the finished goods are cleared in Domestic Tariff Area ('**DTA**') on payment of duty at 'nil' rate. The Tribunal did not agree with the decision of the CESTAT in case of *Technocraft Industries (I) Ltd.* [Final Order No A/86386-86391/2019, dated 13-08-2019] allowing the benefit of said notifications in such cases. [*Eurotex Industries and Exports Ltd.* v. *Commissioner* – 2020 TIOL 1467 CESTAT MUM]

Cenvat credit available on construction/setting up of landfill: The CESTAT Mumbai has allowed Cenvat credit on construction/setting up of landfill. It held that the same is not covered under the exclusion clause of the definition of 'input service' in Rule 2(l)(a) of the Cenvat Credit Rules, 2004. The Tribunal noted that the landfill setup had a very limited life span that helped in storage and disposal of hazardous waste and that setting up of such landfill was a mandatory requirement in waste management as per guidelines of the State Pollution Control Board. It also noted that the subsequent Commissioner, in the similar facts of the case, had held that such landfill is not a 'civil structure'. [*Maharashtra Enviro Power Ltd.* v. *Commissioner* – 2020 TIOL 1515 CESTAT MUM]

Cenvat credit when available on Outdoor Catering service, post 01-04-2011: Observing that the Outdoor Catering service availed by the assessee had a direct impact on the manufacturing process and the cost of the final product, the CESTAT Mumbai has allowed the Cenvat credit on said service to a manufacturer of automobile parts in a case involving period from February 2014 till March 2015, i.e. after amendment of definition of 'input service' on 01-

04-2011. It noted that if the assessee does not avail the said service, the employees in the company would be compelled to step out of the factory premises for refreshments which would lead to loss of manhours for the company. Allowing the appeal, the Tribunal also noted that Rajasthan High Court's decision in the case of *Mangalam Cement Ltd*., allowing the benefit, was not placed before the CESTAT Larger Bench in the case of *Wipro Ltd.* which held to the contrary. [*Varroc Engineering Pvt. Ltd.* v. *Commissioner* – 2020 TIOL 1475 CESTAT MUM]

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