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An e-newsletter from
Lakshmikumaran & Sridharan, India

October 2021 / Issue – 124

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October
2021

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Intermediary Services – Why Circular No. 159 should not be ignored?

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After the 45th meeting of GST Council, when Press Release stated that in order to remove ambiguity and legal disputes, Circular will be issued providing clarification(s) on scope of 'intermediary services', while some cheered with hope, others did not want to raise their expectations.

Circular 159/15/2021 ('**Circular 159**') was issued on 20 September 2021 catering to both sets. Here, we will try to be optimistic and talk about how Circular 159 instils hope, or at least, ensures that it should not be ignored. Let's see why.

Section 2(13) of the IGST Act, 2017 can be dissected as under–

- Intermediary
- ***means***
- ***a broker, an agent or any other person, by whatever name called****,*
- who arranges or facilitates the supply of goods or services or both, or securities,
- between two or more persons,
- but does not include a person who supplies such goods or services or both or securities on his own account.

The definition seeks to cover those persons who will be considered as intermediaries.

'Means' definition

When a word is defined to 'mean' such and such, the definition is *prima facie* restrictive and exhaustive. Therefore, if any person is not covered within the exhaustive scope of the definition, their services cannot be considered to be intermediary services. To begin with, the person should be a broker, an agent or any other person, by whatever name called. It cannot be ignored that after broker and agent, the expression '*any other person, by whatever name called*' widens the scope. The question is, how wide?

Ejusdem generis

As per the Rule of *Ejusdem Generis*, when particular words pertaining to a class, category or genus are followed by general words, the general words are construed as limited to things of the same kind as those specified[1].

Applying the above rule of interpretation, even if the terms broker or agent is succeeded by the expression *any other person, by whatever name called,* such other person also has to bear the character of a broker or agent. Brokers and agents are known to be persons who *generally* act on behalf of another; who look after someone else's business affairs or do business on their behalf; who represent another person. Such person should be identified by the service recipient to enable the latter to conclude transactions and business on his behalf. The purpose was only to ensure that the coverage should not be restricted to those referred to as 'brokers' or 'agents', and persons intended to be covered should not escape coverage due to nomenclature alone.

[1] Principles of Statutory Interpretation 14th Edition page 561

This is not a novel argument. In the context of Income tax law, Supreme Court[2], agreed with the above principle, and which has been relied upon by the Appellate Advance Ruling Authority[3]. However, Advance Ruling Authorities have rejected the application of the rule of *Ejusdem Generis* while construing the definition of intermediary[4].

Emphasis on facilitation

Such narrow construct is possibly, due to over emphasis on the next part of the definition. It is noticed that the expression '*any other person, by whatever name called'* is construed to cover **any person** who arranges or facilitates the main supply. It is ignored that the said expression is to denote the types of persons to be covered and the expression '*who arranges or facilitates the supply of goods or services or both, or securities'* is to denote the type of activities that the broker, agent or a person of similar nature undertakes. In fact, the expression '*who arranges or facilitates the supply'* is only to further explain that the types of persons being similar to brokers or agents facilitate the main supply. It is not the other way around. Every person who facilitates any supply cannot be an intermediary.

Here, Para 3.3 of Circular 159 becomes relevant and is extracted hereunder-

> ***3.3 Intermediary service provider to have the character of an agent, broker or any other similar person****: The definition of "intermediary" itself provides that intermediary service provider means a broker, an agent or any other person, by whatever name called…. This part of the definition is not inclusive but uses the expression "means" and does not expand the definition by any known expression of expansion such as "and includes". The use of the expression "arranges or facilitates" in the definition of "intermediary" suggests a subsidiary role for the intermediary. It must arrange or facilitate some other supply, which is the main supply, and does not himself provides the main supply. Thus, the role of intermediary is only supportive.*

The above Para has taken cognizance of the fact that the expression '*a broker, an agent or any other person, by whatever name called'* is exhaustive and the attempt is not to expand the scope by use of words like 'and includes'. The latter part of the definition is read to give colour to only the role of persons covered and not to the persons themselves. It is made clear that the role is to be supporting the main supply. It indicates that not every person who is facilitating a supply can be an intermediary.

There are many instances where multi-national companies engage their Indian counter parts to provide services. These services may eventually be consumed to undertake a main supply by or to the foreign company. The mere reason that services of the Indian company facilitates another supply has resulted in doubts being raised on whether they qualify to be intermediaries. The fact that these were not engaged to act as brokers or agents, or to merely facilitate supplies to or by the foreign company is ignored. Most seem oblivious to the possibility of such companies being engaged for their expertise and such engagement being irrespective of the conclusion of any main supply, or it could be deliberate ignorance.

[2] McDowell & Co.CIVIL APPEAL NO.2939 OF 2006
[3] Sabre Travel Network India Pvt. Ltd. 2019 (27) G.S.T.L. 754 (App. A.A.R. - GST)
[4] Infinera India Pvt. Ltd. 2020 (33) G.S.T.L. 491 (App. A.A.R. - GST - Kar.); McAfee Software (India) Pvt. Ltd. 2019 (31) G.S.T.L. 662 (A.A.R. - GST)

Scope identical to service tax regime

It is necessary to mention that in Para 2.3, Circular 159 confirms that the scope of intermediary under GST law and Service tax law are broadly the same. Service tax Education Guide issued by CBIC explained the scope of intermediaries. One of the criteria given was that the service provided by the intermediary on behalf of the principal is clearly identifiable. Examples provided were travel agent (any mode of travel), tour operator, commission agent, recovery agent. It was clarified that even in other cases, wherever a provider of any service acts as an intermediary for another person, as identified by the guiding principles outlined, this rule will apply. Normally, it is expected that the intermediary or agent would have documentary evidence authorizing him to act on behalf of the provider of the 'main service'.

Therefore, the fact that even at the time of introduction of the concept of intermediaries in Service tax law, it was made abundantly clear that the service recipient should intend to appoint such person to undertake transactions on its behalf. Such services automatically facilitate a main supply. Facilitation or arrangement of the main supply is not even a separate and independent criterion, it is merely an explanation of the type of service performed by person like brokers or agents.

Sub-contracting

Para 3.4 of Circular 159 is pertinent to this discussion. In case of sub-contracting also, where there are three parties involved. The service of the sub-contractor is to facilitate the service of the main contractor. On a narrow reading, one could have said that such sub-contractor is not a broker or agent but will be covered under the expression 'any other person, by whatever name called. However, it has been clarified that when a portion or whole of a service is outsourced, the sub-contractor is not merely facilitating the main supply. The reason is that he is himself providing an independent supply to the main contractor.

Circling back to the above discussion on engagement of Indian counter parts by foreign group companies, it can be observed that those may also be in the nature of sub-contracting or outsourcing. Therefore, looking at all transactions with the same lens may not be correct.

Having said that, it is important to highlight that the nature of sub-contracting is relevant. Circular 159 intends to clarify that mere sub-contracting will not result in coverage within the definition of intermediary. But, it is highly critical to examine the nature of service of the sub-contractor, which may independently qualify to be intermediary services.

Conclusion

To summarize, Circular 159 has brought the conversation back to the definition of intermediary and that it, cannot and should not, be construed to be so wide that any service indicating facilitation of a supply will be covered. The scope is meant to restrict to only such services where the service provider is, as the name suggests, mediating the supply between to persons like those undertaken by a broker or agent. Consumption of a service for an eventual supply cannot be the sole test.

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Goods and Services Tax (GST)

Notifications and Circulars

Goods – CBIC clarifies GST rates and classification for various goods: The Central Board of Indirect Taxes and Customs ('**CBIC**') has issued an elaborate Circular clarifying on GST rates and classification of various goods. These clarifications are in line with the recommendations of the GST Council's 45th meeting. According to Circular No. 163/19/2021-GST, dated 6 October 2021,

- 'Fresh' fruits and nuts covers only products which are not frozen or dried.
- Seeds including tamarind seeds, falling under Heading 1209, liable to 5% GST w.e.f. 1 October 2021, if not supplied as seeds for sowing.
- *Copra* not covered under S. No. 47 of Notification No. 2/2017-Central Tax (Rate) granting exemption to Coconut, fresh or dried, whether or not shelled or peeled.
- Pure *henna* powder and *henna* leaves, having no additives, are classifiable under Tariff Item 1404 90 90 and attract 5% GST.
- Mehndi paste in cones, falling under Heading 1404 and 3305, attract 5% GST
- Scented sweet supari falls under Tariff Item 2106 90 30 as Betel nut product known as '*Supari*' and attracts GST rate of 18%.
- Flavored and coated *illaichi* is a value-added product covered under sub-heading 2106 and attract 18% GST.
- Brewers' spent grain (BSG), Dried distillers' grains with soluble (DDGS) and other such residues are classifiable under Heading 2303 and attract 5% GST.
- All goods falling under Heading 3006 attract 12% GST under S. No. 65 of Second Schedule of Notification 1/2017-Central Tax (Rate).
- All goods falling under Heading 3822, whether diagnostic or laboratory regents, eligible for 12% GST under S. No. 80 of Schedule II of Notification No.1/2017-Integrated Tax (Rate).
- Goods for petroleum operations – Original/ import Essentiality Certificate by DGH is sufficient. No need for taking a certificate every time on inter-state movement of goods within the same company / stock transfer so long as the goods are same.
- UPS/inverter and external battery sold on same invoice, where prices are separately known, are two distinctly identifiable items. Liable to GST at respective rates.
- Solar PV Power Projects – GST can be paid in terms of the 70:30 ratio for goods and services, respectively, for the period of 1 July 2017 to 31 December 2018 also.
- Fibre drums supplied between 1 July 2017 to 30 September 2021 @ 12% GST to be considered as fully GST paid.

Services – CBIC explains GST rates and exemption for various services: The CBIC has by way of another Circular No. 164/20/2021-GST, dated 6 October 2021 also clarified GST rates and exemption for various services. These clarifications are also in line with the recommendations of the 45th GST Council meeting.

- Cloud kitchens/central kitchens services are covered under restaurant service.
- Ice cream sold by a parlour or any similar outlet is not supply of restaurant service.
- Services provided by any institutions/ NGOs under the central scheme of 'Scholarships for students with disabilities', where total expenditure is borne by the Government is exempt.
- Satellite launch services by New Space India Limited for international customers is 'export of service'.
- Overloading charges at toll plazas are same as toll charges.
- Renting of vehicles to State Transport Undertakings and Local Authorities covered under 'giving on hire' in Sl. No. 22 of the Notification No. 12/2017-Central Tax (Rate).
- Grant of mining rights, taxable at 18% during the period 1 July 2017 to 31 December 2018, even if rate schedule did not specifically mention the service.
- Admission to amusement parks, or theme park etc. or any place having joy rides, merry-go rounds, go-carting etc., whether indoor or outdoor, liable for 18% GST so long as no access is provided to a casino or race club. Clarification also applicable for period prior to 1 October 2021.
- Job work in relation to manufacture of alcoholic liquor for human consumption liable to 18% GST.

Ratio decidendi

Registration of purchasing dealer cannot be cancelled for fraud committed by seller: The Orissa High Court has upheld the plea that for the fraud committed by the selling dealer, which resulted in cancellation of its registration, there cannot be an automatic cancellation of the registration of the purchasing dealer. Relying on the Gujarat High Court decision in the case of *Vimal Yashwantgiri Goswami,* the Court observed that in the present case also apart from simply stating that the explanation offered was not 'satisfactory', no reasons were given by the department for cancellation of the petitioner's registration. The Court noted that the appellate order also only proceeded on the basis that this was a preventive measure and failed to discuss the explanation offered by the assessee. Allowing the petition, the High Court observed that to attribute fraud to the purchasing dealer, the Department needs to satisfy a high threshold of showing that the purchaser indulged in the transactions with the full knowledge that the selling dealer was non-existent. [*Bright Star Plastic Industries* v. *Additional Commissioner* – 2021 TIOL 1965 HC ORISSA GST]

Absence of Form DRC-01 and 02 fatal – Non-adherence of CGST Rule 142 causes prejudice: The Madras High Court has held that non-adherence to Rule 142 of the Central Goods and Services Tax Rules, 2017 ('**CGST Rules**') causes prejudice to the assessee. The Court was of the view that the rule should necessarily be adhered to as it is not a mere procedural requirement. Observing the facts of the case, the Court held that non-serving of Form DRC-01 and 02 by the Revenue department tantamounted to trampling the rights of the assessee. The High Court while holding so, directed the Revenue department to commence the proceedings afresh, i.e. *de novo*. [*Shri Tyres* v. *State Tax Officer* – 2021 VIL 693 MAD]

Show cause notice lacking ingredients of proper notice under CGST Section 74, to be struck down – In-substance compliance not material: In a case where the show cause notice lacked in fulfilling the ingredients of a proper show-cause notice under Section 74 of the Central Goods and Services Tax Act, 2017,

('**CGST Act**') the Jharkhand High Court has declined to accept the contention of the Revenue department that the notice ought not to be struck down if in substance it contains the matters which a notice must contain. The Court observed that the impugned notice was issued in a format without even striking out any irrelevant portions and without stating the contraventions committed by the assessee-petitioner, i.e. whether it was actuated by reason of fraud or any wilful misstatement or suppression of facts in order to evade tax. Allowing the writ petition, the High Court also held that a summary of show-cause notice as issued in Form GST DRC-01 cannot substitute the requirement of a proper show-cause notice. [*NKAS Services Private Limited* v. *State of Jharkhand* – 2021 VIL 732 JHR]

Electronic Credit Ledger cannot be used for payment of pre-deposit while filing appeal: The Orissa High Court has held that Electronic Credit Ledger cannot be debited for making payment of pre-deposit at the time of filing of the appeal in terms of Section 107(6) of the Odisha GST [CGST] Act, 2017. The Court declined to accept the plea that 'Output Tax', as defined under Section 2(82) could be equated to the pre-deposit required to be made in terms of Section 107(6). It also rejected the plea that Section 107(6) was merely a 'machinery provision'. Gujarat High Court decision in *Vinayak Trexim*, where the amount to be refunded was allowed to be used for pre-deposit, was distinguished. [*Jyoti Construction* v. *Deputy Commissioner* – Order dated 7 October 2021 in W.P.(C) Nos.23508, 23511, 23513, 23514 and 23521 of 2021, Orissa High Court]

Blocking of ITC under CGST Rule 86A – Reasons to be recorded and communicated to assessee: The Madras High Court has held that for invoking Rule 86A of the Central Goods and Services Tax Rules, 2017, for the purpose of blocking of electronic credit ledger, reasons have to be recorded and be communicated to the assessee. According to the Court, this will enable the assessee to put forth his objections and pray for release of the blocking of the credit ledger. The Court though observed that no such procedure was provided under the said rule, it nevertheless was of the view that the principles of natural justice are required to be read in Rule 86A. According to the Court, in the absence any reason, which has been recorded, the invocation of power under Rule 86A should be held to be unauthorised, illegal and without jurisdiction. Relying on an income-tax decision of the Supreme Court in *GKN Driveshafts (India) Limited*, the High Court observed that the authority is bound to communicate the reasons which weighed in his mind while passing an order blocking credit ledger. [*HEC India LLP* v. *Commissioner* – 2021 TIOL 1904 HC MAD GST]

Refund – CBIC Circular prescribing online filing of claim cannot override Rule 97A allowing manual filing: The Allahabad High Court has held that the CBIC Circular No. 125/44/2019-GST, dated 18 November 2019, prescribing online mode for refund applications, cannot negate or override the effect of law arising from Rule 97A of the CGST Rules, 2017, allowing manual filing of refund applications. Allowing interest for delaying processing of refund claim, the Court also noted that the said circular was issued after the application for refund was filed by the petitioner and that the department had in fact processed the claim though belatedly. [*Savista Global Solutions Private Limited* v. *Union of India* – 2021 VIL 713 ALH]

SEZ developer can also claim refund when tax paid erroneously by service supplier: The Madras High Court has held that the SEZ developer would be eligible for refund of tax in a case where the service supplier to the developer had paid same erroneously. Rejecting the

contention that according to Section 54 of CGST Act, only supplier of services to a SEZ developer would be eligible to claim refund, the Court observed that Section 54 and Rule 89 both commence with the phrase 'any person' which clearly stipulates that any person other than supplier of goods or services can apply for refund. It also noted clause (h) of the Explanation to Section 54 for this purpose. It was of the view that the second proviso to Rule 89(1) referring that the supplier can apply for refund does not by virtue of such reference exclude other applicants. [*Platinum Holdings Private Limited* v. *Additional Commissioner* – 2021 TIOL 2016 HC MAD GST]

Provisional attachment – 'Opinion' in Section 83 cannot be merely a lip service: The Madras High Court has held the reference to 'opinion' in Section 83 of the Central Goods and Services Tax Act, 2017 cannot be a mere lip service and cannot be satisfied by the officer, proceeding on the basis that the liability of an assessee stood determined even prior to the issue of a notice of assessment and merely stating that, in his opinion, this was a case where the interests of the revenue are to be protected. The Court was of the view that allegations in regard to the excess claim of ITC based on transactions with non-existent or fraudulent entities are to be founded upon supporting materials and evidences if they are to translate into an 'opinion' as required under Section 83. Allowing the writ petition, the Court noted the facts of the case and observed that a conclusion and determination of liability was arrived at even prior to summoning the entities who are stated to be 'bogus' and non-existent. [*Mutharamman and Company* v. *Principal Additional Director General* – 2021 TIOL 1984 HC MAD GST]

Registration cannot be cancelled without considering reasons for delay in filing returns: In this case, order for cancellation of registration was issued without referring to the contents of the show cause notice issued and the response thereto. Further, the order was non-speaking and the reason for cancellation of registration was not mentioned. The writ petition was filed for restoration of registration. The petitioner could not file the returns on time due to the reasons beyond petitioner's reach. However, the petitioner filed the returns after some delay with late fee for relevant period and also discharged the tax liability. The Patna High Court stated that the competent authority should have condoned the delay considering the facts and circumstances and onset of pandemic. Restoration of the petitioner's registration was directed. [*Brajesh Enterprises* v. *State of Bihar* – 2021 VIL 709 PAT]

Working from home and not from business premises is no criteria for cancellation of GST registration: The Calcutta High Court has set aside the order of rejection of application of the petitioner for revocation of cancellation of its GST registration in a case where the registration was cancelled by the Revenue department as the assessee was not operating from his business premises. The petitioner had stated that due to the compelling circumstances of Covid-19 and in following the protocol and norms of Covid-19, petitioner was temporarily not carrying his business from officially registered premises and were conducting business from home. The High Court however did not go into the merit of the petitioner's application for revocation of cancellation. [*International Value Retail Pvt. Ltd.* v. *Union of India* – 2021 TIOL 1974 HC KOL GST]

GST applicable on receipt of money after arbitration (during GST regime) for works contract completed in the pre-GST regime: The Telangana AAR has answered in negative the question on GST liability on unpaid amounts including escalation of price for works executed in pre-GST period (though recovered in GST

regime), refund of excess deductions (both statutory and non-statutory) made against the bills raised for such works, and interest claimed on delayed payments on the works executed and payment certificates received in pre-GST regime. However, in respect of damages as claimed by the applicant from the contractee due to the delays in making available possession of site, drawings and other schedules beyond the milestones fixed for completion of project (before introduction of GST), which were determined by the arbitration award during GST regime, the AAR was of the view that consideration received for such forbearance is taxable under GST. The AAR noticed that the time of supply of the service of tolerance was the time when such determination took place and that the same took place only by arbitration award after introduction of GST. [In RE: *Continental Engineering Corporation* – 2021 VIL 382 AAR]

No GST on employees' share collected for payment to canteen service provider: The Gujarat Appellate AAR has held that GST is not liable to be paid on the amount recovered from the employees towards foodstuff supplied by third party / canteen service provider. The AAAR in this regard noted that the assessee was collecting portion of employees share and paying to canteen service provider (along with his own share), which was nothing but a facility provided to employees without making any profit and by working as a mediator. Noting that the assessee was not carrying out the said activity for any consideration, the Authority held that there was no supply from the assessee to the employees. Ruling of the AAR, holding to the contrary, was thus modified. [In RE: *Amneal Pharmaceuticals Pvt. Ltd.* – 2021 VIL 44 AAAR]

ITC available on supply of other goods at nominal charges under a promotional scheme: The Gujarat AAR has held that supply of various products like gold coins, refrigerators, coolers, split air conditioner, etc. ('**other goods**') at very nominal price to retailers against purchase of specified units of own manufactured goods, pursuant to a promotional scheme, would qualify as individual supplies taxable at the rates applicable to each of such goods. Observing that the supplies were not made for a single price and were not naturally bundled, the AAR held that the supplies were neither mixed nor composite supplies. Further, in respect of availability of ITC, the Authority observed that the scheme was intended to boost the sale of own goods, so would qualify as an activity undertaken in the course or furtherance of business. It also noted that since the other goods were given on nominal charges and after fulfilment of certain criteria, they cannot be termed as 'gifts'. However, it was held that value of the said other goods would be required to be determined as per provision of Section 15, as the price was not the sole consideration for such supply. [In RE: *Kanahiya Realty Pvt. Ltd.* – 2021 TIOL 230 AAR GST]

Electronic platform for booking cabs liable as e-commerce operator – GST payable on net ride charges after deducting discounts: The Gujarat AAR has held that the applicant intending to own and develop an electronic/digital platform for booking cabs would be liable to be registered and classified under the category of e-commerce operator. It was held that since the applicant was a supplier of service as covered under Section 9(5) of the CGST Act, 2017, the applicant stepped into the shoes of the drivers and was liable to obtain GST registration and discharge GST with respect to the said service. Further, on the question of value of supply for passenger transportation service, observing that the applicant intended to offer discount at the time of supply of services on the ride charges to the customer, the Authority upheld the view that the assessee would be liable to pay the amount of tax on the value of supply which would be net of

ride charges in terms of Section 15(3)(a) of the CGST Act, 2017. [In RE: *Gensol Venture Pvt. Ltd*. – 2021 VIL 359 AAR]

Managerial and leadership services provided to branch offices and group companies liable to GST: The Maharashtra AAR has held that the assessee supplying managerial and leadership services to its branch offices which qualified as distinct persons, and group companies which qualified as related persons, is supply of services liable to GST. Noting that branch offices and group companies could not be treated as employees because of separate registrations under GST Law, it held that the applicant would not get the benefit of Entry No. 1 to Schedule III to the CGST Act, 2017 and the arrangement would not be neither a supply of goods nor a supply of services. The activity was held to be covered under Entry No. 2 to Schedule I. The lumpsum amount charged from the recipients was held to be taxable. Further, it as of the view that the valuation shall be governed by Rule 28 of the CGST Rules, 2017 in respect of transactions with related/distinct persons who were eligible for full input tax credit. [In RE: *B.G. Shirke Construction Technology Pvt. Ltd*. – 2021 VIL 363 AAR]

Valuation – Fuel charged as reimbursement or received as free supply from customers, includible in value of rental services: The Gujarat Appellate AAR has held that the amount charged towards fuel is required to be included in the value of rental service of aircraft as supplied by the assessee-appellant. The Appellate Authority observed that as per the terms of the contract the assessee was primarily liable to arrange for fuel which was required for flying of helicopters. It also noted that the activity of arranging for the fuel was an activity done in respect of supply of rental service of the helicopters as provided by the assessee. The plea of assessee being pure agent of its customers, was also rejected. Sections 15(2)(b) and (c) of the CGST Act, 2017 were relied upon. [In RE: *Global Vectra Helicorp Limited* – 2021 VIL 46 AAAR]

Customs

Notifications and Circulars

Remission of Duties and Taxes on Exported Products ('RoDTEP') scheme and Rebate of State and Central Taxes and Levies ('RoSCTL') scheme clarified: The CBIC has issued two Circulars to collate the salient features of the RoDTEP and RoSCTL schemes, which will serve as guidelines for the stakeholders. It may be noted that the RoDTEP scheme was notified *vide* DGFT Notification No. 19/2015-2020, dated 17 August 2021 for exports made on/after 1 January 2021 while *vide* Notification No.12015/11/2020-TTP, dated 13 August 2021, issued by the Ministry of Textiles, the RoSCTL scheme on export of apparel/garments was

extended till 31 March 2024 and apparel / garments and made-ups were excluded from the RoDTEP scheme. Some of the salient features of the schemes, as highlighted in Circular Nos. 22 and 23/2021-Cus., both dated 30 September 2021 are as follows.

- The schemes exclude certain categories/supplies from availing the benefit.
- The rebate/remission amount will be issued in the form of a transferable duty credit/electronic scrip (e-scrip) which will be maintained in an electronic duty credit ledger in the customs automated system.
- E-scrips are freely transferable and only the entire amount in the said E-scrip shall be transferred. Duty credit in part shall not be permitted to be transferred
- The E-scrip shall be used for payment of basic customs duty only
- Duty credit is subject to realization of sale proceeds within the period allowed by RBI.

Crude soya-bean, palm and sunflower oils – BCD exempted and AIDC lowered: Basic Customs Duty ('**BCD**') has been removed on imports of crude soya-bean oil, crude palm oil and on crude sunflower oil into India with effect from 14 October 2021. The exemption by Notification No. 48/2021-Cus., dated 13 October 2021 will remain in force up to 31 March 2022. Simultaneously, Agriculture Infrastructure and Development Cess ('**AIDC**') has also been lowered for these products by Notification No. 49/2021-Cus. which will also remain in force till 31 March 2022.

Syringes with or without needles, of specific denominations – Exports restricted: The Ministry of Commerce and Industry has amended the Export Policy of syringes, to restricted. Accordingly, export of syringes with or without needles, falling under HS Code 9018 31 00 or falling under any other HS Code was put under restricted category with effect from 4 October 2021 [till 13 October 2021] by Notification No. 34/2015-20, dated 4 October 2021. However, it may be noted that from 14 October 2021 further amendments have been made in Chapter 90 of the Schedule-2 of ITC (HS) to specify that only syringes of certain specific denominations, falling under HS Code 9018 31 00, are restricted for export. According to Notification No. 38/2015-20, dated 14 October 2021, only syringes of denominations i) 0.5 ml / 1 ml AD syringes; ii) 0.5 ml / 1 ml / 2 ml / 3 ml disposable syringes; and iii) 1 ml / 2 ml / 3 ml RUP syringes covered under ITC HS Code 901803100, are restricted. The DGFT has also meanwhile on 5 October 2021 issued Trade Notice No. 20/2021-22 to provide for monthly quota of 4 crore syringes in the months of October and November 2021 and 9 crore each in December 2021 and January 2022. Exporters need to apply online for export licences validity of which will be only one month. The Trade Notice also requires submission of certain other documents by the manufacturers.

Ratio decidendi

EPCG scheme – Surrender of SHIS scrips, issued for same period, enough – Assessee not required to obtain policy relaxation: The CESTAT Chennai has allowed the benefit of EPCG scheme in a dispute where the assessee was issued EPCG authorisations and SHIS certificates for the same period but, the assessee had subsequently surrendered the SHIS certificates which were also cancelled by the JDGFT. Department's contention that DGFT Public Notice No. 30/2015-20, dated 8 September 2016, which allowed for such surrender, also required the assessee to obtain a policy relaxation under Para 2.58 of the Foreign Trade Policy, was rejected by the Court. It observed that according to the condition the

power was to be exercised by the DGFT to relax the provisions and that the Public Notice no where stated that the licensee has to apply for, let alone obtain, a policy relaxation. [*ITC Ltd.* v. *Commissioner* – 2021 (10) TMI 94 – CESTAT Chennai]

No CVD on vessel seeking to convert into coastal run when same imported before 2012: Observing that the language of Condition 82 in Notification No. 12/2012-Cus., dated 17 March 2012 (in respect of Sl. No. 462) made it clear that it was meant to apply to vessels imported after the date of the notification and not prior thereto, the Orissa High Court has allowed the writ petition filed by the assessee. Revenue department's contention that since the foreign going vessel was sought to be converted into a coastal run vessel in 2013, the notification will apply and hence CVD would be leviable, was thus rejected by the Court, observing that the concerned vessel was imported in 2003. Noting that the vessel called in Indian port for the first time in 2003, and at that relevant date it was exempt from payment of customs duty, the High Court held the vessel cannot be made amenable to such duty later by a condition in another exemption notification of March 2012. The Court however not found it necessary to strike down the said entry or condition of the notification as suggested by the petitioner. [*Great Eastern Shipping Company Ltd.* v. *Union of India* – Judgement dated 27 August 2021 in Writ Petition (Civil) No. 4 of 2013, Orissa High Court]

Cash refund of SAD earlier paid through DEPB permissible: Observing that the DEPB scheme has expired, the Karnataka High Court has allowed cash refund of SAD earlier paid through the scheme. The Court was of the view that merely because DEPB Scheme had lapsed, the assessee could not be deprived of the benefit flowing from the exemption Notification No.102/2007-Cus. if the conditions specified therein were fulfilled. It also noted that period of limitation prescribed under Section 27 of the Customs Act, 1962 for refund of claim as per Notification No.102/2007-Cus., was untenable as the SAD would be refundable only on subsequent sale which is not in the control of the assessee. [*Commissioner* v. *Molex India Pvt. Ltd*. – 2021 VIL 717 KAR CU]

Waste paper imports can even be in form of books, old or new – Inspection or investigation required to allege mis-declaration: The Madras High Court has held that merely because the imported waste paper (as declared) was in the form of books – new or old, it cannot be said they were for being sold as books and not for use a waste paper for making pulp in paper industry. Setting aside department's contention of mis-declaration, the Court noted that otherwise the value of said goods would have been multi-fold. It also observed that the importer had voluntarily offered for mutilation of the imported goods, much before the date when the Customs alleged the goods as mis-declared. The Court was of the view that there is no mis-declaration unless the department finds it as a different item not going to be utilised as waste paper, after their own inspection or investigation. [*Venkatalakshmi Paper & Boards Pvt. Ltd.* v. *Commissioner* – 2021 (10) TMI 311 – Madras High Court]

eNodeB BTS/ Micro Cell BTS/ Femto Cells BTS/ Pico Cells BTS classifiable under Tariff Item 8517 61 00 as 'Base Station'. The CESTAT Mumbai has held that eNodeB BTS/ Micro Cell BTS/ Femto Cells BTS/ Pico Cells BTS merits classification under Tariff Item 8517 61 00 of the Customs Tariff Act, 1975 as 'Base station'. The Tribunal for this purpose observed that merely because the Base Stations of 4G LTE had overcome the drawback of the Base Stations of 2G and 3G technology, it cannot mean that eNodeB was not a Base Station. Rejecting the

department's plea of classification under TI 8717 62 90 since it did not have a separate controller, the Tribunal observed that even the very first Base Station of 1G Technology also did not have a separate Controller. Department's contention that the scope of CTH 8517 61 00 must be restricted and confined only to be Base Stations of the earlier 2G technology and 3G technology and not cover an evolved Base Station of the new 4G technology, was also rejected. [*Commissioner* v. *Reliance Jio Infocomm Ltd.* – Final Order No. A/86960-86961/2021, dated 6 October 2021, CESTAT Mumbai]

Central Excise, Service Tax and VAT

Ratio decidendi

Cenvat credit available on inputs, capital goods and services used in erection of towers and shelters by providers of cellular telephone services: The CESTAT Chennai has held that Cenvat credit of inputs / capital goods and services utilized in fabrication, erection, installation of towers and shelters by the providers of cellular mobile telephone services is admissible. The Tribunal in this regard followed the decision of the Delhi High Court in *Vodafone Mobile Services Ltd*. [2018 (11) TMI 713-Delhi High Court] which was subsequent to the contrary Bombay High Court decision in the case of *Bharti Airtel Ltd.* [2014 (35) STR 865 (Bom.)]. It also noted that the Chandigarh Bench of the Tribunal after considering the decisions of the Larger Bench [which was contrary], the Bombay High Court and the Delhi High Court, had dismissed the appeal filed by Revenue.

Further, the CESTAT also upheld the contention of the assessee that the show cause notice in respect of denial of credit on certain input services was vague and not substantiated. It noted that service-wise break up of credit was not given in the SCN and that the onus of identifying the service and the credit irregularly availed, if any, by the appellants is squarely on the department. [*Vodafone Cellular Limited* v. *Commissioner* – Final Order No. 42352/2021, dated 1 October 2021, CESTAT Chennai]

Sandalwood oil is a 'forest produce': Holding the dicta in its earlier decision in the case of *Suresh Lohiya* as not a binding authority, the Supreme Court has held that sandalwood is a forest produce. The Court observed that the distinction sought to be made between 'nature's gifts' and, article 'produced with the aid of human labour', in the earlier decision, defeats the purpose of the Kerala Forest Act. It was of the view that otherwise, the illegally procured forest produce, such as sandalwood, rosewood, or other rare species, when worked upon, resulting in a product predominantly based on the essential forest produce, would escape the rigors of the said Act. Another decision in the case of *Forest Range Officer* v. *P. Mohammed Ali*, was

relied upon by the Apex Court for this purpose. [*Bharath Booshan Aggarwal* v. *State of Kerala* – Judgement dated 6 October 2021 in Criminal Appeal No. 834 of 2009, Supreme Court]

Refund of Education Cesses under area-based exemption notifications – Supreme Court refers application for modification of SRD Nutrients decision to 3-Judge Bench: A two-Judge Bench of the Supreme Court has referred a miscellaneous application for modification of the decision of the Court in the case of *SRD Nutrients* [Judgement dated 10 November 2017], to the Bench of three Judges. The earlier decision of the Court had allowed the benefit of area-based exemption notification for refund of education cesses also. The Revenue department in this modification application pleaded that though written submissions were filed by it by placing reliance on the earlier judgment in the case of *Modi Rubber Ltd.*, the same were not considered while disposing of the appeals. Reliance was also placed on subsequent decision in the case of *Unicorn Industries*. Observing that the decision in *Unicorn Industries* was rendered by three-Judge Bench of the Court, relying on earlier judgment of the Court in the case of *Modi Rubber Ltd*. which was also by a three-Judge Bench, the Court ruled that the present application was required to be considered by a three-Judge Bench. [*SRD Nutrients Private Limited* v. *Commissioner* – Order dated 27 September 2021 in Civil Appeal Nos. 2781-2790 of 2010, Supreme Court]

Refund – Limitation – Date of re-submission cannot be considered as date of filing: In a case where the assessee had re-submitted the refund claims after the prescribed period, the CESTAT Chennai has rejected the department's plea of claims being time barred. The assessee had earlier filed its original refund claims within the prescribed time. The claims were however returned through a deficiency memo regarding non-furnishing of certain necessary documents. Allowing the assessee's appeal, the Tribunal noted that there was no decision on merits and that there was no application of mind or a speaking order rejecting the claim. It also noted that the department had, in the Deficiency Memo, not referred to Excise Manual of Supplementary Instructions or prescribed any time-limit within which the assessee had to re-submit the refund claim. It noted that though the appellant took longer time for re-submission, the refund claims were filed within reasonable time. [*Cognizant Technology Solutions India Pvt. Ltd.* v. *Commissioner* – 2021 VIL 533 CESTAT CHE ST]

Amount due under Orissa Entry Tax Act is not first charge on refund due under Central Sales Tax Act: The Orissa High Court has held that the amount due under Orissa Entry Tax Act does not constitute a 'first charge' on the refund of amount due under the Central Sales Tax Act. Revenue department's plea on justification of adjustment, that the same authority was exercising power under both the Acts, was rejected by the Court. The High Court observed that the functions performed as an Assessing Officer under the CST Act are distinguishable from the functions performed under the OET Act, even though by the same person. Further noting absence of any express provision under the CST Act or corresponding provisions under the OET Act, the Court also observed that the proceeding cannot be treated as garnishee proceedings. The Office Order directing for adjustment was set aside after the Court also noticed that the adjustment was sought to be done unilaterally without any notice whatsoever to the assessee. [*Birla Tyres* v. *Commissioner* – 2021 VIL 685 ORI]

Service provided to holding company outside India is exports: Observing that establishment of assessee in India and establishment of its parent company in Hong Kong were not establishments of a distinct person, the CESTAT Allahabad has held that condition specified in clause (f) of Rule 6A(1) of the Service Tax Rules, 1994 was thus satisfied. Relying on the Supreme Court decision in the case of *Vodafone International Holdings BV* and Gujarat High Court in *Linde Engineering India Pvt. Ltd.*, it reiterated that merely because the parent company outside India was a holding company of the assessee in India, the same did not mean that the appellant and its parent company were same 'person'. Further, allowing refund of tax paid due to mistake, the Tribunal also held that services provided by the assessee to its parent company outside India were not 'intermediary services'. It noted that appellant was neither arranging nor facilitating provision of service between the parent company and the third parties in India but was providing its services directly, on its own account, on principal to principal basis. [*CHF Industries India (P) Ltd.* v. *Commissioner* – 2021 VIL 531 CESTAT ALH ST]

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