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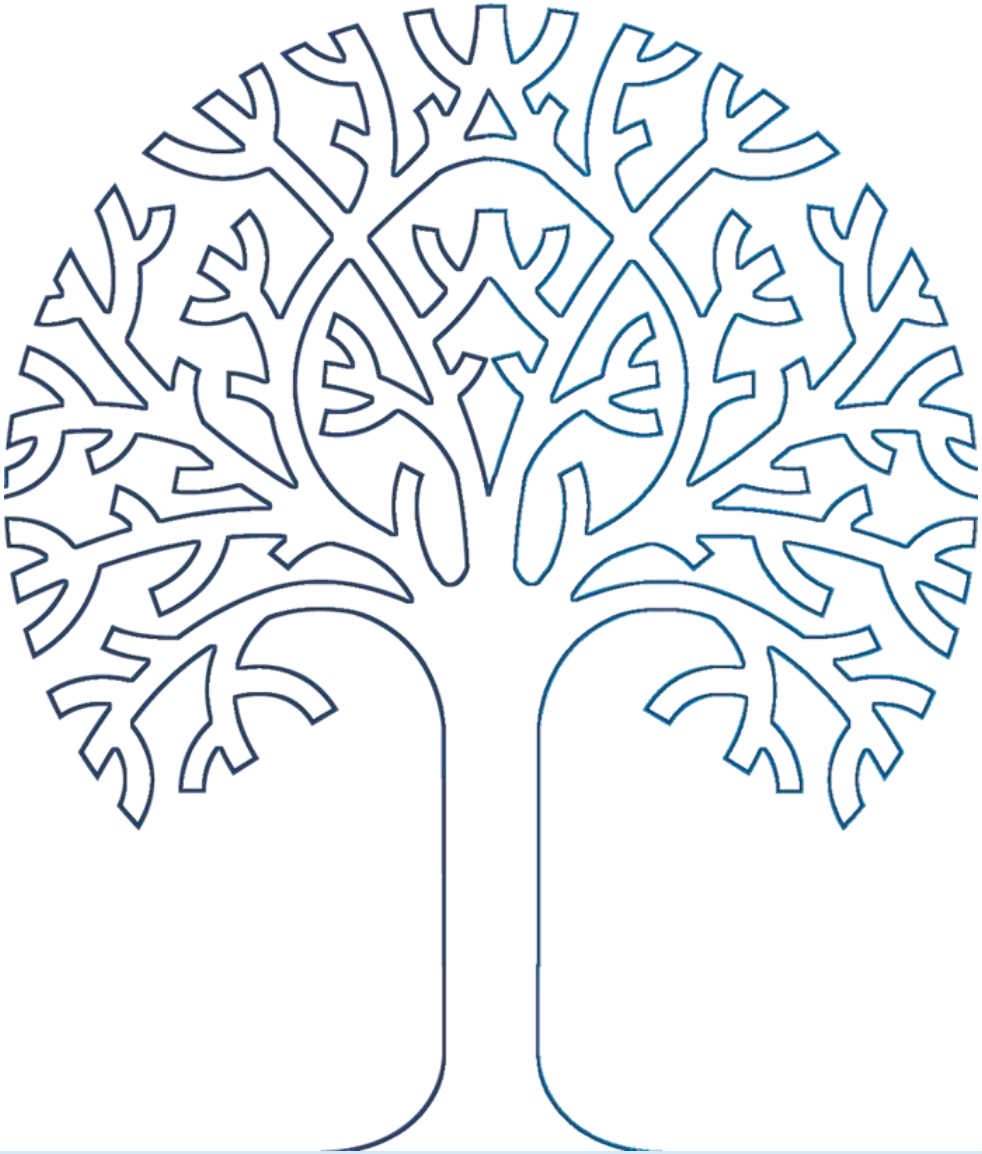
Table of Contents



Article

ISD vs. Cross Charge – The saga continues

By Preeti Goyal and Neha Jain

The article in this issue of Tax Amicus revolves around the recommendation of the 50th Meeting of the GST Council and the clarification brought in by the CBIC Circular No. 199/2023-GST, dated 17 July 2023 with respect to distribution of credit through Input Service Distributor ('ISD'). The article in this regard notes that ISD vs. Cross Charge issue has been an area of ambiguity both for the taxman and the taxpayer since the inception of GST, as different practices have been prevalent in the industry. Noting that the Circular has put at rest many disputes surrounding the issue, the authors highlight some of the open issues and aspects which need to be addressed in view of the proposed amendment in law to make the ISD registration mandatory. They, in this regard, discuss the issues like valuation in case of cross-charge, issues when recipient unit is in SEZ, and the ambiguity regarding the costs which need to be included for the purpose of cross charge of internally generated services. According to them, before making ISD mandatory, it is important that government brings clarification.

ISD vs. Cross Charge – The saga continues

11th July 2023 witnessed the 50th Goods and Services Tax Council meeting under the Goods and Services Tax ('**GST**') regime. The Council, from the very beginning, has considered the concerns raised by the industry from time to time and has come up with the recommendations to provide reliefs to businesses in India.

The theme of the 50th GST Council meeting was no different, in which the Council has addressed several contentious issues being faced by industry and issued necessary clarifications. The subject matter of this article revolves around the recommendation of the GST Council and the clarification brought in by CBIC Circular No. 199/2023-GST, dated 17 July 2023 with respect to distribution of credit through Input Service Distributor ('**ISD**').

ISD vs. Cross Charge has been an area of ambiguity both for taxman and the taxpayer since the inception of GST. While ISD and cross charge are two different concepts with different purposes to cater, they have been confused as substitutes to each other from time and again as both essentially entail credit of common input services and apportionment of the same across branch offices ('**BO**') located in different States[1]. Further, considering the compliance and administrative challenges involved in following the ISD mechanism, many taxpayers have resorted to the route of cross charge from Head Office ('**HO**') to other locations for third party services, instead of distribution of credit *via* the ISD mechanism. Moreover, different practices have been prevalent in the industry for cross charge of internally generated services by HO, especially with respect to the inclusion of the cost of employees working in HO for providing services to other locations under the cross-charge mechanism.

The GST Council was aware of the hardships and confusions of the taxpayer from the very beginning and therefore, this issue was attempted to be dealt in the 35th GST Council Meeting and a detailed circular was drafted to clarify that taxpayers were mandatorily required to follow ISD, and cross charge is required to be followed for support services provided by HO, including employee costs. However, the Circular never saw the light of the day as it was observed by the Council that if it is held that ISD is mandatory, almost 90% of taxpayers might become non-compliant for their past practice as the statute itself never enforced distribution of credit *via* ISD.

However, authorities still raised demands on companies who were following the cross-charge mechanism, for the mandatory distribution of credit *via* ISD. Further, where in case the companies

[1] FAQsONBANKING_INSURANCESTOCKBROKERS.pdf (kar.nic.in) ; *Columbia Asia Hospitals Pvt. Ltd.*, 2019 (20) G.S.T.L. 763 (App. A.A.R. - GST)

had opted for ISD, demands were being raised for cross charge of HO employee salaries to the other locations.

With this milieu, the latest Circular has been issued which *inter alia* clarifies that ISD registration is not mandatory and where an HO procures services from third party which are attributable to both HO and BOs or other BOs, HO has option to distribute credit through ISD or raise invoice for the cross charge. Further, the Circular also clarifies that employee cost need not be included for the purpose of cross charge of internally generated services and where the recipient is entitled to full input tax credit, any value including Nil value can be adopted for cross charge.

Thus, the Circular validates the practice which was adopted by industry in the past and gives a huge relief to the taxpayers who were facing many enquiries by the DGGI authorities.

At skim view, one may state that this Circular has put at rest all the disputes surrounding this issue, however, the authors wish to highlight some of the open issues and aspects which need to be addressed in view of the proposed amendment in law to make the ISD registration mandatory.

- The authors emphasize that though both the concepts appear to lead to similar consequences, there is a fundamental difference in both the concepts, and both serve different purposes. While on one hand, ISD mechanism is required for distribution of credit pertaining to services received by other locations, wherein the invoices are raised on HO. On the other hand, the cross charge is to be used for the charging for the cost of support services provided by HO to other locations while consuming various goods & services for providing such support services.
- It is to be further noted that while Central Goods and Services Tax Act, 2017 under Section 20 read with Rule 39 of the Central Goods and Services Tax Rules, 2017 provides for mechanism to distribute credit through ISD, the value of cross charge needs to be determined as per Rule 28 or Rule 30 of the CGST Rules i.e., open market value or cost of provision of services along with 10% markup.
- Therefore, for the companies where the recipient is entitled to take full credit, though any value may be taken for cross charge, distribution of credit would be mandatorily required for services covered under scope of ISD. Further, where the recipient is not entitled to take full credit, there would be a requirement to add a 10% margin to the cost of goods & services procured or manufactured, as the case may be, for cross charge, though there is no such requirement in case of distribution of credit through ISD. Therefore, one can easily determine that such different basis for valuation may not be revenue neutral.
- In addition to the above, attention is invited to one peculiar case where distribution of credit *via* ISD or cross charge can lead to different results if the recipient unit is a unit in SEZ, since in case of cross charge for the support services the head office can raise invoice without GST claiming it to be deemed export under LUT. However, no such option is available for distribution of credit *via* ISD.

- Further, at the time of receipt of service itself, the assessee would be required to indicate the ISD/ normal registration to the service provider so that invoices can accordingly be booked in the respective registration for the purpose of ISD distribution or cross charge. This is for the reason that credit on invoices booked in normal registration cannot be transferred to ISD registration, except in case of reverse charge.
- Therefore, to avoid any future disputes with the authorities, it would be crucial for industry to put a right system in place to identify the services on which credit has to be distributed *via* ISD and on which the cost needs to be included for the purpose of cross charge.
- The next issue that the authors intend to raise is that despite the Circular, there is still an ambiguity regarding the costs which need to be included for the purpose of cross charge of internally generated services i.e., support services provided by HO to other locations. There are certain services received by HO, for which credit is restricted under Section 17(5) of the CGST Act such as canteen services, car hire charges, etc. Further, there are some services received by HO, which do not attract GST such as financing services. Since no credit is availed by HO on these services, there may not be any need to include cost of such services as part of cross charge between distinct entities, which as a concept was introduced to avoid any breakage in the credit chain.

Therefore, before making ISD mandatory, it is important that government brings clarification around the manner of valuation of cross charge, to avoid confusion in the mind of the taxpayer. It is high time that the ninth head of Lernaean Hydra is addressed and removed so as to deal with this issue for once and all. At the same time, the taxpayer needs to be vigilant about deciding which credit is to be passed through ISD and which credit is to be passed through cross charge till the ISD becomes mandatory.

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Goods & Services Tax (GST)

Notifications and Circulars

- Online gaming – CGST (Amendment) Bill, 2023 and IGST (Amendment) Bill, 2023 granted assent by the President
- Central Goods and Services Tax Rules, 2017 amended for second time in 2023
- Amendments in CGST Act and IGST Act by Finance Acts, 2021 and 2023 notified

Ratio decidendi

- Cash not forming part of stock-in-trade of business cannot be seized during investigation aimed at detecting GST evasion – SC approves Kerala HC decision – Delhi HC also holds that Section 67 is not to seize assets, which are not subject matter of evasion, for recovering tax
- Registration – Show cause notice to be not merely uploaded on web-portal but also forwarded by email or hand delivered – Bombay High Court
- Cancellation of registration – Delay in filing appeal thereagainst to be condoned – Madras High Court
- Input Tax Credit is not available if seller not paid tax to government – Patna High Court
- ITC reversal when not to be asked from the buyer in case the seller had not paid tax – Calcutta High Court
- Provisional blocking of ITC under CGST Rule 86A – Post-decisional hearing to be granted – Karnataka High Court
- Confiscation of goods of the buyer, in case of doubtful existence of the seller, when not sustainable – Andhra Pradesh
- Retrospective cancellation of registration when not sustainable – Delhi High Court
- Natural justice – Telephonic conversation is no substitute for personal hearing – Delhi High Court
- Loan to a credit card holder – IGST when not chargeable on interest – Calcutta High Court
- Demand – Notice under Section 61(3) is not mandatory for proceeding under Section 74 – Allahabad High Court
- Amount deposited under Section 73(5) to be accepted towards fulfillment of pre-deposit under Section 107(6) – Bombay High Court
- Cancellation of registration by succeeding officer – Succeeding officer to also issue notice – Kerala High Court
- Amount paid during investigation is not paid under self-assessment even if paid in Form DRC-03 – Punjab & Haryana High Court
- Advisory to foreign group company for investment in India does not fall under intermediary services – Delhi High Court
- Credit note is not required to accompany return of goods – Madras High Court
- Training for appearing in an examination is not exempt, even though a course completion certificate provided – Uttar Pradesh Appellate AAR
- Restaurant service – ITC reversal required in respect of sale of alcoholic liquor – West Bengal Appellate AAR

Notifications and Circulars

Online gaming – CGST (Amendment) Bill, 2023 and IGST (Amendment) Bill, 2023 granted assent by the President

The President,on 18 August 2023, granted her assent to the Central Goods and Services Tax (Amendment) Bill, 2023 and the Integrated Goods and Services Tax (Amendment) Bill, 2023 ('Amendment Act(s)'). The provisions, which will be applicable from a date yet to be notified, seek to make amendments in the Central Goods and Services Tax Act, 2017 and Integrated Goods and Services Tax Act, 2017 to implement the recommendations of the GST Council to tax the transactions of casinos, horse racing and online money gaming. The Amendment Act also provides for mandatory registration for the persons supplying the services of online gaming from a place outside India to a person in India so as to tax such services provided by such persons. *Detailed clause-by-clause analysis of the two Amendment Acts is available here.*

Central Goods and Services Tax Rules, 2017 amended for second time in 2023

The Central Goods and Services Tax Rules, 2017 has been amended comprehensively by Notification No. 38/2023-Central Tax dated 4th August 2023. Except certain amendments, the changes have come into force on 4th August 2023. *A detailed analysis of the changes in Rules 9, 10A, 21A, 23, 25, 43, 46(f), 59(6), 64, 67(2), new 88D, 89, 94, 96, 108, 109, new 138F, new 142B, 162 and 163, along with comments from the LKS Indirect Tax practice team is available here.*

Amendments in CGST Act and IGST Act by Finance Acts, 2021 and 2023 notified

By Notification No. 28/2023-Central Tax dated 31st July 2023, Sections 137 to 162 (except sections 149 to 154) of the Finance Act, 2023 have been notified from 1 October, 2023 whereas Sections 149 to Section 154 of the Finance Act, 2023 have been made effective from 1st August 2023, amending the CGST Act, 2017 and IGST Act, 2017. Similarly, amendments made to Section 16 of the IGST Act *vide* Section 123 of the Finance Act, 2021, have been made effective from 1 October 2023. *A detailed analysis of all the changes along with comments from the LKS Indirect Tax practice team is available here.*

Ratio Decidendi

Cash not forming part of stock-in-trade of business cannot be seized during investigation aimed at detecting GST evasion – SC approves Kerala HC decision – Delhi HC also holds that Section 67 is not to seize assets, which are not subject matter of evasion, for recovering tax

The Supreme Court has dismissed the Special Leave Petition filed by the Revenue department against the Kerala High Court decision holding that in an investigation aimed at detecting tax evasion under the provisions of the GST, cash cannot be seized especially when it is the admitted case that the cash did not form part of the stock in trade of the assessee's business. The High Court had observed that the findings recorded by the Intelligence Officer (relying on Section 67(2) of the CGST Act, 2017 which authorises seizure of things), that '*it is suspicious that this much amount of money kept in the house as idle and not deposited at bank*', were wholly irrelevant. According to the High Court, the findings could have only been justified had the officer been an officer attached to the Income Tax department. [*State Tax Officer (IB)* v. *Shabu George* – (2023) 9 Centax 89 (S.C.)]

It may be noted that recently the Delhi High Court has also held that power under Section 67 of the CGST Act cannot be read to extend to enable seizure of assets on the ground that the same were not accounted for. The Court also held that provision of Section 67 is also not to seize assets for recovering tax. According to the Court, the word 'things' cannot be read expansively to include any and everything notwithstanding that the same may not yield and / or provide any material useful or relevant to any proceedings under the Act. It was thus of the view that only those goods, which are subject matter of or are suspected to be subject matter of evasion of tax, are liable to be seized. The Department was directed by the Court to release the silver bars and Indian currency, which were seized from the residential premises during search only on the ground that it was 'unaccounted wealth'. [*Deepak Khandelwal Proprietor M/s Shri Shyam Metal* v. *Commissioner* – (2023) 9 Centax 244 (Del.)]

Registration – Show cause notice to be not merely uploaded on web-portal but also forwarded by email or hand delivered

The Bombay High Court has observed that whenever an action is intended to be taken by the Department in respect of registration of the dealers, it is expected that the show cause notice in that regard is not merely uploaded on the web-portal but also a copy of the same be forwarded to the dealers by e-mail and/or by hand delivery, so that the same are effectively replied. The Department had in this case issued a show cause notice to the assessee on 1st August 2022 peculiarly calling upon them to remain present on 2nd August 2022. Such show cause notice was merely uploaded on the web-portal. Further, despite the Department being put to notice of the filing of the present petition, the Department

proceeded to pass an order cancelling the assessee's registration. [*Mayel Steels Pvt. Ltd.* v. *Union of India* - (2023) 9 Centax 25 (Bom.)]

Cancellation of registration – Delay in filing appeal thereagainst to be condoned

Relying upon decision of the Court in the case of *Suguna Cutpiece Centre* v. *Appellate Joint Commissioner of GST*, the Madras High Court has allowed a writ petition at the stage of admission and consequently condoned the delay in filing the appeal against cancellation of GST registration of the assessee. The assessee-petitioner had filed appeal against the cancellation of registration, which was rejected by the Appellate Commissioner being filed beyond the condonable period of 30 days. The Court in the relied upon case had concluded that no useful purpose would be served by keeping the assessee outside the purview of the GST regime without reviving its GST registration, as the assesee will continue to carry on business, and by not revoking the cancellation of the GST registration, the Government will lose the revenue. [*Jaipur Textiles* v. *Appellate Authority* – (2023) 9 Centax 141 (Mad.)]

Input Tax Credit is not available if seller not paid tax to government

The Patna High Court has held that production of invoices, account details and the documents evidencing transportation of goods, will not absolve the assessee from the rigor provided under Section 16(2)(c) of the CGST Act/BGST Act, which requires the credit of tax, collected from the purchasing dealer being available if the supplier has actually paid the tax to the Government. According to the Court, the conditions for availment of credit have to be scrupulously followed, failing which there can be no benefit conferred on the assessee. The Court observed that the benefit is one conferred by the statute and if the conditions prescribed in the statute are not complied; no benefit flows to the claimant. Assessee's plea of double taxation was also rejected by the Court. It may be noted that dismissing the assessee's writ, the Court also observed that the Government could use its machinery to recover the amounts from the selling dealer and if such amounts are recovered at a later point of time, the purchasing dealer who paid the tax to its supplier could possibly seek for refund. [*Aastha Enterprises* v. *State of Bihar* – 2023 VIL 546 PAT]

ITC reversal when not to be asked from the buyer in case the seller had not paid tax

The Calcutta High Court has held that the act of the Department to ask the buyer to reverse the credit (ITC) even though they had the bank statement to substantiate the payment of consideration for goods/services received and the tax invoices, was arbitrary in nature, in the case where the supplier had not paid the taxes. The Court in this regard observed that before directing the assessee to reverse the input tax credit and remit the same to the government, the Department is required to take action against the selling dealer. It hence held that unless and until the Department is able to bring out the exceptional case where there has been collusion between the assessee (buyer) and the seller or where the seller is missing or has closed down its business or does not have any assets, etc., straight away directing the buyer to reverse the credit was not justified. The Delhi High Court's decision in the case of *Arise India Limited and Ors.* v. *Commissioner of Trade and Taxes*, relating to Delhi VAT, was relied

upon by the Court here while also taking note of the Press Release dated 18th October 2018. [*Suncraft Energy Private Limited* v. *Assistant Commissioner* – (2023) 9 Centax 48 (Cal.)]

Provisional blocking of ITC under CGST Rule 86A – Post-decisional hearing to be granted

The Karnataka High Court, while considering the scope, applicability and the manner in which power under Rule 86A of the Central Goods and Services Tax Rules, 2017 can be exercised, has reiterated that while it may not be feasible for the authority to have a pre-decisional hearing, it would be reasonable for it to grant a post-decisional hearing to comply with the principles of natural justice. The Court in this regard was of the view that prior to any steps being taken for action under Sections 73 and 74 of the CGST Act, 2017, which is the actual recovery of ITC, post-decisional hearing is required. The Court also directed that during such post-decisional hearing, the assessee shall be permitted to file their objections along with the supporting material. Bombay High Court's decision in the case of *Dee Vee Projects Ltd.* was relied upon. [*K-9-Enterprises* v. *State of Karnataka* – 2023 VIL 484 KAR]

Confiscation of goods of the buyer, in case of doubtful existence of the seller, when not sustainable

The Andhra Pradesh High Court has held that Department cannot confiscate the goods of a purchaser/assessee who has, with due responsibility, verified the GST registration details of the seller through the Department's web portal and purchased goods from a seller in exchange of a consideration, in the case where the supplier is not present at their registered address or carry out their business from such premises. According to the Court, the Department may initiate confiscation proceedings against the seller under Section 130 of the CGST Act, 2017 in view of his absence in the given address, however, it cannot confiscate the goods of the buyer merely on the ground that the buyer happens to purchase goods from the said seller. The Court noted that the purchaser cannot be expected to comment on the authenticity of the business of seller except to the extent that they shall furnish the authentic proof of payment and received goods from such seller. It was also held that the Department cannot rope in the purchaser into any proceedings initiated against the seller without initiating independent proceedings against them under Section 129 of the CGST Act. [*Arhaan Ferrous and Non-Ferrous Solutions Pvt. Ltd.* v. *Deputy Assistant Commissioner* – (2023) 9 Centax 171 (A.P.)]

Retrospective cancellation of registration when not sustainable

In a case where the reasons for proposing cancellation of GST registration of the assessee were stated as non-filing of returns, the Delhi High Court has held that, absent any other reason, the retrospective cancellation cannot extend to include the period for which returns were filed by the assessee. The Court in this regard noted that although in terms of Section 29 of the Central Goods and Services Tax Act, 2017, the concerned authority has the discretion to cancel the registration from a retrospective date, however, the said power cannot be exercised arbitrarily.

Observing that it was the assessees case that he had ceased carrying on his business from June, 2019, the Court stated that in view of the said stand, the assessee-petitioner cannot be asked to file returns for the period after he had closed down his business. [*Ashish Garg Proprietor Shri Radhey Traders* v. *Assistant Commissioner* – 2023 VIL 476 DEL]

Natural justice – Telephonic conversation is no substitute for personal hearing

The Delhi High Court has rejected the contention of the Department that the visit of the representatives of the assessee in the office of the Departmental Officer and the telephonic conversation the officer had with the proprietor of the assessee could be termed as equivalent to personal hearing. The Court noted that it was not the Department's case that the hearing was conducted in a virtual mode and therefore the personal hearing was granted over telephone. The High Court was also of the opinion that a telephonic conversation for a brief period cannot be a substitute for a personal hearing or for that matter be construed as a hearing at all. In this regard, the Court also noted that when the provisions of Sections 75(4) and 75(5) of the CGST Act, 2017 specifically require that an opportunity of hearing 'shall' be granted, the same cannot be denied or be substituted by telephonic conversation. Further, noting that a personal hearing is to enable the noticee to address its arguments after the reply is filed, the Court observed that in the present case the telephonic conversation was before the filing of reply. [*Jupiter Exports* v. *Commissioner* – 2023 VIL 467 DEL]

Loan to a credit card holder – IGST when not chargeable on interest

In a case where a loan was granted to the appellant *inter alia* stating that it was only available to holders of specific Bank's credit cards issued in India, the Calcutta High Court has directed the Revenue department to refund the IGST paid (on interest amount) by the Bank, and the Bank to refund the amount to the person concerned. Observing that the loan amount was not generated by charging the appellant's card, the Court held that monthly statement issued in relation to use of the card, where the loan amount was shown and the equated monthly instalment payable was indicated, was only a statement of account. According to the Court, the loan transaction had to be taken as an altogether separate transaction and had no relationship with the relationship between the appellant and the bank arising out of issue, holding or operation of the credit card. It may be noted that by a separate order, the Hon'ble Justice Biswaroop Chowdhary observed that when Goods and Services Tax is exempted in case of loan transaction, it is applicable to all transactions coming under the category of loan, and any exception made with regard to category of loan, namely credit card holder or other borrowers, will go against the letter and spirit for which loan schemes are made, being also violative of Articles 14 and 21 of the Constitution. [*Ramesh Kumar Patodia* v. *City Bank N.A.* – (2023) 8 Centax 262 (Cal.)]

Demand – Notice under Section 61(3) is not mandatory for proceeding under Section 74

The Allahabad High Court has held that the scrutiny proceedings of return under Section 61 as well as proceeding under Section 74 of the Central Goods and Services Tax Act, 2017 are two separate and distinct exigencies. The Court was hence of the view that issuance of notice under Section 61(3) cannot be construed as a condition precedent for initiation of action under Section 74. The High Court hence rejected the argument that unless deficiency in return is pointed out to the assessee, and an opportunity is given to rectify such deficiency, the Department cannot proceed under Section 74. Madras High Court decision in the case of *Vadivel Pyrotech Private Ltd*. v. *Assistant Commissioner* was distinguished. [*Nagarjuna Agro Chemicals Pvt. Ltd.* v. *State of U.P.* - (2023) 9 Centax 13 (All.)]

Amount deposited under Section 73(5) to be accepted towards fulfillment of pre-deposit under Section 107(6)

The Bombay High Court has held that the voluntary deposit made under protest by the assessee under the provisions of Section 73(5) of the CGST Act, 2017 cannot be excluded from consideration for the purpose of compliance of pre-deposit as mandated by Section 107(6). The High Court in this regard was of the opinion that the principle as laid down in Supreme Court in *VVF (India) Ltd*. [2021 SCC OnLine SC 1202] will be applicable considering that the provisions of the CGST Act on pre-deposit are not too different from the provisions of the Maharashtra VAT Act, which fell for consideration of the Supreme Court then. The assessee was hence permitted to file an appeal under Section 107 either by electronic mode or by manual filing. [*Vinod Metal* v. *State of Maharashtra* – 2023 VIL 515 BOM]

Cancellation of registration by succeeding officer – Succeeding officer to also issue notice

In a case where the show cause notice was issued by then assessing authority and the order cancelling the registration was passed by the succeeding officer, the Kerala High Court has held that the proper officer has to hear the person concerned before cancelling the registration, which would mean that the assessee should be put on notice by the succeeding officer also. The Court in this regard observed that the requirement that the succeeding Officer should put the assessee on notice has been emphasized by the usage of the words 'Proper Officer' in the proviso to Section 29(2) of the CGST Act, 2017. [*Ajit Associates Architectural Consultants Pvt. Ltd.* v. *Assistant Commissioner* – (2023) 9 Centax 155 (Ker.)]

Amount paid during investigation is not paid under self-assessment even if paid in Form DRC-03

Observing that the assessee shortly after depositing the amount during the course of investigation had approached the Revenue for refund, the Punjab & Haryana High Court has held that ascertainment contemplated under Section 74(5) of the CGST Act,

amounting to an unconditional determination and 'self-assessment', is not attracted. According to the Court, the said deposit could not be stated to be a voluntary deposit by any stretch of imagination, irrespective of the fact that deposits were made in the Form of GST DRC-03. The Court in this regard also noted that the present petition was pending since the year 2021, and that no show cause notice was issued against the assessee in accordance with Section 74(1). Directing refund of the amount so collected during search, the Court also directed for payment of 6% interest from the date of deposit. [*Mahavira Dyes & Chemicals* v. *Principal Commissioner* – 2023 VIL 521 P&H]

Advisory to foreign group company for investment in India does not fall under intermediary services

The Delhi High Court has held that merely because the group company (service recipient) may have on the basis of advisory services given by the assessee, made the investments in entities in India, it cannot be construed to mean that the assessee had rendered the advisory services as an 'Intermediary'. The Court in this regard noted that the assessee-petitioner was the service provider rendering advisory services directly to the group company and was not acting as a facilitator for providing such services. The High Court also, while examining as whether the place of supply of services rendered by the assessee was in India by virtue of sub-section (3)(b) and sub-section (4) of Section 13 of the IGST Act, 2017, held that both the sub-sections as inapplicable in the circumstances of the case. The Adjudicating Authority was directed to process assessee's refund claim. [*Cube Highways and Transportation Assets Advisor Private Limited* v. *Assistant Commissioner* – 2023 VIL 547 DEL]

Credit note is not required to accompany return of goods

The Madras High Court has held that the goods which are being returned need not necessarily accompany a credit note. The Court in this regard observed that credit note under Section 34 of the Central Goods and Services Tax Act, 2017 is not required to be issued at the stage, when the goods are being returned without even it having been received by the recipient. The goods, in the present case, were detained by the Roving Squad after it noticed that no credit note was issued for return of the goods that were being re-transported back to the assessee's factory. [*Luminous Power Technologies Private Limited* v. *State Tax Officer* – (2023) 9 Centax 342 (Mad.)]

Training for appearing in an examination is not exempt, even though a course completion certificate provided

The Uttar Pradesh Appellate AAR has held that supply of education and training services to commercial pilots in accordance with the training curriculum approved by the DGCA for obtaining the extension of Aircraft Type Rating (ATRs) on their existing license, would not be covered under Sl. No. 66(a) of Notification No. 12/2017-Central Tax (Rate) and thereby not

exempt from levy of GST. The AAAR in this regard noted that the assessee imparts training to the trainees and provides ATR extension services, on completion of which a course completion certificate is issued, which is a pre-requisite document for preferring application before the DGCA, who conducts the examination through an approved examiner and on passing of the said exam, the DGCA records the said ATR extension in the Commercial Pilot's Licence of the pilots concerned. The AAAR was hence of the view that thus, the training conducted by the assessee does not result into any qualification and it is not recognized by the law. [In RE: *CAE Simulation Training Private Limited* – 2023 (8) TMI 969-Appellate AAR, Uttar Pradesh]

Restaurant service – ITC reversal required in respect of sale of alcoholic liquor

The West Bengal Appellate AAR has ruled that the sale of alcoholic liquor for human consumption is a non-taxable supply in terms of Section 2(78) of the CGST Act and subsequently is an exempt supply in terms of Section 2(47) of the CGST Act. According to the AAAR, the assessee-appellant, providing restaurant service from their lounge bar including serving alcohol beverages for human consumption to its customers, is thus required to reverse Input Tax Credit in terms of Section 17(2) read with Rule 42 of the CGST Rules. [In RE: *Karnani FNB Specialities LLP* – 2023 (8) TMI 572-Appellate AAR, West Bengal]

Customs

Notifications and Circulars

- Onions – Export duty @ 40% imposed
- Rice, parboiled – Export duty @ 20% imposed till 15 October 2023
- De-oiled rice bran under ITC (HS) Code 2306 prohibited for export
- Laptops, tablets, all-in-one personal computers, and ultra small form factor computers and servers – Import clearances to require licence for restricted imports from 1 November 2023
- Rice – Export policy of non-basmati white rice clarified

Ratio decidendi

- No interest and penalty against demand of Additional Customs duty and Special Additional Duty – Supreme Court affirms Bombay High Court decision
- Time period for adjudication of SCN under Section 28(9) – Words 'where it is possible to do so' do not allow Department to defer adjudication for indeterminate period – Delhi High Court
- Exemption benefit can be claimed post amendment and re-assessment of Bill of Entry – CESTAT Ahmedabad
- Vehicle cannot be confiscated for possibility of future use as means of transport of smuggled goods – Kerala High Court
- Power to search premises under Customs Section 105 does not mean power to seal it – Bombay High Court
- Snow goggles are not classifiable as sunglasses – No confiscation for classifying goods under a Heading different from what opined by Department – CESTAT New Delhi
- Lawn mower is classifiable under Heading 8433 and not under Heading 8467 – CESTAT Chennai
- Roasted areca nut is classifiable under Customs Heading 2008 and not Heading 0802 – Madras High Court
- Different thresholds of Bank Guarantee cannot be fixed when the issues/facts are identical – CESTAT Ahmedabad

Notifications and Circulars

Onions – Export duty @ 40% imposed

Export of onions is liable to export duty of 40% with effect from 19th August 2023. The Central Government has for this purpose made amendments in the Second Schedule to the Customs Tariff Act, 1975 to bring in an entry for onions classifiable under sub-heading 0703 10, and the export duty of 50%. However, simultaneously, another notification has been issued to bring down the effective rate of customs duty to 40%. This exemption of 10% is however available only till 31st December 2023. Notifications Nos. 47/2023-Cus. and 48/2023-Cus., both dated 19th August 2023 have been issued for the purpose.

Rice, parboiled – Export duty @ 20% imposed till 15 October 2023

The Central Government has amended the Second Schedule to the Customs Tariff Act, 1975 to also bring an entry for rice, parboiled classifiable under Tariff Item 1006 30 10, with the customs duty of 20%. Further, as per another notification, Notification No. 55/2022-Cus., dated 31 October 2022 has been amended to notify the effective rate of 'Nil' with effect from 16 October 2023. It may be noted that the rate of duty is also 'nil' if goods meant for export have entered the customs station for the purpose of exportation before 25th August 2023, and are backed by irrevocable Letters of Credit, where the said letters of credit have been opened before 25th August 2023. Notifications Nos. 49/2023-Cus. And 50/2023-Cus., both dated 25th August 2023 have been issued for this purpose.

De-oiled rice bran under ITC (HS) Code 2306 prohibited for export

The export policy of "*Oil-cake and other solid residues, whether or not ground or in the form of pellets, resulting from the extraction of vegetable or microbial fats or oils, other than those of heading 2304 or 2305*" falling under CTH 2306 is free. However, export of De-Oiled Rice Bran under falling under ITC(HS) 2306 and under any other HS code is now 'Prohibited' up to 30th November 2023. Notification No. 21/2023 dated 28th July 2023 has been issued for the purpose.

Laptops, tablets, all-in-one personal computers, and ultra small form factor computers and servers – Import clearances to require licence for restricted imports from 1 November 2023

Vide Notification No. 23/2023 dated 3rd August 2023, the import policy was amended from 'free' to 'restricted' for laptops, tablets, all-in-one personal computers, and ultra small form factor

computers and servers falling under ITC(HS) Code 8471 with immediate effect. However, *vide* Notification No. 26/2023 dated 4 August 2023, the earlier notification has been amended such that the import consignments can be cleared till 31st October 2023 without a license for restricted imports. For clearance of import consignments with effect from 1st November 2023, a valid license for restricted imports will be required.

Rice – Export policy of non-basmati white rice clarified

The DGFT has clarified that conditions (i), (ii) & (iii) of Para- 2 of Notification No. 20/2023 dated 20th July 2023 regarding change in export policy of "*Non-Basmati white Rice (Semi-milled or wholly milled rice, whether or not polished or glazed: Other*" under ITC(HS) 1006 30 90 from 'free' to 'restricted', are independent of each other. Accordingly, export is allowed in case of completion of any one of the conditions of Para-2 of Notification dated 20th July 2023, by the exporter. Trade Notice No. 23/2023 dated 18th August 2023 has been issued for the purpose.

Ratio Decidendi

No interest and penalty against demand of Additional Customs duty and Special Additional Duty – SC affirms Bombay High Court decision

The Supreme Court has dismissed the Special Leave Petition filed by the Revenue department against the Bombay High Court decision which had held that in absence of specific provisions for levy of interest or penalty, same cannot be charged on the portion of demand pertaining to surcharge under Section 90 of the Finance Act, 2000, additional duty being Countervailing duty (CVD) and special additional duty (SAD). The High Court had in its decision observed that the charging section for levy of additional duty is not Section 12 of the Customs Act, 1962, but Section 3 of the Customs Tariff Act, 1975, and that there is no substantive provision in Section 3 or Section 3A of the Customs Tariff Act, 1975 or Section 90 of the Finance Act, 2000 requiring payment of penalty or interest. The High Court was also of the view that

deriving of financial benefits cannot be a ground to order payment of interest in absence of any statutory provisions for payment of interest. The dispute involved SCNs issued in 2004-06. [*Union of India* v. *Mahindra & Mahindra Ltd.* – 2023 VIL 72 SC CU]

Time period for adjudication of SCN under Section 28(9) – Words 'where it is possible to do so' do not allow Department to defer adjudication for indeterminate period

In a case where the show cause notice was issued prior to the coming into effect of Finance Act, 2018, where the unamended Section 28(9) of the Customs Act, 1962 had an inbuilt flexibility by use of words 'where it is possible to do so' in respect of time period for determination of amount of duty and interest by the proper officer, the Delhi High Court has held that the said phrase would not mean that the time period can be endless without any plausible justification. According to the Court, the mention of the said phrase/words does not enable the Department to defer the determination of the notices for an indeterminate period of time when the Legislature in its wisdom has provided a specific period for the authority to discharge its functions. Allowing the writ petition, the Court observed that in the absence of any ground that it was not possible for the officer to determine the amount of duty within the prescribed period, the impugned SCN lapsed and cannot be adjudicated. It may be noted that assessee's contention of retrospective applicability of amendment made in 2018, was however rejected. [*Swatch Group India Pvt. Ltd.* v. *Union of India* – 2023 (8) TMI 864-DELHI HIGH COURT]

Exemption benefit can be claimed post amendment and re-assessment of Bill of Entry

The CESTAT Ahmedabad has held that the bill of entry can be amended under Section 149 of the Customs Act, 1962 and thereafter the same can be re-assessed under Section 17, to claim the benefit of notification not claimed earlier. According to the Tribunal, the expression 'or otherwise' under Section 17(4) is comprehensive to include judicial orders directing re-assessment of self-assessment, when self-assessment was not proper. It was also observed that benefit of a Notification may be claimed, though not claimed initially but was available otherwise, even in self-assessment system, and Customs department was required to extend benefit of the notification. [*Commissioner* v. *Nandan Exim Ltd.* – 2023 (8) TMI 621-CESTAT AHMEDABAD]

Vehicle cannot be confiscated for possibility of future use as means of transport of smuggled goods

The Kerala High Court has held that the words 'used as a means of transport' in Section 115(2) of the Customs Act, 1962 can only be interpreted as 'already used as a means of transport' or as 'presently being used as a means of transport'. According to the Court, the possibility for future use of the vehicle as a means of transport of smuggled goods cannot be brought within the purview of the power of confiscation. The High Court noted that

the discretion to seize or not to seize a vehicle for apprehended future use as a means of transport of smuggled goods will confer an unregulated discretion devoid of any clarity for its exercise, and that such conferment will even fall foul of Article 14 of the Constitution of India. [*Safir P* v. *Commissioner* – 2023 TIOL 878 HC KERALA CUS]

Power to search premises under Customs Section 105 does not mean power to seal it

The Bombay High Court has opined that the power to search the premises under Section 105 of the Customs Act, 1962 cannot mean a power to seal the premises. Observing that a power to seal the premises is a drastic power, the Court opined that such powers cannot be exercised unless the same are expressly conferred by law. The Court also noted that the Department had not supported its contention that such power is vested with the Customs Officers, citing any authority on such proposition. The High Court also observed that sealing of business premises would adversely affect the right to carry on business which is a fundamental right as guaranteed under Section 19(1)(g) of the Constitution. The Court in this regard also noted that there would be a violation of Article 300A of the Constitution as sealing will directly affect the legal rights of the person to use and occupy the premises. [*Narayan Power Solutions* v. *Union of India* – Judgement dated 25 July 2023 in Writ Petition (L.) No. 19691 of 2023, Bombay High Court]

Snow goggles are not classifiable as sunglasses – No confiscation for classifying goods under a Heading different from what opined by Department

The CESTAT New Delhi has rejected the finding in the order impugned before it that Snow Goggles are also sunglasses. The Tribunal in this regard observed that goods are meant for protection of eyes in snowy region and not protection of eyes from sunlight which is the purpose of sunglasses as is common knowledge. It also noted that the user instruction which accompanied the goods (snow goggles) clearly showed that they were designed to provide protection against snow, sun, wind and cold conditions, and were not recommended for use while driving, which also distinguished them from the sunglasses. Further, observing that goods should be classified and assessed to duty as they are imported and not based on what they will become if some changes are made, the Tribunal held that the Department erred in classifying the imported goods on the basis of what they can become if some changes are made. The goggles were held to be classifiable under the residual Tariff Item 9004 90 90 of the Customs Tariff Act, 1975 as 'others'.

It may be noted that the Tribunal also held that the imported goods do not become liable to confiscation under Section 111(m) of the Customs Act, 1962 on the ground that the importer classified the goods under a Heading different from the opinion of the officer. [*Aureole Inspecs India Pvt. Ltd.* v. *Principal Commissioner* – 2023 VIL 759 CESTAT DEL CU]

Lawn mower is classifiable under Heading 8433 and not under Heading 8467

The CESTAT Chennai has held that lawn mowers are correctly classifiable under Heading 8433 covering harvesting or thrashing machinery, including grass or hay mowers, and not under Heading 8467 of the Customs Tariff Act, 1975 which refers to tools for working in the hand, pneumatic, hydraulic or with self-contained electric or non-electric motor. The Tribunal in this regard observed that Heading 8467 *prima facie* gives an indication that the tools referred to in the Heading are invariably portable, designed to be held in hand during use, which can be lifted and moved by the user during work. [*Honda Siel Power Products Ltd.* v. *Commissioner* – 2023 (8) TMI 623 – CESTAT Chennai]

Roasted areca nut is classifiable under Customs Heading 2008 and not Heading 0802

The Madras High Court has rejected the submission of the assessee that roasted areca nut is in common parlance treated as areca nut, i.e., by the process of roasting a different commercial commodity does not emerge, and thus the roasted areca nut would fall under Heading 0802 of the Customs Tariff Act, 1975. Affirming the finding of Authority of Advance Rulings and dismissing the Departments appeal, the Court observed that Heading 2008 is a specific entry insofar as it covers roasted nuts and would thus prevail over Heading 0802, in view of the settled rule that specific entry would prevail over general entry. The High Court in this regard was of the view that it really does not matter whether roasting of betel nut results in emergence of a new commodity for even if it does not, it is still open to the legislature to classify the product differently. [*Commissioner* v. *Shahnaz Commodities International P. Ltd.* – 2023 VIL 508 MAD CU]

Different thresholds of Bank Guarantee cannot be fixed when the issues/facts are identical

The CESTAT Ahmedabad has held that the amount of Bank Guarantee furnished for provisional release of goods must be reduced in consonance with the Tribunal's earlier order in the assessee's own case. Though the CESTAT had passed an order in the assessee's own case, which was accepted by the Revenue, different yard sticks were applied in the present case, particularly when all the facts/circumstances of both the cases were absolutely identical. [*K.L. International* v. *Commissioner* – 2023 (7) TMI 1133- CESTAT AHMEDABAD]

Central Excise, Service Tax and VAT

Ratio decidendi

- Intravenous fluids – Exemption – Composition of product important – Addition of chemicals which do not alter character of product is immaterial – Supreme Court
- Flue gas generated during manufacture of metallurgical coke is not a manufactured product – CESTAT Kolkata
- Parking – Building used for parking is excluded from Renting of Immovable Property service – CESTAT Chennai
- Mere raising of 'debit notes' on sister concern does not make assessee liable to service tax under Management Consultancy services – CESTAT Kolkata
- Cenvat credit available on service fees paid for development of Part Manual and Maintenance, Repair and Construction Manual – CESTAT Allahabad
- Savoury Oats/Silk Oats are classifiable under TI 1104 12 00 and not under TI 1904 20 00 – No change in essential character of oats even after mixing with dehydrated vegetables – CESTAT Chennai

Ratio decidendi

Intravenous fluids – Exemption – Composition of product important – Addition of chemicals which do not alter character of product is immaterial

The Supreme Court has dismissed appeal filed against the CESTAT decision which had allowed benefit of Notification Nos. 6/2000-C.E. and 3/2001-C.E. to intravenous fluids containing Boric Acid and Chlorocresol. The Revenue department had pleaded that in view of the addition of the aforesaid chemicals, it would not be used for fluid replenishment *per se* but was in the nature of a medicinal product, which was administered to animals such as cattle through the medium of intravenous fluids and, therefore, the CESTAT was not right in referring to letter issued by the Deputy Drug Controller for the purpose of grant of exemption. Upholding the CESTAT decision, the Apex Court noted that composition of the product predominantly consisted of Glucose (sugar) and electrolyte (minerals) which are essentially for the purpose of replenishment, not necessarily only used at the time of treatment for any particular disease but also as a preventive measure. The Court in this regard held that the simple test was to note the composition of the product in question and not as to whether it was being used for treatment of any particular disease. The Supreme Court was also of the view that mere addition of Boric Acid and Chlorocresol, that too in minimal proportion, would not alter the character of the product. [*Commissioner* v. *Denis Chem Lab Ltd.* – (2023) 9 Centax 165 (S.C.)]

Flue gas generated during manufacture of metallurgical coke is not a manufactured product

The CESTAT Kolkata has held that flue gas generated during the course of manufacture metallurgical coke, is not a manufactured product and is also not marketable. The Tribunal in this regard noted that the product was not manufactured by the assessee, but it was a waste gas which arose inevitably without beyond the control of the assessee. It also noted that no market enquiry was conducted by the Revenue in this case to hold that the gas in question was marketable. Further, the Tribunal was also of the view that the product cannot be classified as Nitrogen. It was of the view that merely because it is having contents more than 80% v/v, it cannot be said that the said gas is Nitrogen gas by applying Rule 3(b) of the General Rules of Interpretation without any evidence. [*Tata Steel Ltd.* v. *Commissioner* – Final Order No. 76144/2023, dated 12 July 2023, CESTAT Kolkata]

Parking – Building used for parking is excluded from Renting of Immovable Property service

The CESTAT Chennai has held that a building or its part put up on land and which is used for car parking will get the benefit of the exclusion from the levy of service tax under Section 65(105)(zzzz) of the Finance Act, 1994. The order impugned before the Tribunal had held that since the car parking was provided from an immovable property (building) which was not a vacant land, it was liable to tax during 1st November 2011 to 30 June 2012. Allowing assessee's appeal, the Tribunal noted that while clauses (a) and (b) of Explanation 1 to the abovementioned Section mentioned 'vacant land', clause (c) talked only about 'land'. It also noted that the word 'parking' in clause (c) would take the colour of the preceding words and hence for the purpose of Section 65(105)(zzzz), immovable property does not include land used for parking purposes. [*Brookefields Estates Private Limited* v. *Commissioner* – 2023 (8) TMI 540 – CESTAT Chennai]

Mere raising of 'debit notes' on sister concern does not make assessee liable to service tax under Management Consultancy services

The CESTAT Kolkata Bench has held that mere issuance of 'debit notes' does not make assessee-appellant liable for service tax, as there was no evidence to prove that the assessee provided Management and Consultancy services to their sister concern. The Tribunal in this regard also noted that there was no evidence available to dispute the claim of the assessee that the amount received was on account of sharing of costs between the group companies. Service tax liability on reimbursement to common expenses was also rejected by the Tribunal while relying upon the decision in the case of *Sara Services & Engineering Pvt. Ltd.* [*Tega Industries Ltd.* v. *Commissioner* – 2023 VIL 773 CESTAT KOL ST]

Cenvat credit available on service fees paid for development of Part Manual and Maintenance, Repair and Construction Manual

The CESTAT Allahabad has held that service tax paid under reverse charge mechanism by the assessee on the service fees paid by them to their foreign principals for development of Part Manual and Maintenance, repairs and construction Manual is eligible as Cenvat credit. Allowing the assessee's appeal, the Tribunal was of the view that the Part catalogue was essentially the part inventory management, procurement, and supply system of the parts to the dealers and through them, to the ultimate customers. It also noted that maintenance repairs and construction manual was essential to ensure that standard set by the manufacturer is achieved irrespective of the person or the dealer servicing the vehicle. [*Honda Cars India Ltd.* v. *Commissioner* – 2023 VIL 774 CESTAT ALH ST]

Savoury Oats/Silk Oats are classifiable under TI 1104 12 00 and not under TI 1904 20 00 – No change in essential character of oats even after mixing with dehydrated vegetables

The CESTAT Chennai has held that Savoury Oats/ Silk Oats are classifiable under Tariff Item 1104 12 00 of the Central Excise Tariff Act, 1985 as contended by the assessee and not under TI 1904 20 00 as redetermined by the Department. The assessee was involved in process of mixing of imported plain oats and dehydrated vegetables in a mixer, and then packing along with seasoning, with no process of pre-heating or pre-cooking. The Department had contended that by process of mixing of vegetables a new and distinct product emerges and therefore product cannot be classified under TI 1104 200 00. It was also contended by Department that Savoury / Silk Oats was in a pre-cooked condition and was ready for consumption and hence fell under Heading 1904 only. Allowing assessee's appeal, the Tribunal noted that the abovementioned product was not cooked preparation but was to be cooked by the consumer, and that the process undertaken did not change the essential character of the raw material used. [*Ameya Foods* v. *Commissioner* – 2023 VIL 781 CESTAT CHE CE]

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