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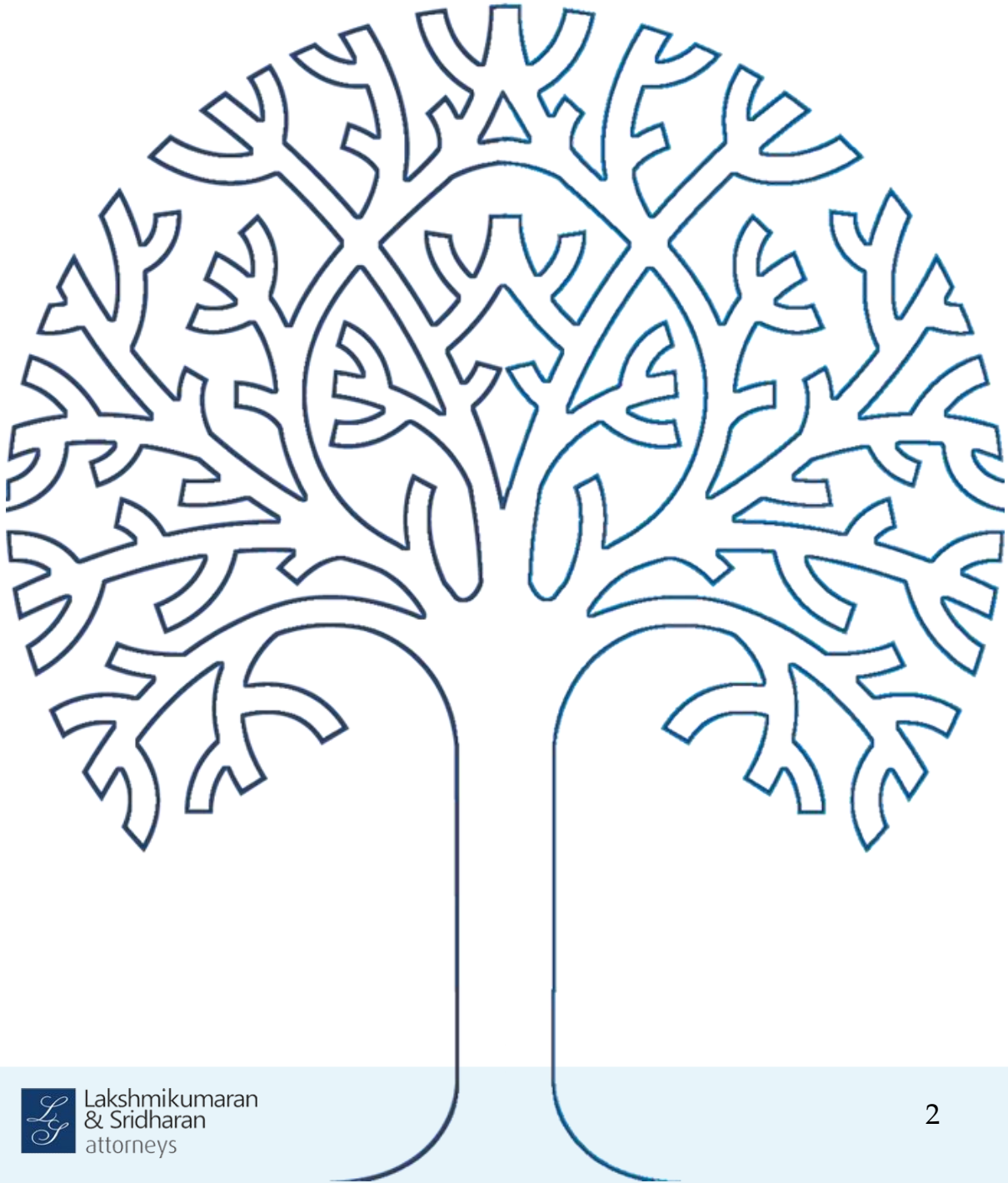
Table of Contents



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Article

Secondment or employment: Court's observation opens new opportunities for tax risk mitigation in 2024

By **Asish Philip Abraham and Mahi Vyas**

The article in this issue of Tax Amicus discusses the observation of the Supreme Court in *Northern Operating Systems* case, recent investigations on the issue, CBIC Instruction, interim orders passed by different High Courts on factual matrix of the cases, legal position under the GST law and the way forward. Elaborating on the test / factors to determine the employee-employer relationship, the article deliberates on application of said tests/factors on the Supreme Court decision, and the factual differentiation of this case. According to the authors, the pending litigation of GST and service tax needs to be examined in light of various aspects as discussed, and that the factual position, evidence and legal arguments are required to be taken at appropriate forum. They also believe that the Tribunals and lower authorities blindly following decision in *NOS* case need to be made aware of distinguishing factors of each case. Further, secondment arrangement in future needs to be examined taking into consideration the factors laid down by the Court of law, and legal jurisprudence in relation to employer-employee relationship, to mitigate the tax risk.

Secondment or employment: Court's observation opens new opportunities for tax risk mitigation in 2024

By Asish Philip Abraham and Mahi Vyas

Every deputation and secondment is not manpower supply and each case is based on its unique factual matrix which is required to be determined based on legal jurisprudence.

While emerging as a global manufacturing and outsourcing hub, India has also attracted a lot of expats for various talent opportunities in recent years. The boom in Global Capability Centres (**GCCs**) or Global In-house Centres (**GICs**) has further widened India's talent pool to sustain multiple functionalities like Audit, Finance, HR, Marketing, Analytics, and other functions. The expats are helping companies in relation to outsourcing functions and also in expanding Indian operations to meet the local demand. The decision of the Supreme Court in *Northern Operating Systems*[1] ('**NOS**') has opened number of issues in respect of the nature of services provided by expats in India.

The tax investigative authorities were quick to act on the observation of the Supreme Court and have initiated pan-India roving inquiries/investigations in relation to the expenditure incurred for the expats without examining the factual matrix unique to each secondment arrangement. Aggrieved by such inquiries/ investigations, various companies made representations before the Central Board of Indirect Taxes and Customs (**CBIC**). The CBIC, considering the representations made by the Indian companies and the improper application of the decision by many field formations, *vide* Instruction No. 5/2023-GST dated 13 December 2023 ('**Instruction**') clarified not to follow cookie-cutter approach in the matters related to secondment. The CBIC clarified that the decision in the *NOS* Case was very fact specific and therefore, tax implications may differ depending upon the specific nature of the contract and employment terms attached to it. The High Courts of various jurisdictions[2] relied upon the Instruction and have granted stay

[1] *CE & ST & Ors.* v. *Northern Operating Systems Pvt. Ltd*., AIR 2022 SC 2450
[2] *Alstom Transport India Limited* v. *State of Karnataka*, 2023 (11) TMI 210; *Metal One Corporation India Pvt. Ltd*. v. *Union of India & Ors*., 2023(11) TMI 1062

order to various organizations in the cases where show cause notices have been issued for alleged evasion of tax pertaining to secondment of employees.

This article discusses the observation of the Supreme Court in *NOS* case, recent investigations on the issue, CBIC Instruction, interim orders passed by different High Courts on factual matrix of the cases, legal position under the GST law and way forward.

GST legal position: Services supplied by an employee to the employer is exempt from GST

Section 7(2) read with Para 1 of Schedule III of the Central Goods and Services Tax Act, 2017 ('**CGST Act**') provides that the services provided by an employee to the employer in the course of or in relation to his employment shall neither be treated as supply of goods nor as a supply of services for the purposes GST levy. Here, question arises as to who shall be considered as an 'employee' and whether the secondees/expats deputed in India from overseas will also be considered as an employee of the host Indian company?

Test / factors to determine the employee-employer relationship

The Hon'ble Supreme Court and various High Courts have repeatedly laid down various tests or factors to determine the relationship of employer-employee or master-servant. The said tests/ factors to be considered are discussed below:

a) ***Right to supervise/ Control Test***: To determine the relationship between master and servant, *prima facie* there shall exist the right in the master to supervise and control the work. The master's right should not only be limited to direct the work to be done but also the manner in which the work should be done. Thus, the master shall be in control of execution of the work.[3]

b) ***Economic reality test***: Whether the employer has economic control over the worker's subsistence, skill and continued employment?

c) Whether the person employed is integrated into the employer's business or is a mere accessory thereof.

[3] *Dharangadhra Chemicals Works Ltd.* v. *State of Saurashtra*, 1957 SCR 158

d) Person employed is on the payroll of host company or not. Who pays the wage or other remuneration to the person employed?

e) Who owns the assets with which the work is to be done? Who ultimately makes the profit or loss?

f) Person who has engaged himself to perform services whether is performing them as a person in business or on his own account.[4]

Further, the Supreme Court in the matter of *Silver Jubilee Tailoring House* v. *Chief Inspector of Shops & Establishments*[5] has held that to determine whether a contract is 'for' service or 'of' service, the Courts can perform a balancing operation weighing up the factors which point in one direction and balancing them against those points that are in opposite direction. Thus, the aforesaid factors can be considered by the Courts and after performing balancing act and weighing all the relevant factors, conclusion can be made depending upon the unique factual matrix of every case.

These factors remain relevant even after *NOS* case because the Supreme Court has specifically mentioned that the court observation is based on specific facts of the case. To understand the rationale behind the taxability of secondment in *NOS* case it is relevant to understand the unique facts of the matter relevant for current discussion.

Application of aforesaid tests/factors on NOS case:

We will now delve into the specific factual matrix under which the transaction was held taxable.

The NOS/assessee was assigned certain specific task by the overseas group company. However, NOS lacked right talented pool to perform the assigned task and to meet the expectations of the overseas group company. Therefore, the overseas group entity deputed its own employees in India with NOS for the task to be performed in turn being delivered to the overseas company. The wages and other remuneration of the deputed employees were paid to them by the overseas entity in foreign currency which then was reimbursed by NOS to the overseas entity against the debit note issued by the overseas entity. The employees were on the pay roll of the overseas company and were providing services in relation to the tasks assigned to NOS which were then ultimately provided to the overseas company.

[4] *Lee Ting Sang* v. *Chung Chi-Keung*, (1990) 2 AC 374

[5] 1974 (1) SCR 747

Now let's apply the test/ factors discussed above to determine who is the employer of the seconded employees in the facts of NOS Case.

On performance of the balance act and weighing all relevant factors, it can be observed that in the *NOS* case, though the assessee had operational and functional control but all other relevant tests/ factors such as economy test, payroll, liability to pay wages, work done ultimately for the overseas entity etc., concludes that the overseas company is the employer of the secondees. Further, since NOS was deriving economic benefit from the secondment arrangement, the same amounts to import of manpower services from the overseas company.

Here, it is to be noted that as the Hon'ble Supreme Court has pointed out that its observations are specific to the factual position of the case, the observations made in the *NOS* case does not have universal application. Further, it is pertinent to note that the said court has not appreciated the scope of dual employment, working for subsidiary for development of Indian market strategies, specific exemption provided in GST, deemed valuation provisions under GST, reciprocity of arrangement, etc.

Factual differentiation of NOS case

While the judgment of the *NOS* case is fact specific and decides tax liability specific to the unique arrangement between the parties thereto, it did not stop the flood of investigation by many field formations against many Indian entities entering into secondment arrangements with overseas group entities. Some of the investigations initiated ahead of the decision of *NOS* case were concluded in issuance of show cause notices for alleged evasion of tax under Section 74(1) of the CGST Act. Aggrieved by the same, various representations have been made before the CBIC and consequently, the CBIC, *vide* the Instruction clarified the applicability of the principle laid down in the *NOS* case. It clarified that the decision of the Supreme Court is based on the facts of the case and the Supreme Court has also emphasized on examination of unique characterization of each specific arrangement, rather than relying on a singular test. Therefore, the decision of the Supreme Court in the *NOS* case should not be applied mechanically in all the cases and careful consideration of different facts including terms of contract is required in each case. The CBIC Instruction also clarified that Section 74(1) of the CGST Act cannot be invoked in the case of mere non-payment of tax.

Relying on the Instruction, the High Court of Karnataka, Punjab and Haryana, and Delhi have granted stay order on the investigations initiated or SCN issued pertaining to evasion of tax on secondment of employees in India from overseas group companies.

The factors such as control by the host Indian entity, secondee being on the payroll of the Indian host entity, payment of wages either fully or partly by the Indian host entity, skill being utilised on the work assigned by the Indian host entity etc, are the distinguishing factors that can distinguish the facts of any secondment arrangement from the facts of the *NOS* case.

Way forward

The secondment and deputation arrangement for GIC, GCC and manufacturing operations are required to be reviewed in light of the legal jurisprudence laid down by the Supreme Court and as per appropriate valuation mechanism provided under the GST laws.

The pending litigation of GST and service tax needs to be examined in light of the aspects discussed above. The factual position, evidence and legal arguments are required to be taken at appropriate forum. The Tribunals and lower authorities blindly following decision in *NOS* case needs to be made aware of distinguishing factors of each case. Secondment arrangement in future needs to be examined taking into consideration the factors laid down by the Court of law, and legal jurisprudence in relation to employer-employee relationship, to mitigate the tax risk.

The year 2024 will be a landmark year as the issue of secondment may be concluded by the Courts considering the pending issue before the Hon'ble Supreme Court in the matter of *Komatsu India Pvt. Ltd.*[6] and pending cases before the High Courts[7].

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[6] *Commissioner of GST and CE Chennai* v. *Komatsu India Pvt. Ltd.*, 2022-VIL-97-SC-ST

[7] Supra Note 2

Goods & Services Tax (GST)

Ratio decidendi

- Show cause notice invoking extended period – Audit report need not contain findings of fraud, willful-mistatement or suppression – Madras High Court
- Show cause notice under Section 74 not containing reasons and particulars of any suppression, is not fatal – Andhra Pradesh High Court
- Notice to be issued through other prescribed modes of service, if notice sent to registered email ID is not responded by assessee – Madras High Court
- Search – Certified copies of search warrant and order sheet/note sheet when not to be made available to assessee – Orissa High Court
- Refund of accumulated ITC on exports – Not uploading of shipping bills in GSTR-1 at time of claiming refund is not fatal – Calcutta High Court
- Refund of amount paid upon wrongful reversal of transitioned credit is available under Section 54 – Not falling under categories specified in Circular No. 125/44/2019-GST is not fatal – Madras High Court
- Refund under CGST Section 142(3) of payment after 1 July 2017, of IGST on non-fulfilment of export obligation, differential excise duty on inter-unit transfer, and in case of forgoing export benefits on re-imports – CESTAT Hyderabad
- Refund of ITC and IGST on exports – Receipt of payment through an intermediary will qualify as payment received by exporter – Madras High Court
- No inherent power with Appellate Authority to set aside order under appeal and remand proceedings to original authority – Allahabad High Court
- Personal hearing is mandatory, even if not requested, if adverse decision is contemplated – Allahabad High Court
- Appeal to Appellate Authority – Limitation – Section 5 of Limitation Act is not applicable – Calcutta HC decision differed with – Allahabad High Court
- Appeal to Appellate Authority – Self-certified copy of decision appealed against is not required if appeal filed electronically – Allahabad High Court
- ITC claim should not be rejected solely because GST registration of supplier cancelled with retrospective effect – Madras High Court
- Registration cannot be cancelled merely because of absence of stock at place of business – Allahabad High Court
- No intention to evade when most documents accompanying goods though there is some typographical error in e-way bill – Allahabad High Court
- Detention of goods on ground of alleged undervaluation is not valid – Allahabad High Court
- Agricultural produce – Loading and unloading of imported pulses is not exempt – West Bengal Appellate AAR

Ratio Decidendi

Show cause notice invoking extended period – Audit report need not contain findings of fraud, willful-mistatement or suppression

The Madras High Court has rejected the contention of the assessee that the audit report should also contain findings of fraud or willful-misstatement or suppression of facts, for the proper officer to issue show cause notice under Section 74 of the Central Goods and Services Tax Act, 2017. The Court noted that there is nothing in the language of Section 65 to indicate that the audit report should contain such findings. It observed that on the contrary, Section 65(7) prescribes that the proper officer may initiate action under Section 73 or 74, thus indicating that the proper officer has an option. The Court also noted that that the proper officer has to allege fraud, willful-misstatement or suppression of fact, if he initiates action under section 74, and that it was not the assessee's case that such assertions or allegations were not contained in the show cause notice. Dismissing the writ petition, the Court declined to interfere with the show cause notice. [*ABT Ltd.* v. *Additional Commissioner* – (2024) 15 Centax 188 (Mad.)]

Show cause notice under Section 74 not containing reasons and particulars of any suppression, is not fatal

The Andhra Pradesh High Court has dismissed a writ petition against a show cause notice in the case where the assessee had contended that the notice was issued under Section 74 of the Central Goods and Services Tax Act, 2017 though the ingredients for initiation of the proceedings i.e. 'suppression' were not made out. The Court observed that use of word 'suppression' is not conclusive, and similarly, if this expression is not used in the show cause notice it cannot be said conclusively that there is no suppression. Observing that the SCN did contain the reasons for its issuance, the Court held that the question of presence of suppression can be determined by the authority, considering the reply. The Court in this regard also noted that 'suppression' alone is not the ground under Section 74(1), as fraud or/and willful misstatement are also the grounds for issuance of show cause notice in evading tax etc. It may be noted that the High Court also noted that the SCN even if not mentioned 'suppression', was within the period of limitation under Section 73 in this case. It was also of the view

that mere mention of a provision would not be determinative of the notice under that section. [*RKEC Projects Ltd.* v. *Additional Commissioner* – 2024 VIL 100 AP]

Notice to be issued through other prescribed modes of service, if notice sent to registered email ID is not responded by assessee

In a case where notice sent to a designated/registered email ID as contemplated in Section 169(1)(c) of the CGST Act, 2017 was not responded by an assessee, the Madras High Court has held that it would be incumbent on the part of the Revenue department to serve at least once another notice through any of the other prescribed modes of service of notice, so as to ensure there communication. According to the Court, this will prevent the assessees to scuttle the proceedings by stating that there was a violation of principles of natural justice. The High Court in this regard noted that all men of commerce from the business community, particularly small traders, small service provider and small manufacturers may not be ready to receive and respond to communications through emails, as may be technologically challenged. The Court also advised the Department to serve notice on such assessees through other mode of communications prescribed when they fail to respond to the summons, orders, notices and other communications etc., sent to them through email. [*Sakthi Steel Trading* v. *Assistant Commissioner* – (2024) 15 Centax 276 (Mad.)]

Search – Certified copies of search warrant and order sheet/note sheet when not to be made available to assessee

The Orissa High Court has upheld the decision of the Deputy Director, DGGI to refuse grant of certified copies of the search warrant and order sheet/note sheet maintained in connection with the inspection/search & seizure proceeding. The documents were sought by the assessee in order to effectively reply to the show cause notice issued after the investigation. The sharing of said documents was rejected by the Department on the ground that these documents are internal official documents related to the investigation, which are not disclosed/provided publicly, as the case had not attained finality. The High Court in this regard observed that mere issuance of SCN does not mean that the process of investigation has been concluded and a final decision has been arrived at, rather, it is only one of the steps to arrive at a final decision. According to the Court, investigation can be deemed to be complete only after the final decision/adjudication about the

liability of the person under investigation has been made after the matter has gone through all the stages of appeals and revisions and a final decision about prosecuting or not prosecuting such person has been taken by the competent authority. It was hence of the view that any disclosure of information at the stage of issuance of SCN would impede the process of investigation. [*Jagannathdham Superstructures Pvt. Ltd.* v. *Deputy Director* – 2024 VIL 86 ORI]

Refund of accumulated ITC on exports – Not uploading of shipping bills in GSTR-1 at time of claiming refund is not fatal

The Calcutta High Court has held that if a taxpayer possesses valid shipping bills, but for some reason may not have been able to upload the same in Form GSTR 1 at the time of claiming refund, the law should not be so rigid so as not to permit the claimant to rectify the mistake that has been committed inadvertently. Observing that there is no other reason for withholding the refund claim, the Court directed the Department to take into consideration the hardcopy of the shipping bills submitted by the petitioner for consideration of his prayer for refund of the unutilized accumulated Input Tax Credit on account of zero-rated supply. The High Court decision also states that petitioner may be permitted to amend the details in Form GSTR-1 so that the authority can verify the genuineness of the shipping bills. [*Sunil Kumar Poddar* v. *Additional Commissioner* – 2024 VIL 93 CAL]

Refund of amount paid upon wrongful reversal of transitioned credit is available under Section 54 – Not falling under categories specified in Circular No. 125/44/2019-GST is not fatal

The Madras High Court has held that a refund claim cannot be rejected merely on the ground that it does not falls within the specific categories enumerated in CBIC Circular No.125/44/2019-GST dated 18 November 2019. The Court for this purpose noted that that sub-section (1) of Section 54 of the CGST Act, 2017 is wide enough to embrace any claim for refund of tax or interest provided such claim is made within a period of two years reckoned from the relevant date. The assessee in this dispute had sought refund of the amount paid upon wrongful reversal of the transitioned credit. The claim was earlier rejected by the Department on the ground that the application was filed under the category 'Any Others'. The Department was of the view that refund claim does not fall within the scope of Section 54, which only enables refund in

case of unutilised ITC on account of inverted duty structure or unutilised ITC on account of zero-rated exports. [*Engineers India Ltd.* v. *Assistant Commissioner* – 2024 VIL 137 MAD]

Refund under CGST Section 142(3) of payment after 1 July 2017, of IGST on non-fulfilment of export obligation, differential excise duty on inter-unit transfer, and in case of forgoing export benefits on re-imports

In a case where the assessee paid the differential customs duty after 1 July 2017 (when GST was introduced) on account of non-fulfilment of export obligation on imports made prior to the said date, the CESTAT Hyderabad has allowed refund of IGST under Section 142(3) of the Central Goods and Services Tax Act, 2017. Similarly, refund was also allowed in case where the assessee had paid the differential excise duty on account of higher CAS-4 value arrived at subsequently for their inter-unit transfer, and in case of export rejects by the overseas buyer when the assessee was required to forego the export benefits and had hence paid CVD at time of re-imports. Tribunal's Larger Bench decision in the case of *Bosch Electricals India* and other Tribunal decisions in cases of *Mithila Drugs P. Ltd.*, *Clariant Chemicals India Ltd.* and *ITCO Industries Ltd.* were relied upon. CESTAT Chennai decisions in the cases of *Aurobindo Pharma* and *Servo Packaging Ltd.* were distinguished. [*Aurobindo Pharma Ltd.* v. *Commissioner* – 2024 VIL 99 CESTAT HYD CU]

Refund of ITC and IGST on exports – Receipt of payment through an intermediary will qualify as payment received by exporter

The Madras High Court has held that merely because the receipts are rooted through the intermediary and received in Indian currency *ipso facto* would not mean that the assessee (exporter of services) had not exported services within the meaning of Section 2(6) of the Integrated Goods and Services Tax Act, 2017. The Court was of the view that receipt of payment by an intermediary for and on behalf of its client will qualify as payment received by the client. The Intermediary (PayPal) had in the dispute received the payment in foreign currency and transferred equivalent amount in Indian Rupees (after deducting service charges) to the exporter while crediting the amount in convertible foreign currency into Reserve Bank of India. The Department had denied refund stating that the assessee-exporter had not realized the payment in terms of CBIC Circular No. 88/07/2019-GST, dated 1 February 2019 and received the same in Indian Rupees. Allowing the writ petition

and holding that the exporter was entitled for refund, the Court observed that the procedure was correct as per Regulation 3 of the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016. [*Afortune Trading Research Lab LLP* v. *Additional Commissioner* – 2014 (2) TMI 1121-Madras High Court]

No inherent power with Appellate Authority to set aside order under appeal and remand proceedings to original authority

Considering the provisions of Section 107(11) of the Central Goods and Services Tax Act, 2017, the Allahabad High Court has held that no inherent power is available with the Appellate Authority to set aside the order under appeal and remand the proceedings to the Original Authority. The Court noted that any doubt in this regard has been clarified by the Legislature itself by stating that the appeal authority shall not refer the matter back to the Adjudicating Authority. Setting aside the order impugned, the Court remanded the matter to the Appellate Authority to pass a fresh order after hearing the parties. [*Kronos Solutions India Pvt. Ltd.* v. *Union of India* – 2024 VIL 106 ALH]

Personal hearing is mandatory, even if not requested, if adverse decision is contemplated

The Allahabad High Court has reiterated that even if no request is received from the person chargeable with tax or penalty, an opportunity of personal hearing must be granted if any adverse decision is contemplated against such person. According to the Court, usage of the word "or" in Section 75(4) of the Central Goods and Services Tax Act, 2017 extends beyond its disjunctive function, as it serves as a pivotal indicator of legislative intent regarding the necessity of providing an opportunity for personal hearing. Taking help of the literal rule of interpretation, the Court observed that inclusion of 'or' in Section 75(4) emphasizes the dual nature of the obligation to provide a personal hearing, accommodating both proactive requests from individuals seeking to defend their interests and reactive responses to adverse orders contemplated by tax authorities. [*K.J. Enterprises* v. *State of U.P.* – 2024 VIL 125 ALH]

Appeal to Appellate Authority – Limitation – Section 5 of Limitation Act is not applicable – Calcutta HC decision differed with

Observing that Section 107 of the Central Goods and Services Tax Act, 2017 operates as a complete code in itself, the

Allahabad High Court has held that the provision explicitly delineates the limitation periods for filing appeals and implicitly excludes the application of general limitation provisions such as Section 5 of the Limitation Act, 1963. Differing with the decision of the Calcutta High Court in *S.K. Chakraborty & Sons* v. *Union of India*, where it was held that Section 5 of the Limitation Act, providing for extension of time-period in certain circumstances, will be applicable, the Court here observed that it is essential to consider the rationale behind the exclusion of the Limitation Act in certain special statues, particularly in the context of taxation. It observed that tax laws are often characterized by strict procedural requirements and time-bound deadlines, reflecting the need for expeditious resolution of tax disputes to ensure revenue certainty and fiscal stability. [*Yadav Steels* v. *Additional Commissioner* – 2024 (2) TMI 1069-Allahabad High Court]

Appeal to Appellate Authority – Self-certified copy of decision appealed against is not required if appeal filed electronically

The Allahabad High Court has approved the contention of the assessee that when the appeal is filed electronically and uploaded on the common portal in Form GST APL-01, there is no requirement to file self-certified copy of the decision. The Court in this regard observed that considering the literal interpretation of the first proviso to Rule 108(3) of the Central Goods and Services Tax Rules, 2017, the self-certified copy of the decision or order appealed against is required only in the case when the appeal is not uploaded on common portal. The Commissioner had earlier rejected the appeals filed by the assessee-petitioner on the ground that the same were time barred, as the self-certified copy of the decision was not made available within time as per proviso to Rule 108. [*Visible Alpha Solutions India Private Limited* v. *Commissioner* – 2024 VIL 139 ALH]

ITC claim should not be rejected solely because GST registration of supplier cancelled with retrospective effect

The Madras High Court has held that ITC claim of the assessee should not be rejected solely on the ground that the supplier's GST registration was cancelled with retrospective effect. The matter was remanded by the Court while it observed that the assessee-petitioner may be called upon to prove that the transaction was genuine by providing relevant documents such

as tax invoices, e-way bills, lorry receipts, delivery challans, proof for payment and the like. The Court was hence of the view that the assessee may be called upon to produce evidence of the existence of the supplier at the relevant point of time. [*Engineering Tools Corporation* v. *Assistant Commissioner* – 2024 VIL 167 MAD]

Registration cannot be cancelled merely because of absence of stock at place of business

The Allahabad High Court has held that merely because no stock was found at the place of business of the assessee, it cannot be concluded that the assessee did not conduct any business activity. Setting aside the cancellation of registration of the assessee, the Court observed that there is no law which mandates a businessman to always retain stock at the place of business. The Court also noted that the assessee had filed returns for financial years 2021-22 and 2022-23 and which were not doubted by the authorities. It was also noted that there was no allegation that the assessee had contravened any provision of the CGST/UPGST Act or the Rules made thereunder. [*Shree Ram Glass Bachauli Kuftabad Beekapur* v. *State of U.P.* – 2024 (2) TMI 1006-Allahabad High Court]

No intention to evade when most documents accompanying goods though there is some typographical error in e-way bill

The Allahabad High Court has held that when most of the documents are accompanying the goods and there is some typographical and/or clerical error, a presumption to evade tax does not arise. Setting aside the order imposing penalty under Section 129 of the Central Goods and Services Act, 2017, the Court noted that the invoices and *bilty* documents contained the correct address of the destination while only four out of eight of the e-way bills had the incorrect address, and that event this incorrect address was the registered office of the assessee-petitioner. Observing that there was thus no presumption to evade tax arises at all, the High Court held that mere technical error cannot result in imposition of harsh penalty. [*Hawkins Cookers Ltd.* v. *State of U.P.* – 2024 VIL 146 ALH]

Detention of goods on ground of alleged undervaluation is not valid

The Allahabad High Court had held that detention of goods on the ground that their valuation as per the invoice was not correct, is not a valid ground as the officers of the Department are not competent to carry out such detention. The Court

observed that detention of goods in such scenario is not envisaged under the GST provisions and that the officers have not been vested with such power to detain such goods and thereafter impose penalty under Section 129 of the CGST/UPGST Acts. The High Court in this regard also noted that appropriate notices in such cases are required under Sections 73 and 74. [*Shamhu Saran Agarwal and Company* v. *Additional Commissioner* – 2014 (2) TMI 187-Allahabad High Court]

Agricultural produce – Loading and unloading of imported pulses is not exempt

The West Bengal Appellate AAR has held that service of loading and unloading of imported unprocessed 'toor' and 'whole pulses' and 'black matpe' is not exempt under Sl. No. 54(e) of the Notification No. 12/2017-Central Tax (Rate) and Sl. No. 24 of notification No. 11/2017-Central Tax (Rate). The AAAR in this regard noted that prior to the exportation to India, pulses originating from overseas must have undergone an extensive series of processing procedures, such as winnowing, cleansing, packaging, labelling, and various exchanges of ownership and value enhancements, and that further, after importation, the goods also undergo process of fumigation, plant quarantine and FASSAI compliance procedure. The Authority was hence of the view that these processes render the imported pulses disqualified to be treated as 'Agricultural Produce', even for undehusked and whole pulses, and further not to be considered as 'marketable for primary market'. [In RE: *Sona Ship Management Pvt. Ltd.* – 2024 VIL 02 AAAR]

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Customs

Notifications and Circulars

- Rice, parboiled – Export duty extended beyond 31 March 2024
- Yellow peas – Exemption from BCD and AIDC extended beyond 31 March 2024 – Import Policy condition also revised
- Cotton, not carded or combed, of staple length exceeding 32.0 mm, exempted from BCD and AIDC
- Turkey meat, cranberries and blueberries – BCD reduced
- ITC(HS) of Export Items notified for Chapters 01 to 39
- EPCG scheme – Relief in average Export Obligation for EPCG Authorizations for 2022-23

Ratio decidendi

- No interest and penalty against demand of Additional Customs duty and Special Additional Duty – SC dismisses review petition against its earlier order affirming Bombay HC decision – Supreme Court
- No confiscation even if classification or exemption is not in conformity with the Department's view or held not correct in appellate proceedings – CESTAT New Delhi
- Amendment of documents – Ambit of Section 149 is not confined to rectification of *bona fide* errors – Documentary evidence should be in existence and not necessarily produced at time of clearance – Madras High Court
- Amendment of documents – Application not to be rejected in absence of reference to Section 149 or when word 'rectification' is not used – Madras High Court
- SCN under Customs Section 28AAA is not correct till DGFT cancels instrument/scrip – Madras High Court
- Valuation of exports – Reasonable doubt cannot be based on mere opinion of DRI officers – CESTAT New Delhi
- ASEAN-India FTA – Absence of cost data from Malaysian exporter when not fatal for claiming benefit – CESTAT Ahmedabad
- Swim seats, arm bands, etc., used by kids to remain afloat are classifiable under TI 9506 29 00 – Goods even used for fun and not competition are covered as sport equipment – CESTAT Chennai

Notifications and Circulars

Rice, parboiled – Export duty extended beyond 31 March 2024

The export duty on parboiled rice has been extended beyond 31 March 2024. Notification No. 12/2024-Cus., dated 21 February 2024 (effective from 22 February 2024) for this purpose amends Notification No. 55/2022-Cus., by omitting S. No. 2A in the table and Condition No. 5 in the Annexure. It may be noted that earlier Notification No. 59/2023-Cus., dated 13 October 2023 had amended Notification No. 55/2022-Cus. and revised the date of effect of 'nil' rate of duty to 1 April 2024 instead of 16 October 2023. Export duty on this product was introduced on 25 August 2023 and was to expire on 15 October 2023 initially.

Yellow peas – Exemption from BCD and AIDC extended beyond 31 March 2024 – Import Policy condition also revised

The Ministry of Finance has extended the exemption from Basic Customs Duty (BCD) and Agriculture Infrastructure and Development Cess (AIDC) on imports of yellow peas (TI 0713 10 10) beyond 31 March 2024. The exemption would not be available on goods for which the Bill of Lading is issued on or before 30 April 2024. Amendments in this regard have been made in Notification No. 64/2023-Cus. by Notification No. 12/2014-Cus., dated 21 February 2024 which is effective from 22 February 2024.

It may be noted that Import Policy Condition for the said product has also been revised by Notification No. 61/2023, dated 23 February 2024. Consequently, import of yellow peas is free without the MIP condition and without port restrictions, subject to compulsory registration under the Import Monitoring System, for all imports consignments where bill of lading is issued on or before 30 April 2024.

Cotton, not carded or combed, of staple length exceeding 32.0 mm, exempted from BCD and AIDC

Import of cotton, not carded or combed, of staple length exceeding 32.0 mm, falling under Tariff Item 5201 00 25 of the Customs Tariff Act, 1975 has been exempted from Agriculture Infrastructure and Development Cess (AIDC), with effect from

20 February 2024. The specified goods were till 19 February liable to 5% AIDC under Sl. No. 14 of Notification No. 11/2021-Cus. which has now been amended by Notification No. 11/2024-Cus., dated 19 February 2024.

Further, Notification No. 50/2017-Cus. has been amended to insert Sl. No. 304B to provide for exemption from Basic Customs Duty to the specified product. Notification No. 10/2024-Cus. has been issued on 19 February 2024 and made effective from 20 February 2024.

Turkey meat, cranberries and blueberries – BCD reduced

The Basic Customs Duty (BCD) has been reduced to 5% on meat and edible offal, of turkeys, frozen, with effect from 20 February 2024. Similarly, BCD has been reduced to 10% on cranberries and blueberries, fresh, frozen or dried. Further, while cranberries, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included, are liable to BCD @ 5%, blueberries, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included, are liable to BCD @ 10%. Amendments in this regard have been made in Notification No. 50/2017-Cus. by Notification No. 10/2024-Cus., dated 19 February 2024, effective from 20 February 2024.

ITC(HS) of Export Items notified for Chapters 01 to 39

Indian Trade Classification (Harmonised System) based Export Policy for Chapters 01 to 39 of Schedule 2 has been notified by Notification No. 60, dated 13 February 2024. Chapters 01 to 39 of Schedule 2 now contain current export policy of items (8-digit ITC(HS) based) indicated along with policy conditions to be fulfilled, if any. This will bring the Export Policy in line with the Chapters of Schedule 1 which contains Import Policy. As per Trade Notice No. 38/2023-24, dated 16 February 2024, this will reduce the compliance burden and promote ease of doing business. Further, efforts are being made to map the policy pertaining to rest of the chapters to 8-digit HS Code. It has also been clarified that the new Export Policy notified on 13 February does not include any new policy changes or amendments, and that the policies as applicable before shall continue.

EPCG scheme – Relief in average Export Obligation for EPCG Authorizations for 2022-23

Exercising its powers under para 5.17 of the Handbook of Procedures Vol. 1, which envisages relief to exporters of those sectors where total exports in that sector/product group has declined by more than 5% as compared to the previous year, the DGFT has notified the list of product groups showing the percentage decline in exports during 2022-23 as compared to 2021-22. All Regional Authorities have been accordingly requested to re-fix the Annual Average EO for EPCG Authorizations for the year 2022-23. Policy Circular No. 10/2023-24, dated 22 February 2024 has been issued for the purpose.

Ratio Decidendi

No interest and penalty against demand of Additional Customs duty and Special Additional Duty – SC dismisses review petition against its earlier order affirming Bombay HC decision

The Supreme Court has on 9 January 2024 dismissed the Review Petition filed by the Revenue department against the dismissal of its Special Leave Petition filed 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 Apex Court in this regard was satisfied that there was no error apparent on the face of the record or any merit in the Review Petition warranting reconsideration of the order impugned.

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.* – Order dated 9 January 2024 in Review Petition (Civil) Diary No. 41195/2023, Supreme Court]

No confiscation even if classification or exemption is not in conformity with the Department's view or held not correct in appellate proceedings

The CESTAT New Delhi has held that classification of goods by the importer, even if the same is not in conformity with re-assessment by the proper officer or even if it is held to be not correct in any appellate proceedings, does not render goods liable to confiscation under Section 111(m) of the Customs Act, 1962. The Tribunal in this regard was of the view that it would

lead to absurd results if Section 111(m) is read to mean that goods can be confiscated if classification of the goods and the exemption notification claimed by the importer self-assessing the duty under Section 17 do not match with what the proper officer may apply after re-assessment or later. It noted that the importer self-assessing the goods must apply his mind when classifying the goods and not predict the mind of the proper officer.

It was further held that goods cannot be reclassified based on the exemption notification issued under Section 25 or on the basis of any policy of any Ministry. The Tribunal in this regard observed that notifications or policies can be issued, modified or withdrawn but the classification of the goods under the tariff will remain the same, and that only if the tariff itself is amended can the classification change. [*Vivo Mobile India Pvt. Ltd.* v. *Principal Commissioner* – 2024 VIL 156 CESTAT DEL CU]

Amendment of documents – Ambit of Section 149 is not confined to rectification of *bona fide* errors – Documentary evidence should be in existence and not necessarily produced at time of clearance

The Madras High Court has held that the ambit of Section 149 of the Customs Act, 1962 is not confined to the rectification of inadvertent and/ or *bona fide* errors. According to the Court, there is nothing in the language of Section 149 that justifies such a curtailed reading of the scope thereof. Disposing off the writ petition and remanding the matter to the Deputy Commissioner, the High Court also observed that the relevant question to be considered when an application for amendment is submitted is whether documentary evidence in support of the claim was in existence at the time of clearance of goods. It was noted that the provision does not record that the relevant documentary evidence should have been produced or submitted at the time of clearance of goods. The assessee had cleared goods without claiming benefit of concessional rate under FTAs with Korea and Thailand, which was subsequently claimed. The matter was remanded for determination whether Form I and certificate of origin were in existence at the time of clearance of goods. It may be noted that the Court also stated that CBIC communication dated 13 November 2020, regarding difficulties in implementation of CAROTAR, and which recognises that importers are not required to submit Form I while filing bills of entry, is in consonance with Section 149. [*Hanon Automotive India Pvt. Ltd.* v. *Commissioner* – 2024 VIL 117 MAD CU]

Amendment of documents – Application not to be rejected in absence of reference to Section 149 or when word 'rectification' is not used

Observing that power is conferred under Section 149 of the Customs Act, 1962 on the proper officer to consider an application for rectification, the Madras High Court has held that there is no reason to reject the application for amendment merely because it does not make reference to Section 149 or on the ground that the word rectification is not used therein. The Court noted that the statute does not prescribe a format in which a rectification application should be filed. It also noted that assessee's communication had the subject description 'amendment of bill of entry for inclusion of CETA notification' and thus there was sufficient indication in the communication that the petitioner sought rectification of the Bill of Entry. The Department in this case was of the view that the communication was a request for re-assessment and not rectification. [*Sharoof Steel Suppliers* v. *Deputy Commissioner* – 2024 VIL 126 MAD CU]

SCN under Customs Section 28AAA is not correct till DGFT cancels instrument/scrip

The Madras High Court has held that unless the DGFT initiates any proceedings to cancel the instrument, the customs authorities cannot assume any jurisdiction to issue notice under Section 28AAA of the Customs Act, 1962 assuming the jurisdiction of the DGFT. The case involved sale of SEIS (Service Exports from India Scheme) scrips allegedly obtained by mis-statement and by suppression of facts. Setting aside the show cause notice, the Court observed that though the DGFT had issued show cause notices on various dates and an order came to be passed by it, placing the assessee under the Denied Entities List, the same were withdrawn in entirety later. The SCN was held as being contrary to CBEC Circular No. 334/1/2012-TRU dated 1 June 2012. Supreme Court's decision in the case of *Pennar Industries Limited* was distinguished. [*Jeena and Company* v. *Union of India* – 2024 VIL 131 MAD CU]

Valuation of exports – Reasonable doubt cannot be based on mere opinion of DRI officers

The CESTAT New Delhi has held that the opinion of the DRI officers by itself cannot even constitute some reason of doubt, let alone, become a reasonable doubt regarding the truth and accuracy of the transaction value declared by the exporter. The Tribunal in this regard noted that as per the order of the Joint Commissioner, the reasonable doubt was based on the visual examination of sample goods by DRI officers which allegedly revealed that the quality of goods was sub-standard and the

value of the goods was over stated. It was noted that the proper officer assessing exports had no doubt at all but, the DRI officers based on intelligence and their subjective opinion and that of another trader, doubted the transaction value and proceeded to seize the consignment and issued show cause notice. The Tribunal was surprised as to how the Joint Commissioner adjudicated the matter solely based on subjective opinion of DRI officers ignoring all documents (including bank realisation certificate) produced by the exporter in support of transaction value, while there was no document on record as evidence by DRI to raise doubt regarding transaction value. Rejection of export transaction value under Rule 8 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007, was thus set aside. [*Sai International* v. *Commissioner* – 2024 (1) TMI 1128-CESTAT New Delhi]

ASEAN-India FTA – Absence of cost data from Malaysian exporter when not fatal for claiming benefit

The CESTAT Ahmedabad has held that failure of Indian authorities to get more detailed verification or underlying cost data from the Malaysian Government authorities cannot be held against the assessee-importer who had discharged its burden to claim benefit of ASEAN-India FTA by producing relevant prescribed documents under the agreement and under Customs notification. The Tribunal in this regard noted that the certificate of origin was duly got verified through the Government to Government process and Malaysian authorities had not doubted the issuance of genuine certificate of origin nor its contents. Allowing the appeal filed by the importer, the Tribunal also noted that no one will part its cost data with any buyer as same is generally considered confidential. [*Kiara Ingredients Inc.* v. *Commissioner* – 2024 (2) TMI 740-CESTAT Ahmedabad]

Swim seats, arm bands, etc., used by kids to remain afloat are classifiable under TI 9506 29 00 – Goods even used for fun and not competition are covered as sport equipment

Sea squad swim seats, arm bands, and bio fuse fitness fin are classifiable under Tariff Item 9506 29 00 of the Customs Tariff Act, 1975 and not under 9506 99 90 *ibid*. According to CESTAT Chennai, once the items are accepted as used for swimming, be it for recreation or otherwise in the swimming pool, classification under TI 9506 99 90 as meant for outdoor games

is not correct. The Tribunal was of the view that once it was accepted that the items were meant for kids and used for swimming, the finding that since they were not used for competition but used for fun, they are not classifiable as water sport equipment, is not a logical finding. It may be noted that the Tribunal also stated that it cannot be said that swimming is only an outdoor game. It also was of the view that generally, swimming is considered as a sport rather than a game. [*Page Industries Ltd.* v. *Commissioner* – 2024 VIL 110 CESTAT CHE CU]

Central Excise, Service Tax and VAT

Ratio decidendi

- Cenvat credit is available on inputs used in generation of power wheeled out and not sold to sister units – Supreme Court's decision in *Maruti Suzuki* distinguished – Madras High Court
- Venture Capital Funds, rendering services of asset management, are not liable to service tax – Karnataka High Court
- GTA services – Exemption under Notification No. 32/2004-S.T. – Declaration separately made and not on consignment note is not fatal – Calcutta High Court
- Sabka Vishwas (LDR) Scheme – Time period for making payment is not extended by Supreme Court's decision in *suo-motu* writ petition due to Covid-19 – Jharkhand High Court
- Scrap-veg-refuse is classifiable under Heading 2308 – Mere presence of starch content does not make the product potato starch – CESTAT Chandigarh

Ratio Decidendi

Cenvat credit is available on inputs used in generation of power wheeled out and not sold to sister units – Supreme Court's decision in Maruti Suzuki distinguished

The Madras High Court has held that Cenvat credit is available on inputs used in generation of power which is wheeled out and not sold to the sister units of the assessee. According to the Court, the facts that the power was not sold for consideration but had only been shared with the sister units (supplied though wheeling by Tamil Nadu Generation and Distribution Corporation Limited to sister units located elsewhere) was a relevant consideration.

Supreme Court's decision in the case of *Maruti Suzuki*, where power was sold to other units, was distinguished by the High Court here. The High Court also noted that period involved in the present case was from September 2012 till May 2013 to which the definition of 'input' as substituted from 1 April 2011 would apply, while the SC judgment was related to an interpretation of the term 'input' during the period July 2002 and December 2002.

The Court also observed that according to Section 2(k)(iii) of the Cenvat Credit Rules, 2004, as substituted from 1 April 2011, which allows credit on all goods used for generation of electricity or steam for captive use, there is no stipulation of place as regards the goods. Further, according to the Court, the use of the term 'captive' was a qualification of the location where the electricity was generated and not of the location where it was used. Allowing the appeals, the Court also noted that the captive power plant was set up at substantial cost; the electricity generated was used as 'input' only within the assessee's group of companies though at different locations; and the consumption was in *pari materia* with the power generation. [*India Cements Ltd. v. Commissioner* – 2024 VIL 112 MAD CE]

Venture Capital Funds, rendering services of asset management, are not liable to service tax

The Karnataka High Court has set aside the CESTAT Order which had held that a Venture Capital Fund (VCF) set up as a Trust is a 'distinct entity' separate from its contributors/investors. Disregarding the doctrine of mutuality of interest, the Tribunal had held that a VCF was rendering taxable services of portfolio or asset management to its contributors for a consideration on which service tax was liable. Allowing a bunch of appeals, the High Court found untenable the Tribunal's view that since trust is

treated as a juridical person under SEBI, there is no reason why it should not be treated as a juridical person for taxation. Observing that the definition clauses of each statute must be read with the object and purpose of that statute only as intended by the legislature, the Court noted that the issue involved in this case was liability to pay service tax and therefore the relevant statute was the Finance Act, 1994, and that the said Finance Act does not recognize 'trust' as a person. It noted that the assessee acted as a 'pass through', wherein funds from contributors were consolidated and invested by the investment manager. The Court observed that the assessee acted as a trustee holding the money belonging to contributors to be invested as per the advice of the investment manager. It was hence held that the doctrine of mutuality must apply in the instant case. [*India Advantage Fund III* v. *Commissioner* – Judgement dated 8 February 2024 in C.E.A No. 20/2021 and Ors., Karnataka High Court]

GTA services – Exemption under Notification No. 32/2004-S.T. – Declaration separately made and not on consignment note is not fatal

The Calcutta High Court has rejected the contention of the Revenue department that declaration separately made by the GTA, and not on the consignment note, shall not amount to fulfilment of the condition of the Notification No. 32/2004-ST dated 3 December 2004. Taking note of the CBEC Circular No. B1/6/2005-TRU dated 27 July 2005, as relied by the Department, and which provided a mechanism for making endorsement on the consignment note, the Court observed that the Circular did not prohibit making a declaration separately. According to the Court, the Circular was merely for the purposes of removing the inconvenience in availing the benefit under the notification while it provided as an option to make declaration on the consignment note as compliance of the condition of the notification. Upholding the CESTAT decision, the Court noted that the Circular had neither narrowed down the notification in question nor it could narrow it down. [*Commissioner* v. *Bharat Petroleum Corporation Ltd*. – 2024 VIL 133 CAL ST]

Sabka Vishwas (LDR) Scheme – Time period for making payment is not extended by Supreme Court's decision in suo-motu writ petition due to Covid-19

The Jharkhand High Court has held that Supreme Court's order in *suo-motu* writ petition due to Covid-19 pandemic, extending the period of limitation under general/special law pertaining to judicial and/or quasi-judicial proceedings, did not extend the

time limitation prescribed for making payment of an amount which has already been determined pursuant to culmination of quasi-judicial proceedings. The Court hence rejected the contention that time period for making payment was also extended beyond 30 June 2020 due to the said decision of the Apex Court. The High Court in this regard noted that the process of adjudication being quasi-judicial in nature ended on the date on which Statement in Form SVLDR-3 was issued to the assessee, and thereafter, the assessee was required to discharge the liability in terms of Section 127(5) of the Scheme read with Notification No. 1/2020 dated 14 May 2020 by 30 June 2020. [*Singh Enterprises* v. *Union of India* – 2024 VIL 140 JHR ST]

Scrap-veg-refuse is classifiable under Heading 2308 – Mere presence of starch content does not make the product potato starch

The CESTAT Chandigarh has held that scrap-veg-refuse is classifiable under Heading 2308 as vegetable waste and not under Heading 1108 as potato starch. Noting that just because the product has some starch content does not qualify it as potato starch, the Tribunal reiterated the finding of earlier decisions that mere presence of certain elements of starch in the residue or scrap does not take it out of the purview of a waste or residue. The Tribunal also noted that the process of manufacturing starch from potato is entirely different from the process involved in present case, which was actually recycling of wastewater during which vegetable residue was separated from water. Setting aside the demand of central excise duty, the Tribunal further observed that as per HSN Explanatory notes, potato starch should be in white powdered form while scrap-veg-refuse was in the form of wet paste; the goods did not come into existence after a manufacturing process; test report of Central Revenue Control Laboratory was not conclusive; and that such scrap/residue was exempted under various notifications. [*Pepsico India Holdings Pvt. Ltd.* v. *Commissioner* – 2024 VIL 150 CESTAT CHD CE]

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