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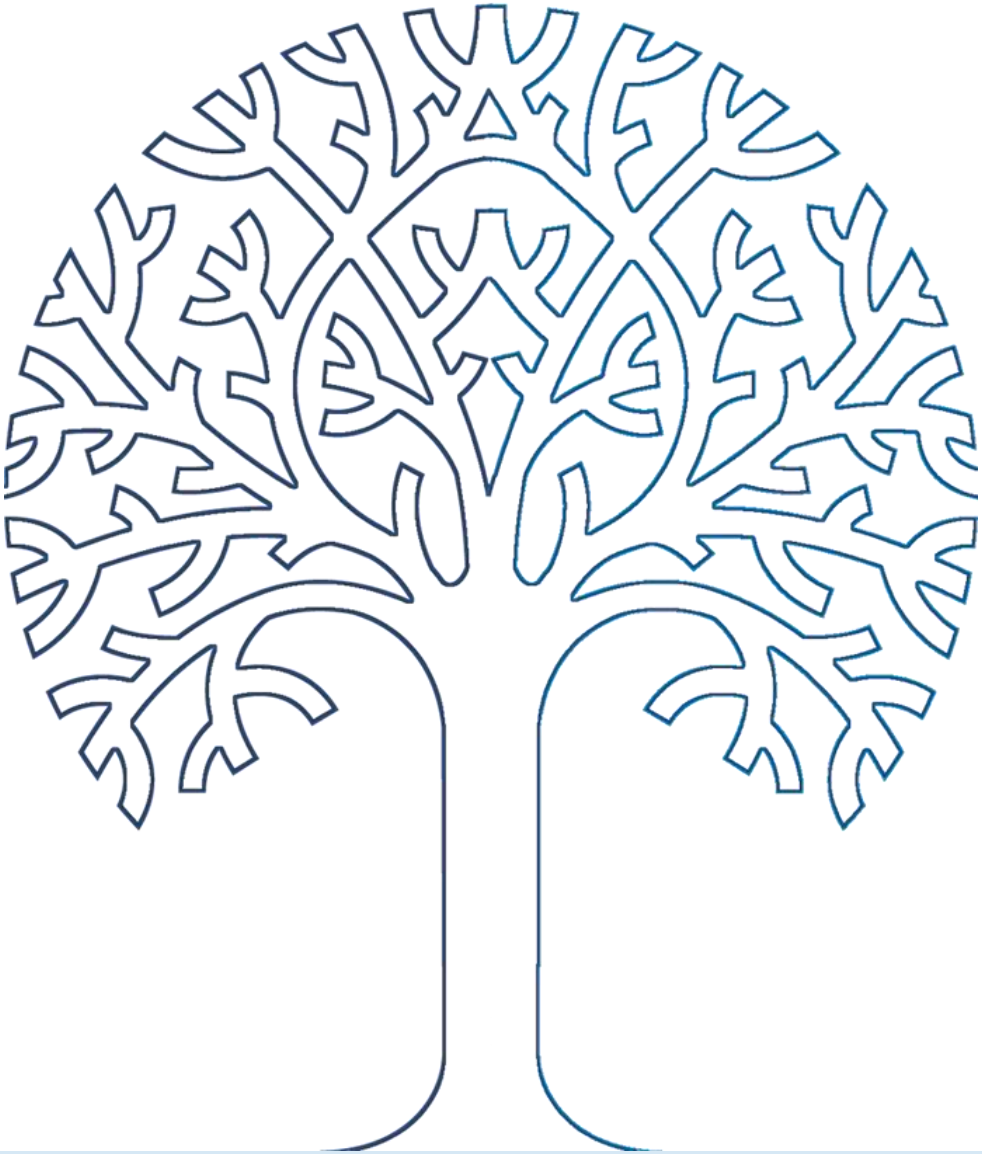

Article

The bittersweet classification of Flavoured Milk

By Preeti Goyal and Neha Jain

Classification of goods under the correct tariff item is the first, and arguably, most important step for a taxpayer. This is also the most litigative issue in any tax jurisdiction. The article hence analyses the implications of a recent Madras High Court decision in the case of Parle Agro Pvt. Ltd. which has held that flavored milk is classifiable under Heading 0402 and not under Heading 2202 of the Tariff covering beverage containing milk. Deliberating on the reasoning adopted by the High Court and the relevance of this decision, the authors highlight various issues which need to be understood by the industry, before falling prey to the impulsive decision of changing the classification of this product. They discuss the HSN Explanatory Notes, scheme of classification under GST and Customs, different objectives of FSSAI regulations (which were relied upon by the High Court), deviation from international jurisprudence, change in character of the product with addition of flavours, and how the perspective that only the plant-based milk beverages would be classified under Heading 2202 needs to be re-examined. According to the authors, the judgment should not be thoughtlessly followed for the classification of milk-based drinks.

The bittersweet classification of Flavoured Milk

Introduction

Classification has always been one of the most interesting as well most litigative issue in any tax jurisdiction. C*lassifying goods under the correct tariff item* is the first, and arguably, most important step for a taxpayer as apart from determination of the applicable rate of tax, it can be used as a tool for unnecessary harassment by the tax authorities.

Recently, the issue of classification of milk beverages (flavored milk) had come for discussion before the Madras High Court in the case of *Parle Agro Pvt. Ltd.*[1]. The two competing entries being discussed were **CTH 0402 as *Milk and cream, concentrated or containing added sugar or other sweetening matter, including skimmed milk powder, milk food for babies, other than condensed milk*** and **CTH 2202.99.30 as *Beverages containing milk***. The High Court held that the classification of flavored milk should be CTH 0402 instead of CTH 2202 and thus, the rate of GST on the same should be 5% instead of 12%. The reasoning adopted by the High Court for classification of the flavored milk under CTH 0402 not under CTH 2202 is two folds:

i. The FSSAI Regulations, 2011 provide that the dairy products are to be grouped and classified together and such regulations do not include plant-based milk products in its ambit. However, CTH 2202 includes only those milk products which are derived from plants such as soya milk drink, almond milk etc. The said heading does not include the milk derived from milch animals; and

ii. *Beverage containing milk* under CTH 2202 is a subset of *Other Non-Alcoholic beverage* and thus, includes only those products wherein alcohol content of less than 0.5 vol is present. The impugned goods did not have any alcohol content present in it. Therefore, the flavored milk made from milk derived from milch animals would not merit classification under CTH 2202.

Relevance

The judgment is of great importance to the industry especially the dairy industry for the following reasons:

A. The judgment has deviated from the previously concluded classification of flavored milk. In various advance rulings[2] and judgments by the Tribunals and High Court[3], where it has been held that the flavored milk is to be classified under CTH 2202 as beverage containing milk.

[1] 2023-VIL-789-MAD

[2] 2021 (8) TMI 193; 2020 (32) GSTL 206; 2021 (4) TMI 595; 2021 (4) TMI 616

[3] 2023 (7) TMI 873; 2009 (236) E.L.T. 329

B. The above rulings and even the Appellate Authority for Advance Ruling in the case of *Parle Agro* relied upon the recommendations of GST Council to include flavored milk under CTH 2202. However, the High Court in the instant case held that the GST Council's views are recommendatory in nature and not binding and it is for the Government to fix appropriate rates on the goods. Therefore, the said judgment has tethered the power of the GST Council.

Issues

While the instant judgment may look enticing for business to reclassify flavored milk under CTH 0402, however, before falling prey to the impulsive decision of changing the classification of flavored milk, it is important to understand the following interpretational issues.

a. Being a member of WTO, India requires to follow HSN Explanatory Notes for classification of the product which hold a persuasive value for determination of classification under Customs and GST. In the instant case, it is to be noted that the General Explanatory Notes to Chapter 4 as well as Explanatory Notes to CTH 0402 prescribe specific additives which can be added to the milk and do not mention flavors as one of the permitted additives. In such a case, can it be argued that merely because flavors have not been specifically restricted under CTH 0402, they are covered within the scope of permitted additives for the purpose of CTH 0402.

b. For the classification under GST and customs, it is essential to understand the scheme of classification. From the classification scheme adopted in the Customs Tariff, it can be seen that products in their natural state are classified in the initial chapters and value-added products manufactured using such natural products are classified in the later chapters. In the present case, flavored milk is not the natural form of milk but obtained after application of specific processes and additives in the milk.

c. Furthermore, this judgment has relied upon the FSSAI regulations which provide that all the dairy products are to be classified together. Here, it is to be noted that the objective of FSSAI regulation is completely different, i.e., to ensure the uniformity in the practices and standards adopted for the edible milk products while the classification under tax statutes is to impose tax.

d. There is no denial from the fact that the major component in flavored milk is milk. However, the process adopted in the form of adding sugar, flavors etc. alters the intrinsic character of the milk. Therefore, relying on other statutes with different objectives for the purpose of classification should not be a practice to be adopted for classification and thus rate determination. A typical example of the same is Monosodium Glutamate (MSG), commonly known as Ajino-moto, which is a food preservative and thus, covered by FSSAI regulations. However, for the purpose of classification under tax statutes, MSG is classified as monosodium glutamate under CTH 2922. The fact that MSG is dealt as food under FSSAI should not impact the

classification for the rate determination purposes under the tax statutes.

e. It is pertinent to note that the instant judgment not only deviates from the Indian jurisprudence but also challenges the international jurisprudence. There are multiple cross rulings[4] with respect to classification of flavored milk which classify it under CTH 2202 as milk-based drinks. Having a classification digressed from international classification is assailing to the very reason for existence of WTO whose main purpose is to ensure uniformity in classifications and tax rates across the borders.

f. The instant judgment differentiates itself from and challenges the judgment of Apex Court in the case of *Amrit Foods*[5], by stating the product under consideration in said judgment is different from flavored milk and thus, ruling under *Amrit Foods* (*Supra*) should not be relied upon. However, it is to be noted that the Apex Court in *Amrit Foods* (*Supra*) held that a product remains classified under Chapter 04 as long as the additives do not alter the character of products to be classified. In the instant case, the addition of sugar & flavors to the milk changes the character as well as the perception of milk at the end of customers. Further, the usage and requirement by the consumer does not remain the same for an unflavored milk *vis-a-vis* flavored milk, which is more of a ready to drink beverage.

g. Lastly, the instant judgment has brought a different perspective that only the plant-based milk beverages would be classified under CTH 2202. This would require a re-examination of all those beverages which use animal-based milk as one of the ingredients. Even if those beverages would continue to be outside the scope of Chapter 04, eight-digit classification under CTH 2202 would certainly undergo a change.

Parting remarks

On the basis of the above discussion, the authors are of the view that the judgment should not be thoughtlessly followed for the classification of milk-based drinks. Having deviated from the previously held understanding, it is to be seen whether the revenue would challenge the decision of the High Court in higher forums and what would be the outcome in that case. Also, would this prompt the revenue to amend the rate Notification under GST and cover flavored milk/ milk-based beverages falling under CTC 0404 or CTH 2202 at a higher rate, is also an area to be watched out.

However, at the same time, the authors are of the view that the most important take away from the instant judgment is that it is not oblivious to the increasing scope of power of GST council. In fact, said judgment has clarified the obscured principle that GST council recommendations are not mandatory and only recommendatory, which is a welcome move.

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[4] NY C86413; NY F81309; N241301

[5] 2015 (9) TMI 1269

Goods & Services Tax (GST)

Notifications and Circulars

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Notifications and Circulars

Amnesty Scheme notified for condoning delay in filing of appeal against demand orders

An amnesty scheme has been introduced for taxable persons, who could not file an appeal under Section 107 of the Central Goods and Services Tax Act, 2017 against the demand order passed under Section 73 or 74 on or before 31 March 2023, or whose appeal against the said order was rejected solely on the grounds that the said appeal was not filed within the time period specified in Section 107(1). As per Notification No. 53/2023-Central Tax, dated 2 November 2023, filing of appeal by the taxpayers will be allowed against such orders up to 31 January 2024, subject to payment of pre-deposit of 12.5% of the tax under dispute, out of which at least 20% (i.e. 2.5% of the tax under dispute) should be debited from the Electronic Cash Ledger. It may be noted that no appeal under this notification shall be admissible in respect of a demand not involving tax. Further, no refund shall be granted on account of this notification till the disposal of the appeal, in respect of any amount paid by the appellant in excess of the specified pre-deposit before the issuance of this amnesty scheme.

Services – GST on certain services clarified

The Central Board of Indirect Taxes and Customs (CBIC) has issued Circular No. 206/18/2023-GST, dated 31 October 2023 to clarify on applicability of GST on certain services. According to the Circular,

- 'Same line of business' in case of passenger transport service and renting of motor vehicles does not include leasing of motor vehicle without operators.
- Electricity charges received by real estate companies, malls, airport operators etc. from their lessees/occupants is liable to GST if forms a part of composite supply. However, electricity supplied by the Real Estate Owners, Resident Welfare Associations, Real Estate Developers etc., as a pure agent, will not form part of value of their supply.
- Job work for processing of 'Barley' into 'Malted Barley' attracts GST @ 5% as applicable to 'job work in relation to food and food products'.
- District Mineral Foundations Trusts (DMFTs) set up by the State Governments are Governmental Authorities.
- Pure services and composite supplies by way of horticulture/ horticulture works made to CPWD are eligible for exemption from GST under Sr. No. 3 and 3A of Notification No. 12/2017-Central Tax (Rate).

Monetary limits revised for filing appeals by the Department before CESTAT, High Courts and Supreme Court

The Central Board of Indirect Taxes and Customs has revised the monetary limits below which appeal shall not be filed in the CESTAT, High Court and the Supreme Court. According to Instruction F. No. 390/Misc/30/2023-JC, dated 2 November 2023, monetary limit for filing appeal to the Supreme Court is INR 2 crore while for High Courts it is INR 1 crore. For filing appeal to CESTAT, the monetary limit is INR 50 lakh.

Ratio Decidendi

Tax Research Unit (TRU) of Ministry of Finance has no authority to clarify on classification – Circular No. 80/54/2018-GST quashed

The Delhi High Court has observed that the Tax Research Unit (TRU) of the Ministry of Finance has not been clothed with the authority or jurisdiction to render a clarification with respect to classification of goods. Taking note of Section 168 of the Central Goods and Services Tax Act, 2017, the Court also observed that such power is exclusively conferred upon the Central Board of Indirect Taxes and Customs ('CBIC' or 'Board').

Quashing Circular No. 80/54/2018-GST, dated 31 December 2018, in respect of classification of polypropylene woven and non-woven bags, the Court noted that Circular while clarifying on classification of the product under Chapter 39 rested its conclusions solely on the basis of the provisions of Chapter 39 while not alluded to Section XI of the Customs Tariff Act, 1975 nor referred to Chapter 56 or 63 thereof. According to the Court, the Circular also failed to advert to the Notes in Chapter 39, which in unambiguous terms exclude textiles from the ambit thereof. Allowing the writ petition, the Court also noted that divergent or contrary views by the appropriate AARs' or AAARs' cannot be put to rest by issuance of a directive or clarification of the nature as the impugned Circular. [*Association of Technical Textiles Manufacturers and Processors* v. *Union of India* – 2023 VIL 795 DEL]

Registration cannot be cancelled ab initio for not furnishing returns for 6 months

The Delhi High Court has held that GST registration of an assessee cannot be cancelled *ab initio,* retrospectively from the date it was granted, on the ground of non-furnishing of returns for a period of six months. According to the Court, if the assessee had filed its returns during the relevant period when it was functioning, there would be no reason to cancel the GST registration during the said period for the reason that the subsequent returns had not been filed. The assessee here had stopped its business in 2019 and applied for cancellation of GST registration with effect from 28 November 2019, but the Department cancelled the registration from 1 July 2017 after issuing a show cause notice on 13 January 2021 alleging non-filing of returns for a continuous period of six months. [*Balajee Plastomers Pvt. Ltd.* v. *Commissioner* - (2023) 12 Centax 181 (Del.)]

No interest and penalty if ITC wrongly taken is reversed without utilisation

The Punjab & Haryana High Court has held that legislative intent as reflected from a purposeful reading of Section 50 of the CGST Act is that mere wrong reflection of input tax credit in electronic ledger itself is not sufficient to draw penal proceedings until the same or any part of such ITC is put to use so as to become recoverable. According to the Court, if the credit is reversed before utilization, then even the demand of interest and penalty cannot be said to be tenable. The High Court in this regard relied upon decisions of the Court in *Commissioner* v. *Jagatjit Industries Ltd.* [2011 (22) S.T.R. 518 (P&H)], *Commissioner* v. *Grasim Bhiwani Textile Ltd.* [2018 (362) E.L.T. 424 (P&H)] under Cenvat credit regime, and the decision of the Patna High Court in *Commercial Steel Engineering Corporation* v. *State of Bihar* [2019 (28) G.S.T.L. 579] in respect of VAT ITC. [*Deepak Sales Corporation* v. *Union of India* – (2023) 12 Centax 164 (P&H.)]

Blocking of electronic credit ledger cannot be for an amount more than the pre-deposit amount required for appeal

The Punjab & Haryana High Court has directed for unblocking of electronic credit accounts of the assessee after retaining only 10% of the penalty amount. The case involved blocking of credit account under Section 86A of the Central Goods and Services Tax Act, 2017. The SCN was issued, and the matter was pending for adjudication. Allowing the writ petition, the Court observed that the assessee-petitioner has remedy of filing an appeal after the adjudicating order is passed and even if he is required to file an appeal, he is to deposit only 10% of the penalty amount assessed. According to the Court, the account hence cannot be blocked beyond 10% of the penalty amount assessed. The assessee had pleaded that adjudication proceedings pursuant to the show cause notices will take some time and, in the meantime, if Input Tax Credit remained blocked, it (assessee) cannot file its return, which would lead to cancellation of its registration. [*K.J. International* v. *State of Punjab* – 2023 VIL 746 P&H]

Seizure during search – No authorisation required for each and every person, article, goods, books, and documents discovered during search

The Kerala High Court has held that authorisation for seizure under Section 67(2) of the CGST Act, 2017 has to be in general terms and cannot be with respect to any specific books, items, things or documents. Rejecting the contention of the assessee-petitioner that there was no authorisation for the seizure of excess gold discovered during search at business premises, the Court held that there cannot be authorisation in respect of each person, article, goods, books, and documents which may be discovered during the search operation. Accordingly, it was held that the authorisation has to be done in respect of the business premises of an assessee, and if things, items, books or documents are found that the authorised officer has reasons to believe that they would be relevant for the purpose of proceeding under the SGST/CGST Act 2017, they are liable to be seized. [*Velayudhan Gold LLP* v. *Intelligence Officer* – (2023) 12 Centax 15 (Ker.)]

Refund due to inverted duty structure available if input supplier mistakenly charges higher tax

In a case where though the input was chargeable only at the rate of 5% but the input supplier wrongly charged GST @ 18% on such inputs which were used in production of final product chargeable @ 5%, the Madras High Court has held that the assessee is entitled for refund in terms of Section 54(3)(ii) of the CGST Act, 2017. The High Court declined to accept the Department's contention that since the input supplier had wrongly paid 18% IGST on the inputs, the assessee-respondent should have paid 18% duty on output supplies. The Court in this regard observed that the petitioner-Department cannot insist or advise the assessee to pay excess rate of duty than the duty prescribed in the law. It may be noted that the assessee was also held entitled for interest at the rate of 9% per annum of the refund amount for the delay period in terms of Section 56. [*Commercial Tax Officer* v. *Suzlon Energy Limited* – 2023 VIL 810 MAD]

Refund due to inverted duty structure is not deniable on premise that 'rate is more or less the same'

Observing that proviso (ii) to Section 54(3) of the CGST Act, 2017 uses the words 'inputs' and 'output supplies', i.e., in plural, the Rajasthan High Court has held that the scheme of refund of unutilised input tax credit in cases of inverted duty structure cannot be restricted only to those cases where there is single input and single output supply. Taking into consideration the legislative intendment and objective of the refund scheme, the Court was of the view that literal interpretation has to be given full effect to, and hence the scheme would be applicable despite there being multiple inputs and output supplies. The Department had rejected the refund observing that output sales to the extent of 80% had 5% tax only and inputs too were majorly of 5% rate, and hence the rate was more or less same. According to the Court,

the approach that 'rate is more or less the same' runs contrary to the statutory scheme and violates not only the letter but also the spirit of the law. It may be noted that the High Court also dismissed the Department's plea that refund claim was mainly due to high input purchases which were in stock during the claim period. The Court in this regard observed that the determining factor is rate of tax and quantum of ITC content and not the value/quantum of individual inputs and the outputs. [*Nahar Industrial Enterprises Ltd.* v. *Union of India* – (2023) 12 Centax 47 (Raj.)]

Refund – Time limit under Section 54(1) is not mandatory – Furnishing of supporting documents at time of personal hearing only when is not fatal

Noting that the term used in Section 54(1) of the CGST Act, 2017 is 'may', the Madras High Court has observed that the time limit fixed under Section 54(1) is directory in nature and is not mandatory. According to the Court, it is not mandatory that the application must be made within two years and in appropriate cases, refund application can be made even beyond two years. The Madras High Court gave the above observations in a dispute where the refund of IGST was denied in case of supply to SEZ unit, as the supporting document (endorsement from Authorised officer) was furnished at the time of personal hearing only and not filed along with refund application. The Court was of the view that the delay in filing the supporting document at the time of filing of reply/personal hearing would only extend the time limit to pass an order under Section 54(7). Holding that non-submission of documents at the time of filing application for refund cannot be deemed to have filed with a delay, the Court also noted that the delay in obtaining the endorsement was owing to Covid-19. Reliance in this regard was also placed on CBDT Circular dated 11 April 1955 and provisions of Rule 90(3) of the CGST Rules, 2017 while the Court held that the Department ought to have issued a memo pointing out such deficiency and not issue a SCN directly to reject the refund. [*Lenovo (India) Pvt. Ltd.* v. *Joint Commissioner* – (2023) 12 Centax 230 (Mad.)]

Interest on delayed refund available @ 6% after 60 days from date of initial refund application till 60 days of second application filed pursuant to favourable appellate order

The Delhi High Court has held that as per the plain reading of the provisions of Section 56 of the CGST Act, 2017 read with Sections 54(7) and 54(8), refund applicant would be entitled to interest on the amount of refund from the date immediately after the expiry of 60 days from the date when the complete application is received and acknowledged by the Department. According to the Court, assessee's entitlement for interest cannot be defeated merely because the proper officer passed an incorrect order which was subsequently rectified in appellate proceedings. The Court hence rejected the Department's contention that according to proviso to Section 56 read with Rule 89(2)(a) of the CGST Rules, 2017, interest would run only from the date after expiry of sixty days from the date of an application filed pursuant to the order by Appellate Authority. As per the High Court, the proviso to Section 56 merely enhances to 9% the rate of interest payable for

the period after 60 days application pursuant to Appellate order and that this does not mean that interest @ 6% is not payable for the period from expiry of 60 days from first application till 60 days after filing of second application after appellate order. The High Court also held as without merit the assumption that any refund application filed after order by appellate authority is required to be considered as fresh application. [*Bansal International* v. *Commissioner* – 2023 VIL 809 DEL]

Demand – Reasonable period to respond to SCN ought to be 30 days

Observing that the time period provided for paying tax, interest and penalty specified in the show cause notice is statutorily prescribed to be thirty days in Section 73(8) of the CGST Act, 2017, the Madhya Pradesh High Court has held that reasonable period within which the show cause notice is to be responded to by the assessee, ought to be treated as thirty days. The Court in this regard noted that though no time period is stipulated in Section 73 for the noticee to respond, concept of reasonable opportunity demands that reasonable period of time to reply to the notice should be not less than 15 days, if not more. In this dispute the order impugned before the High Court was passed after 8 days of issuance of show cause notice which according to the Court fell desperately short of satisfying the concept of reasonable opportunity of being heard. Further, observing that the SCN lacked material particular, the Court allowed the writ directing the Department to pay an amount of INR 10,000 to the assessee-petitioner. [*Raymond Ltd.* v. *Union of India* – 2023 VIL 806 MP]

Non reference of particular statutory provision in SCN when is not fatal

The Kerala High Court has held that merely because the show cause notice issued to the assessee did not refer to a particular statutory provision, the assessee cannot be said to have been prejudiced when the facts leading to the invocation of the statutory provision concerned were admitted by the assessee. The writ appeal filed by the assessee was dismissed by the Court in a case where the show cause notice mentioned Section 73(8) of the CGST Act, 2017 instead of Section 73(11) thereof, though the case involved non-payment of tax due to the State despite collecting same from the customers. [*Global Plasto Wares* v. *Assistant State Tax Officer* – 2023 VIL 792 KER]

Unsigned Order even if uploaded by competent authority is not valid

Observing that an unsigned order is no order in the eyes of law, the Andhra Pradesh High Court has held that merely uploading of the unsigned order, may be by the Authority competent to pass the order, would not cure the defect of the order being not signed. Setting aside the impugned order, the Court was of the view that an unsigned order cannot be covered under 'any mistake, defect or omission therein' as used in Section 160 of the CGST Act, 2017. The Court in this regard also held that Section 169 is also not attracted, as here, the question was of not signing the order and not of its service or mode of service. [*SRK Enterprises* v. *Assistant Commissioner* – 2023 VIL 807 AP]

SEZ supplies – IGST refund not to be denied for delay in obtaining, or mistake in, endorsement

In a case where there was no doubt on the aspect of payment of tax by the DTA supplier (to SEZ) and also entry of goods into SEZ and endorsement by the Authorised Officer under Rule 30(4) of the SEZ Rules was also obtained, the Madras High Court has held that refund of IGST to the DTA supplier cannot be denied for delay in obtaining the endorsement. According to the Court, delay in obtaining the endorsement would result only in a delay of entertaining the application for refund and in which case, the affected party would only be the assessee (DTA supplier) and the interest of the Department is not going to be affected in any way. Allowing the writ petition, the Court observed that the Officer, who is processing the refund, should be concerned only about the aspect as to whether the goods have reached SEZ zone and whether tax for such entry has been remitted. It may be noted that the High Court also stated that the delay in obtaining the endorsements, or mistake, if any, in such endorsements are all technical irregularity and so long as the signature is not doubted, the petitioner cannot be penalized for the actions of AO. Further, the Court also observed that the requirement of use only in authorised operations in SEZ, was incorporated in Section 16 only prospectively from 1 October 2023. [*Lenovo (India) Pvt. Ltd.* v. *Joint Commissioner* – (2023) 12 Centax 230 (Mad.)]

GST Council cannot determine classification of goods – Flavored milk made from dairy milk is not 'beverage containing milk' under Heading 2202

The Single Bench of the Madras High Court has held that the function of the GST Council is not to determine the classification of goods under the provisions of the Customs Tariff Act, 1975. Finding that the GST Council gave a wrong recommendation in respect of classification of flavored milk, the High Court also held that the GST Council cannot determine the classification. The Court in this regard observed that determination of classification does not fall within the preserve of the GST Council, and that it ought to have been independently determined by the Assessing Officer. The High Court stated that as long as the Customs Tariff Act, 1975 is adopted for the purpose of interpretation of Notification No.1/2017-CT(Rate), classification has to be strictly in accordance with the classification under Customs Tariff Act, 1975. It also noted that the power of the GST Council is merely recommendatory.

The High Court also held that flavored milk made from diary milk is classifiable under Heading 0402 of the Customs Tariff Act, 1975 and not under Heading 2202 *ibid*. It was held that such product would therefore be liable to Central GST at 2.5% in terms of Entry 8 to First Schedule to Notification No.1/2017-CT(Rate) and not at 6% under Entry 50 to Second Schedule to the said notification. The Court observed that the expression 'Beverage containing milk' in sub-heading 2202 90 can be identified only as specie of 'Other Non-Alcoholic Beverage' in the said sub-heading. Relying on

Chapter Note 3 to Chapter 22, according to which the term 'non-alcoholic beverages' means beverages of an alcoholic strength by volume not exceeding 0.5% vol., the High Court opined that 'beverages containing milk' has to necessarily contain alcohol of the specified strength. According to the Court, therefore, 'flavored milk' made from dairy milk from milch cattle/diary animals cannot come within the purview of Chapter 22.

Further, applying the principle of '*noscitur a sociis*', the Court held that the expression 'Beverage containing milk' in sub-heading 2202 90 30 can include only such beverage containing plant/seed based milk. Reliance was also placed on the provisions of the Food Safety and Standards Act, 2006 and the definition of 'milk' in Food Safety & Standards (Food Products Standards & Food Additives) Regulations, 2011. It may be noted that the High Court was also of the view that the notifications issued under Sections 4A, 5A and 11C of the Central Excise Act, 1944, which classified 'Flavored Milk' / 'Flavored Milk of Animal Origin' as 'Beverage Containing Milk', were erroneous, and that the classification adopted in those notifications is not relevant for determining correct classification under GST regime. [*Parle Agro Pvt. Ltd.* v. *Union of India* – (2023) 12 Centax 199 (Mad.)]

Inspection and affiliation fees are not covered under certain exempt 'education services' – GST liable

The Telangana High Court has held that under the taxing law, unless there is a specific exemption granted specifically on inspection fees and affiliation fees, the assessee (colleges/educational institutions paying these fees to universities) cannot be permitted to claim exemption drawing an inference of the affiliation and inspection fees being part of the Notification No.12 of 2017-Cental Tax (Rate). The Court also relied upon clause (4) of the Circular dated 17 June 2021, and further noted that the said notification does not deal with the services rendered by the university to the educational institutions and not specifically exempt said services. It may be noted that the Court was also of the view that such fees cannot also be inter-linked to the curriculum which is undertaken by the educational institutions and the admissions derived therefrom. It, in this regard, observed that the admission and the services rendered by the educational institutions to the students, the faculty and the staff are all services rendered subsequent to the affiliation. Karnataka High Court decisions in the cases of *Rajiv Gandhi University of Health Sciences* [W.P.No.57941 of 2018] and *Bangalore University* [W.P.No.112 of 2019], were distinguished. [*Care College of Nursing* v. *Kaloji Narayana Rao University of Health Sciences* – 2023 VIL 738 TEL]

Exemption available to contractor cannot be extended to sub-contractor – Both constitute independent supplies

The Telangana AAR has held that the supply of works contract services by a contractor and procurement of works contract services by it constitute two independent taxable events under the CGST Act, and that an exemption extended to a contractor supplying works contract services is not applicable to procurement of works contract. The Authority was of the view that the supply of services in GST regime by a sub-contractor to a main

contractor is a distinct taxable event. The issue before the AAR was whether the supply of services by the Applicant (sub-contractor) to the principal contractor is covered under Entry 3A of Notification No. 12/2017-Central Tax (Rate) to claim exemption on GST payable. The principal contractor was under an operation and maintenance contract with the State Government in respect of water pipelines for providing drinking water to certain villages and districts. [In RE: *Immense Construction Company* – 2023 (11) TMI 592- AAR, TELANGANA]

Canteen and transportation services provided to employees when liable to GST

The Telangana AAR has held that canteen services and transportation facilities provided to employees in terms of employment agreement which is in the nature of perquisites will not be subject to GST. The AAR was however of the view that if the Applicant makes taxable supply of such canteen services and transportation facilities to employees by charging consideration for the purpose of its business, instead of providing them as a perquisite, the same will be subject to GST. Further, the Authority has also ruled that the ITC in respect of canteen services shall be available, in case if it is obligatory for the employer to provide the same to its employees under the Factories Act, 1948. According to the AAR, ITC in respect of transportation facilities is ineligible under Section 17(5)(g) of the CGST Act, 2017, as said facility is used for personal consumption or comfort of employees. [In RE: *Kirby Building Systems & Structures India Private Limited* – 2023(11) TMI 658- AAR, TELANGANA]

Rate revision for works executed before 1 July 2017 – Issuance of invoice

In a case involving rate revision in 2021 in respect of works contract executed from September 2010 till June 2017, the Telangana AAR has held that the consideration received by the Applicant-assessee for the work executed by him prior to the appointed day, i.e., 1 July 2017, will fall under Section (142)(2)(a) of the CGST Act, 2017 and therefore, the time of supply will be the date on which such consideration is received as enumerated under Section 13(c)(a). On the question of how to issue a tax invoice in this scenario, the AAR ruled that the applicant should issue a supplementary invoice or payment debit note, within thirty days of such price revision and such supplementary invoice or debit note shall be deemed to have been issued in respect of an outward supply made under the GST Law. [In RE: *Jaiprakash Associates Limited* – 2023 (10) TMI 471-AAR, TELANGANA]

Gold coins and white goods provided to dealers for achieving certain targets is 'supply' – ITC is not restricted as gift, and there is no permanent transfer of business assets

The Applicant was providing gold coins and white goods to dealers who have achieved the stipulated lifting of the material/purchase target under the promotional schemes. The Telangana AAR has held that ITC in respect of gold coins and

white goods would not be restricted as gifts. The AAR also held that the instant transaction is not permanent transfer or disposal of business assets by the Applicant, where ITC has been availed on such assets. The Authority has also held that the Applicant's obligation to issue gold coins/ white goods to the dealers/ customers upon achieving certain targets would be regarded as 'supply' under Section 7 of the CGST Act. According to the Authority, there is supply of goods to the dealers for consideration and the consideration is the monitory value of the "act" of attaining a level of business indicated in the incentive scheme. The AAR in this regard observed that the Applicant is inducing his dealers / stockiest to attain a particular level of business. [In RE: *Orient Cement Limited* – 2023 (10) TMI 472-AAR, TELANGANA]

Customs

Notifications and Circulars

- Postal exports – Authorization of 170 additional booking post office under the Postal Export (Electronic Declaration and Processing) Regulations, 2022
- Courier Shipping Bills – Provision introduced for advance assessment
- Sugar exports – Restrictions extended beyond 31 October 2023
- Onion exports exempted from export duty but Minimum Export Price effective from 29 October

Ratio decidendi

- EPCG Scheme – Spares can be imported for pre-production purposes also – CESTAT Kolkata
- Valuation – Effect of discharge of service tax on import of designs and drawings – CESTAT Kolkata
- Valuation – Appeal against enhanced value maintainable even when price initially accepted in B/E or letter – CESTAT Ahmedabad
- MEIS benefit on flexible intermediate bulk containers – Retrospective withdrawal from 7 March 2019 by Public Notice dated 29 January 2020 is not correct – Delhi High Court
- Description of goods as 'used' when machine used only for trial run, when correct – CESTAT Ahmedabad
- Customs assessing authority is empowered to make assessment regarding claim of exemption from IGST – Kerala High Court
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- ASEAN FTA benefit not deniable when invoice raised by third-party country or for minor discrepancies in invoice number mentioned in the CoO certificate – CESTAT Chennai
- Drawback – Delay in realisation of export proceeds is procedural lapse – CESTAT Prayagraj
- Transfer Door Color Strip, classifiable under TI 3919 90 90, is eligible for benefit of Notification No. 57/2017-Cus. (Sl. No. 9) – CESTAT Ahmedabad
- Clear Float Glass is classifiable under TI 7005 10 90 and not under TI 7005 29 90 – CESTAT Kolkata
- Goods used for positioning of patients on X-ray machines covered under Heading 9022 – CESTAT Ahmedabad

Notifications and Circulars

Postal exports – Authorization of 170 additional booking post office under the Postal Export (Electronic Declaration and Processing) Regulations, 2022

The CBIC has issued Circular No. 27/2023-Cus. dated 1 November 2023 notifying the Office Memorandum (CF-4/2/2020-CF dated 11 October 2023) issued by Department of Posts, Ministry of Communication, which has authorized 170 additional booking post offices and their Foreign Post Offices ('FPOs') for electronic filing of Postal Bill of Export ('e-PBE') and acceptance of international mail articles booked through Dak Ghar Niryat Kendra ('DNK') portal. The Circular has been issued in order to facilitate smooth implementation of Postal Export (Electronic Declaration and Processing) Regulations, 2022, issued *vide* Notification No. 104/2022-Cus. dated 9 December 2022. It also lists all booking post offices and the corresponding foreign post offices.

Courier Shipping Bills – Provision introduced for advance assessment

The CBIC has provided for advance assessment of Courier Shipping Bills on the Express Cargo Clearance System ('ECCS'). Further, an Advisory No. 11/SYS/WZU/2023 dated 19 October 2023 has also been issued by DG (Systems), according to which suitable modifications have been made in the ECCS export workflow. The Courier Shipping Bills marked for assessment will be available in advance to the assessing officers before physical arrival of the export consignment at the ICT. CBIC Circular No. 28/2023-Cus. dated 8 November 2023 has been issued for the purpose.

Sugar exports – Restrictions extended beyond 31 October 2023

DGFT has partially modified Notification No. 40/2015-20 dated 28 October 2022 and has extended the restrictions on export of sugar (raw sugar/white sugar/refined sugar and organic sugar) under HS codes 1701 14 90 and 1701 19 90, beyond 31 October 2023 till further orders. It may be noted that the restriction is not applicable on sugar being exported to European Union and United States of America under CXL and TRQ quota. DGFT Notification No. 36/2023 dated 18 October 2023 has been issued for the purpose.

Onion exports exempted from export duty but Minimum Export Price effective from 29 October

The Indian Ministry of Finance has, with effect from 29 October 2023, removed export duty on export of onions covered under

sub-heading 0703 10 of the Customs Tariff Act, 1975. It may be noted that export duty @ 40% was imposed on 19 August 2023, when the Second Schedule to the Customs Tariff was also amended to prescribe a Tariff rate of 50% on export of onions. Notifications Nos. 61 and 62/2023-Cus., both dated 28 October 2023, have been issued for this purpose. However, a condition of Minimum Export Price of USD 800 FOB/MT has been imposed on export of onions falling under HS Code 0703 10 19. As per DGFT Notification 45/2023, dated 23 November 2023, this condition will be applicable till 31 December 2023.

Ratio Decidendi

EPCG Scheme – Spares can be imported for pre-production purposes also

The CESTAT Kolkata has allowed assessee-importer's appeal in a case where the Department had denied benefit of EPCG scheme when spares were imported under the scheme which according to the Department were required only subsequent to installation of capital goods. The Tribunal in this regard observed that assemblies, sub-assemblies, components, sub-components were allowed as spares under the Foreign Trade Policy at Para 9.57, and that as per Para 6 of 5.1 of FTP, capital goods include spares. According to the Tribunal, spares can thus be imported for pre-production purposes also. The Tribunal also noted that the assessee had provided the details of spares to the DGFT for getting Discharge Certificate and the DGFT was satisfied with the imports made. The Tribunal held that when FTP allows such imports under EPCG, Customs has no authority to question same. [*Tata Steel Ltd.* v. *Commissioner* – 2023 VIL 1176 CESTAT KOL CU]

Valuation – Effect of discharge of service tax on import of designs and drawings

In a case where service tax was discharged on import of designs and drawings and the same was accepted by the Department without questioning the service tax paid, the CESTAT Kolkata has held that the Department cannot term the same contract items as goods so as to demand customs duty. The Revenue department had, based on assumption, alleged the importer had initially envisaged a single contract but in order to evade customs duty, the contract was divided into several sham contracts with a view to split the consideration for supply of equipment into designs

and drawings and other post importation activities. Allowing assessee's appeal, the Tribunal noted that even at the stage of pre-first offer, the clear demarcation of service, purchase, scope of work was available at all stages. The Tribunal hence concluded that the Department had built the case purely on presumptions and assumptions, without actually verifying the documentary evidence. Further, observing that the issue involved was valuation and not of non-fulfilment of export obligation under EPCG, for which bond was provided by the importer, the Tribunal also held that the demand was beyond even the extended period. [*Tata Steel Ltd.* v. *Commissioner* – 2023 VIL 1176 CESTAT KOL CU]

Valuation – Appeal against enhanced value maintainable even when price initially accepted in B/E or letter

The CESTAT Ahmedabad has rejected the contention of the Revenue department that by accepting the assessable value and not asking for the speaking order, the value assessed by the assessing officer attains finality and the assessee-importer is precluded from contesting the same. The Commissioner (Appeals) had dismissed the appeals earlier on grounds that since the assessee had accepted the value before payment of duty, it had no *locus standi* to contest the same subsequently. Allowing assessee's appeal, the Tribunal observed that re-assessment under Section 17 of the Customs Act, 1962 has necessarily to follow the statutory provisions under Section 14 and the Valuation Rules, and that mere acceptance of price cannot justify the re-determined value which is unlawful *ab-initio*.

It may be noted that the Tribunal also stated that mere acceptance to pay the redetermined value in a letter or Bill of Entry has no statutory force and cannot act as estoppel against the importer for further legal proceedings. The Tribunal however noted that there would be difference however in case of acceptance of undervaluation which is part of any investigation and has been recorded in a statement under Section 108. Relying on Delhi High Court decision in the case of Cisco Systems, the Tribunal also noted that the very act of filing appeal is a protest against the duty as assessed. [*Bhuria Overseas* v. *Commissioner* – 2023 VIL 1121 CESTAT AHM CU]

MEIS benefit on flexible intermediate bulk containers – Retrospective withdrawal from 7 March 2019 by Public Notice dated 29 January 2020 is not correct

The Delhi High Court has held that retrospective withdrawal of the Merchandise Exports from India Scheme (MEIS) benefits on flexible intermediate bulk containers with effect from 7 March 2019, through a Public Notice dated 29 January 2020 is not correct. Relying upon Supreme Court decision in the case of *Kanak Exports* and various other decisions, the Court was of the view that there is a formidable legal argument against the validity of retrospective amendments unless expressly permitted by the governing statute. The Court further noted that paragraph 1.02 of the Foreign Trade Policy (FTP) which recognises the Central Government's discretion to amend the FTP in public

interest, does not suggest that these amendments can retrospectively reshape prior understandings or actions.

Holding that withdrawal of the benefit was effective prospectively only, the Court also rejected the DGFT's argument emphasizing the widespread publicity of the MEIS's discontinuation prior to the actual notification. Similarly, argument that the simultaneous availability of both MEIS and RoSCTL schemes would result in an undue double benefit for the exporter, was also found to be lacking substance as the RoSCTL rate for FIBC bags was stipulated as "Nil". The High Court was also of the view that equating the two schemes – MEIS and RoSCTL is erroneous since the claims under each scheme are distinct, separate, and cannot be juxtaposed or adjusted against one another. Further, according to the Court, given that the entire MEIS scheme faced scrutiny at the WTO, singling out FIBCs from export incentives retrospectively, while retaining benefits for other products, especially those under Chapters 61 to 63, exhibits arbitrariness and discrimination. [*Indian Flexible Intermediate Bulk Container Association* v. *DGFT* – (2023) 12 Centax 191 (Del.)]

Description of goods as 'used' when machine used only for trial run, when correct

The CESTAT Ahmedabad has set aside the confiscation and penalty on charge of misdeclaration, in case of import of machine with a description as 'used' goods. The description given by the importer in the bill of entry was disagreed by the Department through various opinions of experts, as well as committee specifically constituted by the Department because there were varied opinions, at various stages specially regarding the 'used' nature of the goods. The Tribunal in this regard was of the view that when there is conflict in the departmental examination reports of the machine being new or used to some extent in trial run, the benefit of doubt must go in favour of the importer. According to the Tribunal, even if the use was for trial run, as mentioned in some reports, same is sufficient to consider that the machine was used and therefore the description given by the assessee in the bill of entry was correct. It may be noted that the valuation as arrived by the Department was accepted by the assessee in this case. [*Ferromatik Milacron India Pvt. Ltd.* v. *Commissioner* – TS 548 CESTAT 2023 (Ahd) CUST]

Customs assessing authority is empowered to make assessment regarding claim of exemption from IGST

The Kerala High Court has held that Section 28 of the Customs Act, 1962 is not only in respect of duty which means customs duty but, is in respect of duties which may be applicable on imported items/goods. In a case where the assessee-importer had claimed exemption from IGST on import of 'wet dates', the Court also noted that Section 2(2) of the Customs Act empowers the assessing authority to determine the dutiability of any goods and the amount of duty/tax, cess or any sum so payable under the Customs Act or the Customs Tariff Act, 1975 or under any other law. [*Ajwa Dry Fruit Impex* v. *Union of India* – 2023 VIL 768 KER]

Non-compliance of Standing Order is only a procedural lapse – Letter signed by authorised customs agent must be taken as signed by importer

The CESTAT Ahmedabad has held that non-compliance of a standing order is only a procedural lapse. Allowing the appeals of the importer, the Tribunal held that if all other conditions such as import from the manufacturer are satisfied, then mere procedure of prior written approval (as directed by a standing order issued by Commissioner of Customs) cannot come in the way of allowing the 10% variation from the Platts rate to arrive at the valuation of plastic goods. The importer had earlier submitted the letter seeking prior approval on its letter head but the same was signed by its customs agent. The letter was rejected by the Department observing that the signatures were of unauthorised person. The Tribunal in this regard also observed that the letter signed by authorised customs agent of the importer must be considered as submitted by the importer only. [*R Padmasanan* v. *Commissioner* – 2023 (11) TMI 571-CESTAT Ahemdabad]

ASEAN FTA benefit not deniable when invoice raised by third-party country or for minor discrepancies in invoice number mentioned in the CoO certificate

In this case, the issue pertained to rejection of benefit under Preferential Trade Agreement on import of Steaming Non-cooking coal. The CESTAT, Chennai observed that the Preferential Trade Agreement (ASEAN FTA) allows invoices to be issued by a third-party country hence the denial of benefit on the ground that invoice was raised by the third-party country was incorrect. Further, difference in the invoice number mentioned in the Country-of-Origin Certificate as compared to invoice issued by the supplier was due to the fact that the invoices were split into two for the convenience of the quantity of the goods exported and for issuing the Country-of-Origin Certificate respectively. According to the Tribunal, these discrepancies do not have any bearing to the benefit under the Preferential Trade Agreement. [*TCP Limited* v. *Commissioner* – 2023 (11) TMI 530-CESTAT CHENNAI]

Drawback – Delay in realisation of export proceeds is procedural lapse

The CESTAT Allahabad has held that once the fact of realisation of export proceeds is not disputed, there cannot be any reason for denial of substantiated benefit (of Drawback) to the exporter for the delay in realisation of such proceeds, which is nothing but a procedural lapse. Dismissing the appeal filed by the Department, the Tribunal relied upon various decisions of the Court/Tribunal while it held that procedural lapses are technical violations which should not come in the way of extending substantial benefit. [*Commissioner* v. *Abrar Karim* – 2023 (11) TMI 112-CESTAT Allahabad]

Transfer Door Color Strip, classifiable under TI 3919 90 90, is eligible for benefit of Notification No. 57/2017-Cus. (Sl. No. 9)

The CESTAT Ahmedabad has held that Transfer Door Color Strip' and 'Transfer Rear Door Color Strip' which are classifiable under Tariff Item 3919 90 90 of the Customs Tariff Act, 1975 are entitled for concessional rate of basic customs duty in terms of Notification No. 57/2017-Cus. (Sl. No. 9). The Tribunal in this regard rejected the contention of the Department that Serial No.9 of said notification is available only for goods meant for use in manufacture of cellular mobile goods and other electronic goods, and since the impugned consignment was meant for use in automobiles namely cars, the benefit of exemption is not available. The Tribunal was also of the view that denial of exemption was without any logic and was arbitrary. [*Ford India Pvt. Ltd.* v. *Commissioner* – 2023 TIOL 980 CESTAT AHM]

Clear Float Glass is classifiable under TI 7005 10 90 and not under TI 7005 29 90

The CESTAT Kolkata has held that Clear Float Glass, which is a non-wired glass, having microscopical layer of metal (tin), which is an absorbent layer as contemplated under Chapter Note 2(c) of Chapter 70 of the Customs Tariff Act, 1975, is correctly classifiable under Tariff Item 7005 10 90 and not under 7005 29 90. The Tribunal in this regard also observed that the goods imported were absorbent and had non-reflective layer. [*Bagrecha Enterprises Ltd.* v. *Commissioner* – 2023 (11) TMI 485-CESTAT Kolkata]

Goods used for positioning of patients on X-ray machines covered under Heading 9022

The CESTAT Ahmedabad has held that goods which are primarily used for positioning of the patient and his/her body parts on various machines including X-ray machines during the radiation treatment for cancer, are to be classified under Heading 9022 as accessories/apparatus used for X-ray or radio therapy. The Tribunal in this regard relied upon Chapter Note 2(b) and HSN Explanatory Note 4. It was also of the view that Heading 9018 is a general heading and has *prima facie* no connection with the items mentioned. Supreme Court decision in case of *Insulation Electrical (P) Ltd.* [2008 (224) ELT 512 (SC)] was held as not applicable here. [*Scan O Plan Systems* v. *Commissioner* – 2023 VIL 1222 CESTAT AHM CU]

Central Excise, Service Tax and VAT

Ratio decidendi

- Validity of audit and inspection under Service Tax Rule 5A(2) – Delhi HC refers issue to Larger Bench
- Export of services – Routing of consideration through a third-party is not material – CESTAT Chandigarh
- Permanent transfer of lease hold rights is not 'sub-lease' – CESTAT Kolkata

Ratio decidendi

Validity of audit and inspection under Service Tax Rule 5A(2) – Delhi HC refers issue to Larger Bench

Observing that there is apparent conflict between the decisions in *Travelite (India)* v. *Union of India & Ors* [2014 SCC Online Del 3943] and *Mega Cabs Private Limited* v. *Union of India & Ors* [2016 SCC Online Del 3630] *vis-à-vis* the decision in *Aargus Global Logistics Private Limited* v. *Union of India & Anr* [2020 SCC Online Del 2295], which was subsequently affirmed in *Vianaar Homes Private Limited* v. *Assistant Commissioner, Central Goods and Services Tax & Ors* [2020 SCC Online Del 1394], the Division Bench of the Delhi High Court has referred the question of validity of Rule 5A(2) of the Service Tax Rules, 1994 to a Larger Bench of the Court. The High Court in this regard observed that this position of uncertainty cannot be permitted to prevail merely because appeals in respect of *Travelite* and *Mega Cabs* are pending before the Supreme Court. Further, according to the Court, declaration of invalidity as rendered by it in *Travelite* and *Mega Cabs* does not stand effaced merely because those judgments were stayed by the Supreme Court. The Court was of the view that the stay order passed by the Supreme Court would not, in any case, revive the provision itself. [*KTC (India) Pvt. Ltd.* v. *Commissioner* – (2023) 12 Centax 81 (Del.)]

Export of services – Routing of consideration through a third-party is not material

The CESTAT Chandigarh has held that it cannot be said that service is not used outside India just because the payment is made to a third-party. According to the Tribunal, as long as the service is enjoyed by the contracting party, routing of payment or consideration through a third-party does not alter the position. In a case where the assessee-respondent was rendering services with respect to clinical trials for the overseas company located in U.K., who undertook further research on the basis of the reports submitted by the assessee, the Tribunal was of the view that it is not correct to say that the use of services was in India. Dismissing Department's appeal, the Tribunal observed that the services rendered by the assessee were used by the overseas company who were benefitted by the same. [*Commissioner* v. *Glaxo Smithkline Asia Pvt. Ltd.* – 2023 VIL 1064 CESTAT CHD ST]

Permanent transfer of lease hold rights is not 'sub-lease'

The CESTAT Kolkata has held that permanent transfer of the lease hold rights by the assessee to the other business entities is not 'sub-lease' to bring it under the ambit of levy of service tax.

According to the Tribunal, it can be termed as 'sale of leasehold rights' which is not liable to service tax. The assessee had relinquished their leasehold right on certain portion of the land and permanently assigned the same on long term lease in favour of the few companies *vide* different Deeds of Assignment. The issue before the Tribunal was whether this permanent assignment of land was covered under the definition of 'Renting of Immovable Property' as defined in Section 65(105)(zzzz) of the Finance Act,1994, after the amendment, with effect from 1 July 2010.

Allowing the appeal of the assessee, the Tribunal observed that the assessee, who had himself leased the land from the State Government, was not having any reversionary right of the property after the permanent transfer of their leasehold rights, and that after such transfer, the rent was payable by the other entities directly to the State Authorities and not to the assessee. The Tribunal noted that once the assessee executed the Deed of Assignment in favour of other entities, the 'Title' of the land which was assigned to them was transferred in the name of the said parties, and subsequently, lands were also mutated in the name of the respective parties. It was also observed that the amount received as one-time payment as 'premium or Salami' by the assessee was meant for the developmental activities undertaken by them. Department's plea that the assessee exercised some sort of control even after assignment of the land, as they reserved certain rights even after the assignment, was also rejected. The Tribunal noted that this was only to honour the commitments as agreed with the State Government in the original lease deed. [*Luxmi Township Ltd.* v. *Commissioner* – 2023 VIL 1087 CESTAT KOL ST]

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