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Article

Intermediary services - Taxability of cross-border services after withdrawal of circular

By **Satya Sai and Ranadeep Voriganti**

Cross-border supplies (import and export) of goods and services generally entail the presence of an intermediary. Such an intermediary is usually a subsidiary of the foreign principal which undertakes facilitation as well as provision of various services on behalf of the principal. Each such case involves provision of two independent supplies, i.e., one from the principal to the ultimate customer and another from the agent to the principal.

The concept of intermediary is old, which was originally introduced in the service tax law in July 2012 when the negative list scheme was introduced. Since then the industry and its members who are dealing in cross border transactions are struggling with litigation on the question as to whether the said services provided to overseas entities is an export of service or intermediary service. The definition of intermediary under GST law and under erstwhile Service Tax law is identical.

With the advent of modern technologies and increased requirements of businesses, there are growing opportunities in India to provide back office services such as administrative, accounting, customer service, technical support services, etc., by Indian entities to many overseas clients and in a few cases, to its parent company located outside India. India is a hub for technical and software personnel and, the foreign companies are outsourcing back office operations to Indian entities as a cost cutting measure.

In view of the above background, let us try and understand this very taxing concept of intermediary service under GST.

Section 2(13) of the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as the '**IGST Act'**) provides that an "Intermediary" means *a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account*.

The aforesaid definition of 'intermediary' emphasizes the following points:

i. An intermediary must be a 'broker' or an 'agent' or 'any other person', by whatever name called;

ii. Who *arranges or facilitates* the supply of goods or services or both or securities between two or more persons;

iii. But does not include a person who supplies such goods or services or both or securities *on his own account*.

Thus, an intermediary is a person who merely arranges or facilitates supply of goods or services or both, belonging to the other person. A person can arrange or facilitate supply of goods or services belonging to some other person ('principal'), only when he has been authorized by the principal. An intermediary cannot alter the nature or value of supply, which he facilitates on

behalf of his principal. The intermediary service providers generally receive consideration in the form of commission or brokerage in respect of the services rendered by them. However, the person who supplies goods or services or both on his own account (on principal to principal basis) is not an intermediary. Under GST law, if supplier qualifies as an intermediary, then his services would not qualify as an export in terms of Section 13(8) of the IGST Act. Consequently, he would not be eligible for export benefits. In such a case, entities, being intermediaries, may be liable to pay GST at the rate of 18% despite earning foreign exchange.

In the case of *V Serv Global Private Limited*[1], the Maharashtra Authority for Advance Ruling ('AAR') has held that the back-office support services (liaising with client's buyers/suppliers with respect to delivery, transportation of goods and settlement of payment between them etc.,) provided to foreign clients are intermediary services as the applicant is arranging or facilitating the supply of goods between the overseas client and its customers. The applicant is not providing the goods or services to its client's buyers or its client's suppliers on his own account. The said ruling was upheld by the Appellate Authority for Advance Ruling (AAAR)[2] as well. This ruling indeed sparked the controversy in the industry.

The aforesaid ruling has undisputedly created serious concerns amongst several multinational companies engaged in providing back-end support services from India to overseas clients.

It is relevant to refer the case of *GoDaddy India Web Service Private Limited*[3] under **the** erstwhile service tax regime, wherein the applicant had entered into an agreement with the parent company (Godaddy US) for providing services viz., advising marketing situation prevailing in India, advising marketing staff of Godaddy US regarding events and places wherein advertisements can be displayed, supervising third party customer care services, taking part in seminars and events to spread awareness about Godaddy US. The Authority for Advance Ruling had held that the services proposed to be provided by the applicant were support services to marketing and applicant was not an intermediary.

However, there is a marked difference with respect to the scope of services agreed in the above two cases. In the case of *V Serv Global*, the scope included arranging certain services and also liaising with services providers whereas in the case of *Godaddy*, the applicant only provided support services relating to marketing like, brand promotion, etc.

Considering the confusion prevalent in the industry, CBIC issued a clarification vide Circular No. 107/26/2019-GST, dated 18 July 2019 elaborating the scope and implications of different scenarios under Information Technology-enabled Services ('ITeS'). The three scenarios discussed in the said circular are as follows:

Scenario	Clarification
1. The supplier of ITeS services supplies back end services (back office operations, call centres or contact centre services, payroll, support centres, etc.,).	The supplier of these services will not qualify as intermediary where these services are provided on his own account by such supplier.
2. The supplier of back-end services located in India arranges or facilitates the supply of goods or services or both by the client	The supplier of these services will fall under the ambit of intermediary as these services are merely for arranging or facilitating

[1] 2018-VIL-270-AAR
[2] 2019-VIL-39-AAAR
[3] 2016-VIL-08-ARA

located abroad to the customers of client. Such back-end services may include support services, during pre-delivery, delivery and post-delivery of supply.	the supply of goods or services or both between two or more persons.
3. The supplier of ITeS services supplies back end services on his own account along with arranging or facilitating the supply of various support services during pre-delivery, delivery and post-delivery of supply for and on behalf of the client located abroad. Here, the supplier is supplying two set of services, that is, ITeS services and various support services to his client or to the customer of the client.	Whether the supplier of these services would fall under the ambit of intermediary under sub-section (13) of section 2 of the IGST Act will depend on the facts and circumstances of each case keeping in view which set of services constitutes the principal / main supply.

An attempt was made by CBIC to address the issue by issuing the above circular, however, it can be observed from the Scenario 1, that the circular explains why ITeS services are not covered by intermediary services as these are the services provided on their own account. But in respect of Scenario 2, it failed to acknowledge that back-end services are also provided on their own account and are outside the purview of intermediary services. Further, in respect of Scenario 3, wherein supplier is providing services on his own account as well as facilitates other services, the circular does not clarify either way. It is left open to interpretation, therefore, it may eventually end-up in prolonged litigation. Thus, the Circular issued by CBIC kept the situation unsettled rather than settling it.

Due to the above reasons, the circular created more confusion than clarity. Facing backlash from the various members of industry, instead of amending the circular, the CBIC has chosen to withdraw the Circular No. 107 /26/2019-GST dated 18 July 2019, *ab-initio*, vide Circular No. 127/46/2019-GST dated 04-12-2019.

On one hand, it is well settled fact that circulars are not binding on the courts and on the other hand, withdrawal of the circulars like in the present case by CBIC would lead the industry nowhere, but to confusion. Therefore, whether members of industry can take tax positions based on the circulars issued by the CBIC is itself a big question now.

It is imperative for the Government to ensure that companies providing back office support services remain globally competitive. Therefore, in order to avoid unwarranted litigation and financial repercussions on Indian industries, we may expect the much needed clarity from the Government on this issue in the coming Union Budget 2020-21.

Be that as it may, it is essential for all members of industry who are providing services to its parent companies or to foreign clients on principal to principal basis, to ensure that the agreements or contracts entered with the foreign clients clearly describe the nature and scope of service from this perspective since, under the current GST regime, the agreements between the parties have paramount importance with respect to payment of taxes.

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Goods and Services Tax (GST)

Notifications and Circulars

Central Goods and Services Tax Rules, 2017 – First amendment of 2020: Rules 117(1A) and 117(4) of the CGST Rules, 2017 have been amended with effect from 1-1-2020 to provide that in cases where the registered person could not submit Tran-1 or Tran-2 on account of technical difficulties, they can submit Tran-1 by 31-3-2020 and Tran-2 by 30-4-2020. These dates were 31-12-2019 and 31-1-2020 earlier. Further, Forms REG-01, GSTR-3A and INV-01 have also been revised to make certain changes. While Form REG-1 will now have an additional field pertaining to "Period of Validity" as per approval order in case of SEZ Unit or Developer, Form GSTR-3A pertaining to 'Notice to return defaulters under Section 46' has been amended to state that in case of failure to furnish return within 15 days of notice, tax liability "may" be assessed under Section 62 (best judgement assessment). The word used was "will", earlier. Further, a disclaimer has been added to Form GSTR-3A that this is a system generated notice and does not require signature. Form INV-1 has been substituted and is similar to E-invoice schema earlier uploaded by GSTN on the common portal, except for addition of certain mandatory and optional details like Invoice Sub Type Code, Billing Trade Name, and Shipping to (Trade Name) details which will be mandatory. Notification No. 2/2020-Central Tax, dated 1-1-2020 has been issued for this purpose.

Central GST Act, 2017 - Amendments by Finance (No.2) Act, 2019 effective from 1-1-2020: Certain amendments as made by the Finance (No. 2) Act, 2019 have also been brought into force with effect from 1-1-2020. However, the Notification No. 1/2020-Central Tax which prescribes 1st of January 2020 as the date for certain amendments, excludes many amendments as made by the Finance (No.2) Act. Effectively, amendments relating to National Appellate Authority for Advance Ruling, furnishing of return under Section 39 as per new return procedure, interest chargeability on net cash tax liability under Section 50, and disbursement of refund of State tax by the Government under Section 54, have not yet come into force. Further, while amendments have been made in Sections 10, 22, 25, 44, 49, 52, 168 and 171, new Sections 31A (Facility of digital payment to recipient) and 53A (Transfer of certain amounts to State/Union Territory tax account) have been inserted in the CGST Act, 2017.

Exemption to upfront amount for long-term lease – Conditions imposed: Sl. No. 41 of the exemption Notification No. 12/2017-CT (R) provides exemption to upfront amount payable in respect of service by way of long-term lease of 30 years or more of industrial plots or plots for development of infrastructure for financial business, provided by the State Government Industrial Development Corporations or Undertakings or by any other entity having 50% or more ownership of Central Government, State Government, Union territory to the industrial units or the developers in any industrial or financial business area. The notification has now been amended by Notification No. 28/2019-Central Tax (Rate), dated 31-12-2019 to reduce the percentage criterion of government ownership of such entities from 50% to 20%. Further, amendment has also been made to add certain conditions that the leased plots shall be used

only for the purpose for which they are allotted and that State Government shall monitor and enforce the above conditions as per the order issued by State Government in this regard.

Refund of IGST on exports – Standard Operating Procedure for verification specified: In cases involving IGST refund, certain exporters are taken for further verification after applying stringent risk parameters-based checks driven by rigorous data analytics and artificial intelligence tools. CBIC has now prescribed Standard Operating Procedure for verification of exporters claiming such refund. CBIC Circular No. 131/1/2020-GST in this regard notes that while the verifications are caused to mitigate risk, it is necessary that genuine exporters do not face any hardship. The Circular advises that the exporters whose scrolls have been kept in abeyance for verification would be informed at the earliest. The exporters have to submit the information, as specified in the Circular, to the jurisdictional CGST authorities for verification. While the verification must be completed within 14 working days of furnishing of information, the Circular also provides for escalations (first to jurisdictional Pr. Chief Commissioner/Chief Commissioner of Central Tax and then to CBIC) if the timelines are not followed.

RCM for renting of motor vehicle: Notification No. 13/2017-Central Tax (Rate) has been amended to provide that reverse charge mechanism (RCM) shall be applicable on the service by way of renting of any motor vehicle designed to carry passengers where the cost of fuel is included in the consideration charged from the service recipient only if the supplier is other than a body corporate, does not issue an invoice charging GST @12% from the service recipient, and supplies the service to a body corporate. Notification No. 29/2019-Cetnral Tax (Rate), dated 31-12-2019 has been issued in this regard. It may however be noted that according to Circular No. 130/2019-GST, dated 31-12-2019, issued to clarify the amendment, present amendment is merely clarificatory in nature and therefore shall apply for the period from 1-10-2019 to 31-12-2019 also.

GST rates revised on woven and non-woven bags: Rate of GST on woven and non-woven bags and sacks of polyethylene or polypropylene strips or the like, whether or not laminated, of a kind used for packing of goods (covered under HSN 3923 or 6305), and on flexible intermediate bulk containers (FIBC - covered under HSN 6305 3200) has been revised to 18% from 12%. The change, effective from 1-1-2020, puts at rest the dispute relating to classification of woven & non-woven bags made of polyethylene or polypropylene. Notification No. 27/2019-Central Tax (Rate), dated 30-12-2019 has been issued for this purpose.

Revisional authorities under CGST Section 108 notified: Principal Commissioner or Commissioner of Central Tax has been notified as the Revisionary Authority under Section 108 of the Central Goods and Services Act, 2017 for the decisions or orders passed by the Additional or Joint Commissioner of Central Tax. Further, according to Notification No. 5/2020-Central Tax, dated 13-1-2020, Additional or Joint Commissioner of Central Tax are authorized as Revisionary Authority for decisions or orders passed by the Deputy Commissioner or Assistant Commissioner or Superintendent of Central Tax.

Ratio decidendi

No IGST on ocean freight for import of goods – Sl. No. 9(ii) of Notification Nos. 8/2017-Integrated Tax (Rate) and Sl. No. 10 in 10/2017-Integrated Tax (Rate) held ultra vires IGST Act: The Gujarat High Court has set aside the levy of IGST on ocean freight in case of import of goods on CIF basis. It held that Sl. No.

9 in Notification No. 8/2017-Integrated Tax (Rate) and Sl. No. 10 in Notification No. 10/2017-Integrated Tax (Rate), levying tax on supply of service of transportation of goods by a person in a non-taxable territory to a person in a non-taxable territory from a place outside India up to the customs station of clearance in India and making the importer liable for paying such tax, are ultra vires the provisions of the IGST Act. Observing that IGST was already levied and collected on import of goods on the entire value which includes the ocean freight, the Court termed the separate tax on the services components (freight) as erroneous misconception. Elaborating further, it noted that the importer while importing goods on CIF basis, neither availed the services of transportation of goods in a vessel nor he was liable to pay the consideration of such service, and hence the writ-applicant (importer) was not the 'recipient' of the transportation of goods in a vessel service as per Section 2(93) of the CGST Act. It was also observed that Section 5(3) of the IGST Act does not further provide that the Government can specify the person, other than the recipient of supply, as liable to pay tax. The Court was also of the view that the said service was neither an inter-state supply nor an intra-state supply, and that Section 7(5)(c) of the IGST Act is also not applicable to the cases on hand. Observing that the entire transaction took place outside the taxable territory, it was held that the mere fact that the transportation of goods terminates in India, will not make such supply of transportation of goods as taking place in India. The High Court also held that double taxation, by way of delegated legislation, when the statute does not expressly provide, is not permissible. [*Mohit Minerals Pvt. Ltd.* v. *Union of India* - R/Special Civil Application No. 726 of 2018 and Ors., decided on 23-1-2020, Gujarat High Court]

Composite supply – Independent supplies by two different taxable persons cannot be clubbed: Kerala High Court has held that the concept of enhancement of utility of the instrument through the supply of reagents/calibrators/disposables, while is relevant for the purposes of valuation of the supply of instruments, it cannot be imported into the concept of composite supply under the GST Act. The AAR and AAAR had in this case held that the placement of specified medical instruments in the premises of unrelated customers like hospitals, laboratories etc., for their use without any consideration, in the backdrop of an agreement containing minimum purchase obligation of products like reagents, calibrators, disposables etc. for a specified period constituted a "composite supply". Setting aside the rulings by AAR/AAAR, the Court noted that the supplies were made by two different taxable persons - the supply of instrument being by the assessee-petitioner and the supply of the reagents, calibrators and disposables being by his distributor, who purchased it from the assessee on principal to principal basis. The High Court was of the view that while clubbing of two independent supplies may be resorted to for the purposes of valuation of each of those supplies, there is no scope of clubbing of two independent supplies to notionally alter the nature of each of those supplies as they existed at the relevant point of time. It was also held that the supplies were not naturally bundled and supplied in conjunction with each other in the ordinary course of business. [*Abbott Healthcare Private Limited* v. *Commissioner* – 2020 VIL 08 KER]

Refund of IGST when higher drawback claimed wrongly refunded with interest: In a case where the exporter had wrongly claimed higher drawback on exports, but refunded it with interest later, the Madras High Court has allowed the benefit of refund of IGST. Department's plea

that the assessee having relinquished his right to get refund of IGST, he is not entitled to refund, was thus rejected. The High Court was of the view that Circular No. 37/18-Customs, dated 09-10-2018 cannot have an application in the present case as explanation of provisions of drawback has nothing to do with the IGST refund. It also held that circulars are issued only to clarify the statutory provision and it cannot alter or prevail over the statutory provision. Department had contended that the entire refund is system-managed and it cannot be manually operated, and that once the exporter draws higher duty drawback, the system automatically scrolls out IGST refund. [*Precot Meridian Ltd.* v. *Commissioner* - 2019 VIL 616 MAD]

Tran-1 – Proof of not being able to upload form due to technical glitches, not mandatory: In a case where the petitioner did not have any proof that they were unable to file the requisite GST Form Tran-1 due to non-functioning of GST portal, the Delhi High Court has held that the benefit of doubt can be given to him owing to similar complaints of GST portal not being accessible before the deadline. The High Court was of the view that it was not fair to expect that each person who was not able to upload the said form should have preserved some evidence of it such as by taking a screen shot, etc. It noted that many of the registered dealers/traders came from rural/semiliterate background, and that issuance of Notification No. 49/2019 itself emanates from the fact that the department recognized that registered persons were not able to upload the form due to glitches in the system. The Court directed the department to either open portal to enable petitioner to file Form TRAN-1 electronically or accept the same manually. [*A.B. Pal Electricals (P) Ltd.* v. *UoI* – 2020 VIL 06 DEL]

Tran-1 – Software systems must be in tune with law and not vice versa: In a case where the assessee could not transfer his credit accumulated before 1-7-2017 into the GST regime with effect from 1-7-2017 and was bound to pay tax in cash in respect of exports made in July and August 2017, Delhi High Court has allowed the refund of the said tax paid in cash. The Court in this regard noted that even the Form GST TRAN-1 was made available on the department's portal only from 25-8-2017. It observed that the failure of the department in first putting a workable system in place, before implementing the GST regime, reflects poorly on the concern that the department has shown to the difficulties that the trade faced throughout the length and breadth of the country. The High Court was of the view that the rights of the parties cannot be subjugated to the poor and inefficient software systems adopted by the department and that software systems must be in tune with the law, and not *vice versa*. [*Vision Distribution (P) Ltd.* v. *Commissioner* – 2019 VIL 626 DEL]

Tran-1 – Karnataka High Court allows filing of revised Tran-1 till 31-12-2019: Karnataka High Court has directed the department to permit the assessee-petitioners to file/revise the TRAN-1 either electronically or manually on or before 31-12-2019. The Court was of the view that the legitimate rights of petitioners to carry forward unutilized credit of duty/tax already paid cannot be denied on technicalities i.e. on the ground of limitation by framing rules when the same is absent in the Act. It also noted that the GST regime was new and that too in its transition period. The Court though took note of the fact that there was no explicit provision to permit filing of revised TRAN-1 at an extended period, it rejected the plea of the department observing absence of any specific time prescribed under Section 140 and in terms of the introduction of Section 117(1A) and 120A. It also observed that

under Section 172 of CGST Act, a suitable order can be passed for the purpose of removing the difficulty within a period of three years, if any difficulty arises in giving effect to any provisions of the Act. [*Asiad Paints Ltd.* v. *UoI* - 2019 VIL 598 KAR]

Confiscation notice under Section 130 when can be issued: Gujarat High Court has held that for the purpose of issuing a notice of confiscation under Section 130 of the CGST Act at the threshold, i.e., at the stage of Section 129 (detention / seizure) itself, the case has to be of such a nature that on the face of the entire transaction, the authority concerned is convinced that the contravention was with a definite intent to evade payment of tax. It however held that Section 130 can be invoked even in cases where the amount of tax and penalty is paid in terms of the provisions of Section 129 and goods have been released. The Court was also of the view that detention of goods on the ground that tax paid on the product was less, is not justified. It held that in such circumstances the inspecting authority is expected to alert the assessing authority to initiate appropriate proceedings, and that the process of detention of goods cannot be resorted to when the dispute is bona fide, especially concerning the exigibility of tax or the rate of tax. The Court also observed that both Section 129 and Section 130 are mutually exclusive and independent of each other. It noted that while Section 130 requires to clearly establish intent to evade, same is not required to be established in case of Section 129. [*Synergy Fertichem (P) Ltd.* v. *State of Gujarat* – 2019 VIL 623 GUJ]

Attachment of current account having debit balance merely ruins business: Punjab & Haryana High Court has held that attachment of "over cash credit" account, having debit balance, cannot be permitted at the stage of pending investigation. Observing that the power of attachment of bank account cannot be exercised as per whims and caprices of the Authority, the Court held that the Commissioner is bound to ensure that by attachment of property or bank account, interest of revenue is going to be protected. The Court was of the view that attachment of current account having debit balance does not protect interest of revenue, instead merely ruins the business of the assessee. It observed that in case a property is mortgaged with bank and the value of property is less than outstanding dues of bank, provisional attachment is meaningless and action remains only on paper. Gujarat High Court decision in the case of *Valerius Industries*, was relied upon. [*Bindal Smelting Pvt. Ltd.* v. *Additional Director General* – 2020 VIL 17 P&H]

No interest liability when IGST amount wrongly deposited as CGST: In a case where the assessee had wrongly deposited IGST as CGST, the Jharkhand High Court has quashed the letter saddling petitioner company with liability to pay short paid IGST along with interest. The High Court however directed the petitioner to deposit IGST and to claim refund of CGST or adjust the amount wrongly deposited under CGST head against future CGST liability. The Court found substance in the submission that by deliberately depositing cash in wrong electronic cash ledger, assessee could not have possibly derived any benefit and that confusion was conceivable due to initial stage of GST regime. It also observed that there was nothing on record to show that petitioner company had not acted in a *bona fide* manner. [*Shree Nanak Ferro Alloys (P) Ltd.* v. *UoI* – 2020 TIOL 128 HC JHARKHAND GST]

Anti-profiteering – Price reduction before roll out of GST is not passing of ITC benefit received after GST: In a case where assessee had reduced prices of constructed units in March 2017, i.e. much before roll out of GST, the

National Anti-profiteering Authority has observed that it was not possible that reduction was due to change in the tax laws which resulted in the benefit of ITC to the assessee. The Authority noted that the assessee had not produced any evidence to prove that the discount was computed by him on the basis of ITC availed by him. It held that there was no doubt that the said discount was given for commercial reasons. It observed that the assessee-respondent benefited from additional ITC of 4.52% as ITC percentage to total turnover in pre-GST period was 2.76% and in post GST it was 7.28%. The Authority also rejected the contention that profiteered amount computed by DGAP includes GST deposited by him in govt. account. It observed that had the assessee not collected additional GST, the buyers would have paid less price and by doing so he denied them the benefit of additional ITC which amounts to violation of Section 171. [*Shubhra Vipin Gajbhiye* v. *Pyramid Arcades (P) Ltd.* – 2020 VIL 04 NAA]

Anti-profiteering - Rebate and discounts cannot be treated as passing on benefit of ITC: NAPA has held that any amount passed on as discount cannot be treated as passing of benefit of additional input tax credit. The Authority was of the view that granting of rebates/discounts is the most prevalent practice followed in the construction industry to increase sales and hence said rebate cannot be equated with passing on of the benefit of ITC as per the provisions of Section 171(1) of the CGST Act, 2017. The Authority directed the assessee to return the profiteered amount to all the eligible flat buyers along with interest as it observed that the assessee had not submitted the details of the entries made in his books of account or cheques issued to the buyers or the copies of the tax invoices/demand letters or the acknowledgements made by his customers of having received the benefit of ITC due to implementation of the GST, in support of the contention that he has passed on the benefit of ITC. Assessee's claim that the methodology adopted was wrong, was rejected by NAA holding that profiteering has to be determined on the basis of the facts of each case and no mathematical straight jacket formula can be fixed for calculating the same. The NAA further held that it has power to 'determine' the methodology and not to 'prescribe' it and therefore, no set prescription can be laid while computing profiteering. [*Susheel Prasad Todi* v. *ACME Housing India (P) Ltd.* – 2020 VIL 01 NAA]

ITC not available on material used for construction of property for renting out: AAR Tamil Nadu has held that input tax credit is not available against any goods or services received by the assessee for construction of marriage hall on his own account even if it is used in course or furtherance of his business of renting the place. The Authority referred to Section 17(5)(d) of the CGST Act, 2017 which states that ITC shall not be available in respect of goods or services or both received by a taxable person for construction of an immovable property (other than plant and machinery) on his own account. Further, the Authority referred to the decision of Orissa High Court in the case of *Safari Retreats Pvt Ltd.* [2019-VIL-223-ORI], wherein the High Court though had allowed ITC on goods or services used for construction which was rented for commercial purposes, had rejected the plea to hold Section 17(5)(d) as *ultra-vires.* [In RE: *Sree Varalakshmi Mahaal LLP* – 2019 VIL 481 AAR]

Valuation in case of supply to distinct person – Rules not to be applied sequentially: The Appellate Authority for Advance Ruling, Tamil Nadu has held that the construction of Rule 28 of CGST Rules, 2017 provides the taxpayer an option to adopt 90% of the price charged for supply to unrelated recipients as value to be adopted initially (i.e., supply between distinct persons) and in the alternative, in case of full ITC

being available to the recipient, the invoice value will be declared as 'Open market value'. It held that in case the supply is made to the distinct person and the recipient will be eligible for full ITC, the second proviso provides the value declared in the invoice to be the 'open market value' for such transaction. The AAAR was also of the view that the second proviso does not restrict its application as in the first proviso, which is to be applied for cases of 'as such supply' only. [In RE: *Specsmakers Opticians Private Limited* – 2019 VIL 87 AAAR]

ITC available on supply received from HO for further sub-lease, even when consideration paid by netting off of payable and receivable: The applicant entered into an agreement with its head office (HO) in different State, wherein the applicant received order from the customers for providing cranes on hire charges and it, in turn, raised an order on HO, which transported the crane and its components to the customer's location on the instructions of the applicant. The value of consideration in respect of supply by HO to the applicant was paid by netting off of payable against receivable. The Appellate Authority observed that HO being distinct person in the eyes of law and the transaction was in the course or furtherance of business, the supply was taxable supply for which HO had adopted a value agreed under the 'Pricing' clause of the MOU and paid the tax on the value declared in the invoice. Observing that the proviso to Rule 37 provides for deemed payment of value in such transactions, it was held that the applicant will be entitled to avail ITC of tax charged by HO on hire charges as consideration was paid to HO either by the customer of the appellant or by netting off against the receivables from HO. [In RE: *Sanghvi Movers Limited* – 2019 VIL 88 AAAR]

Mobilisation amount remaining unadjusted on 1-7-2017 is liable to GST: The applicant had received certain amount as mobilization advance under an agreement prior to GST regime, which was to be adjusted towards the payment due on attaining the contract progress milestones. The West Bengal Appellate AAR observed that on introduction of CGST Act, the erstwhile Finance Act, 1994 and the notifications issued thereunder ceased to exist. Thus, the time of supply of services will be required to be determined by Section 13(2) of the CGST Act, 2017. Accordingly, it was held that the unadjusted amount of mobilization advance, as on 1-7-2017, will be construed as if it was credited into the account of the appellant on 1-7-2017 only, which will attract GST on that date itself. [In RE: *Siemens Ltd.* – 2019 VIL 84 AAAR]

Printing of banners using content provided by customer when a composite supply with predominance of service: The advance ruling was sought on (a) whether the job of printing of content provided by the customer on PVC banners and supplying such printed trade advertisement material amounts to supply of goods; and (b) what will be the classification of such trade advertisement material under GST if the transaction is a supply of goods. The West Bengal Appellate Authority referred to Para 4 and 5 of the Circular No. 11/11/2017-GST dated 20.10.2017 and observed that the items mentioned in Para 4 have no secondary use other than carrying the printed content whereas the items mentioned in Para 5 have secondary usage. The Appellate Authority observed that, in the instant case, the content printed on the base material was owned by the customers of the appellant only and the appellant had no right of usage on the content. Accordingly, it was held that the Appellant was more akin to the case represented in Para 4 of the aforesaid Circular. Thus, the transaction undertaken by the appellant constitute a composite supply, wherein the supply of service was a principal supply. [In RE: *Macro Media Digital Imaging Pvt. Ltd*. – 2020 VIL 02 AAAR]

Customs

Notifications and Circulars

AIR drawback schedule revised – New rates to come into effect from 4th of February 2020: Ministry of Finance has revised the All Industry Rates of Drawback available on export of goods. While the general rate of 1.5% presently available will get reduced to 1.3% for most of the products with effect from 4-2-2020, rate of drawback on leather and leather products will get marginally increased. Separate higher rates have also been prescribed for many chemicals. According to Notification No. 7/2020-Cus. (N.T.), dated 28-1-2020 which supersedes Notification No. 95/2018-Cus. (N.T.), drawback rates for many textile products have also been revised. The rates will generally get reduced on articles of wool and silk while higher drawback would be available on goods of cotton or man-made fibres. Rates have also been generally reduced on ceramic products and glassware (except Glass Artware/Handicrafts), iron and steel, copper, aluminium, zinc, tin, goods of Chapter 81, 82, 83, machinery and mechanical appliances and electrical machinery and equipment. Drawback rates for motor vehicles however broadly remain same.

Social Welfare Surcharge payable in cash on imports under MEIS/SEIS – No recoveries for past cases where SWS paid through scrips: CBIC has clarified that in case of imports under Merchandise Exports from India Scheme (MEIS) and Services Exports from India Scheme (SEIS), Social Welfare Surcharge (SWS) is not exempted and must be levied and collected on the imported goods. Circular No. 2/2020-Cus., dated 10-1-2020 clarifying so, also observes that the debit of SWS through duty credit scrips is not envisaged in the FTP and the exemption notifications, and hence the same must be paid in cash. The Circular however states that it has been decided by the Board that in respect of past cases, payment of SWS made through duty credit scrips may be accepted as revenue duly collected and recoveries in cash will not be insisted.

DTA supplies by SEZ - Registration under Steel Import Monitoring System when not required: DGFT has clarified that if the goods imported after registration under Steel Import Monitoring System (SIMS) in SEZ/FTWZ are supplied to DTA unit without any processing, the DTA unit need not seek any registration under SIMS. However, according to Policy Circular No. 30/2015-20, dated 8-1-2020, if manufacturing process in SEZ results in change of HS Code at 8-digit level, the importer in DTA shall be required to register under SIMS. It may be noted that Import Policy of Iron & Steel was revised from 'Free' to 'Free subject to compulsory registration under Steel Import Monitoring System' for the items covered in Chapter 72, 73 and 86 of ITC (HS), with effect from 21-11-2019.

Gifts – Import prohibition clarified: Clarifying the recent DGFT Notification relating to prohibitions on import of gifts, CBIC has clarified that the DGFT Notification effectively means that if for the goods imported through courier/post as gifts exemption available for imports of *bona fide* gifts up to a CIF value of Rs. 5000/- *vide* Sl. No. 608A of Notification No. 50/2017-Cus., is sought then such imports will be prohibited. However, gifts can be allowed import free (without prohibition) on payment of full Customs duties as applicable. CBIC Circular No. 4/2020-Cus., dated

21-1-2020 in this regard notes that goods imported as gifts would be personal imports and hence tariff rate of duty will be 35% BCD and 28% IGST. Further, according to the Circular, lifesaving drugs or medicines can continue to avail exemption available under Sl. No. 607A and 608A of above-mentioned notification.

SCOMET – Procedure for export for demo/display, etc., revised: Para 2.79D of Handbook of Procedures Vol.-1 has been amended to prescribe the procedure for export of SCOMET items imported for demo/display/exhibition/tenders/RFP/RFQ/NIT purposed in India. DGFT Public Notice No. 50/2015-20, dated 27-12-2019 in this regard also modifies the undertaking by an applicant firm seeking authorisation for export of indigenous/imported SCOMET items for demo/display/exhibition etc. abroad. The undertaking will now also include the purpose of export, details of invitee along with schedule and specific location of event. Further, details of items to be exported for demo, etc., along with their SCOMET category, quantity and item description, also need to be specified.

Import of refined bleached deodorized palm oil and palmolein made restricted: DGFT has placed the import of refined bleached deodorized palm oil and palmolein in the restricted category. According to the Notification No. 39/2015-20, dated 8-1-2020 amending Chapter 15 in Schedule-I of ITC (HS) Import Policy of items under Exim code 151190 has been amended from 'Free' to 'Restricted'.

Gold and Jewellery exports – Revision in documents to be submitted as proof of exports: Para 4.68(a) of the Handbook of Procedures Vol.1 has been amended to allow submission of self-attested copy of exporter's copy of shipping bill in place of export promotion copy of shipping bill as "proof of exports" with respect to gold/silver/platinum jewellery and articles thereof. DGFT Public Notice 48/2015-20, dated 18-12-2019 has been issued for this purpose.

Export to Nepal – Mandatory online application for SAFTA and SAPTA Certificate of Origin: For exports from India to Nepal under South Asian Free Trade Area (SAFTA) and SAARC Preferential Trading Arrangement (SAPTA), application for issuance of COO must be filed online from 18.12.2019. According to DGFT Trade Notice No. 41/2019-20, dated 12-12-2019, the Preferential COO for exports made to Nepal under SAFTA and SAPTA shall be applied and issued only from the said platform, w.e.f. 18-12-2019. The online platform, designed as a single-point access for all FTAs/PTAs, for issuance of Preferential COO has been live since 19-9-2019 and can be accessed at https://coo.dgft.gov.in.

DIN mandatory in respect of all communications including e-mails: As a measure towards boosting transparency, the practice of generating and quoting Document Identification Number (DIN) has now been extended to all communications sent to tax payers and other concerned persons by any office of the CBIC across the country with effect from 24-12-2019. It may be noted that this system was implemented earlier only in respect of specified documents, including search authorizations, summons, arrest memos, etc. The CBIC Circular No. 43/2019-Cus., dated 23-12-2019 issued in this regard also reiterates that any specified communication not bearing the e-generated DIN and not covered by the exceptions mentioned in paragraph 4 of Circular No. 37/2019-Cus. is to be treated as invalid and deemed to have never been issued unless the omission is regularized as per the procedure stated in para 5 of earlier Circular.

Ratio decidendi

Social Welfare Surcharge payable in cash for imports under MEIS: In a case involving payment of Basic Customs Duty (BCD) using MEIS scrips, where the department had also debited the amount of Social Welfare Surcharge (SWS) from the value of scrips, the Madras High Court has held that the importer was liable to pay SWS on BCD as adjustment of Customs duty from the duty credit scrips by way of debit is not to be termed as Nil duty. The Court observed that act of debiting duty from the scrips amounts to levy and collection of the duty from the importer. It held that neutralization of duty and the fact that duty in money had not gone to the exchequer, does not mean that no duty was levied and collected. The Court also was of the view that exemption granted under the Notifications Nos. 24 and 25/2015-Cus., is not an exemption from payment of Customs duty in toto. It was however held that recovery of SWS cannot be done by making debit from the value of the scrips, as SWS is not the subject matter of exemption granted under said Notifications and since the levy and collection of SWS is an independent levy, that too, under a different enactment. Recent Supreme Court decision in the case of *Unicorn Industries*, was relied upon. [*Gemini Edibles and Fats India Pvt. Ltd.* v. *Union of India* – Common Order dated 3-1-2020 in W.P. Nos. 24490 and 27452 of 2019, Madras High Court]

Exemption – Rules for import of goods at concessional rate of duty for manufacture of excisable goods, not procedural: Madras High Court has held that Rules 3 and 4 of the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996 are not procedural. Setting aside the Tribunal Order allowing benefit of exemption in a case where the registration under the Rules was taken after the imported goods were allowed to be cleared by Customs authorities, the Court held that CESTAT erred in holding that the Rules were merely procedural or directory in nature. It was also held that the certificate that the assessee had not availed the Cenvat Credit on that consignment, had nothing to do with the 1996 Rules in question. Further, the Court also upheld the maintainability of the appeal before it, observing that the controversy was not with regard to valuation of the goods or rate of duty, but, was of the wrong exemption claimed by the assessee and granted by the Tribunal. [*Commissioner* v. *Medreich Sterilab Ltd.* – 2020 TIOL 68 HC MAD CUS]

Advance authorization – Para 4.28(f) of FTP-HoP not applicable to cases where export obligation fulfilled: CESTAT Ahmedabad has held that Para 4.28(f) of Handbook of Procedure, 2004-09 relating to regularization of *bonafide* default by exporters using Advance Authorisations, cannot be applied straight away to normal imports where export obligations have been fulfilled. The Tribunal in this regard noted that policy prescribed in Para 4.1.5 of FTP permitted the use of left-over material for manufactured goods and clear the same in domestic tariff area. The Revenue department had demanded Customs duty on the inputs imported duty free but not used in manufacture of export goods as lesser quantity was required. [*PCL Oils & Solvent Ltd* v. *Commissioner* – 2020 VIL 01 CESTAT AHM CU]

Valuation – Service charge paid for import, when not includible: CESTAT Hyderabad has held that the service charge paid to the importer by another company (buyer) was not includible in the assessable value as there was no evidence showing that the importer-respondent acted as a canalizing agent or that the transaction was on high seas sales. It observed that the mere fact that the bids for import were finalized by the assessee-respondent after approval of the buyer company, would not change the nature of

transaction. The Tribunal also noted that there was no evidence that there was privity of contract between overseas supplier of coal and the buyer company, and that the buyer company was either the owner or held themselves out to be the importer. [*Commissioner* v. *MMTC Ltd.* – 2019 TIOL 3471 CESTAT HYD]

DGFT and not Customs empowered to take action for alleged wrongful availment of TED: The Gujarat High Court has held that for breach of condition of Advance Authorization or deemed export or for wrongful availment of TED, it is only DGFT who is empowered to initiate investigation and take appropriate action. The case involved supply to EOU where the assessee got TED refund and was also granted Advance Authorisation, while the department alleged clandestine disposal of goods in domestic market. The Court set aside the impugned order where DRI had issued notice proposing recovery of excise duty (TED) refunded by DGFT for material supplied to 100% EOU. It also observed that non-performance of official duty (physical verification) by excise officers cannot be a ground to initiate action against the assessee who was holding valid Advance Authorization and had claimed benefit of deemed export in view of Para 8.3 of FTP. The Court also noted that Advance authorization was valid and no action was taken by the DGFT for breach of any condition thereof. Proceedings by Customs were held as exercise of power in excess of jurisdiction. [*Rajhans Impex (P) Ltd.* v. *UoI* – 2020 VIL 20 GUJ CU]

Refund – Unjust enrichment – Incidence of duty not passed merely because duty booked as expenditure in P&L account: CESTAT Delhi has held that when assessee's invoice showed a composite price and duty was not indicated separately and the sale price of the goods before as well as after the reclassification, revaluation, etc., remained the same, it can be concluded that the incidence of duty was not passed on to the consumer. It held that merely because excise duty was booked as expenditure in Profit & Loss account, it cannot be said that the incidence of duty was passed on. The Tribunal noted that the assessee placed on record a C.A. certificate falsifying the allegations of unjust enrichment and that same cannot be ignored in the absence of evidence contrary to it. It was also noted that the invoices evidencing the sale, which were on record, showed that the price charged did not include therein the duty component. [*Commissioner* v. *U.T. Electronic (P.) Ltd.* – 2020 VIL 06 CESTAT DEL CU]

Central Excise, Service Tax and VAT

Ratio decidendi

Waiver of redemption fine under Sabka Vishwas (Legacy Dispute Resolution) Scheme – Gujarat High Court grants interim relief: Gujarat High Court has stayed the order of the Designated Authority under the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 holding that cases involving confiscation and redemption fine are not covered under the said Scheme. The Court was of the view that *prima facie* it appears that the legislature did not have the intention of excluding cases involving confiscation and fine in lieu of confiscation from the purview of the scheme. It observed that as

per clauses (a) and (h) of Section 125 of the Finance (No.2) Act, 2019, persons whose cases involved confiscation and fine in lieu of confiscation are not placed in the categories of persons who are not eligible to make declarations under the scheme. Referring to FAQs, press notes issued by CBIC, it was held that the legislature would not have contemplated waiver of fine under Section 9 of the Central Excise Act, 1944 and that the only other fine is in lieu of confiscation. The department was directed to permit the petitioners to file fresh declarations without payment of redemption fine, subject to the final outcome of the petition. To eliminate multiplicity of the proceedings involving the same issue, the Court granted benefit of the interim order to even those declarants who had not approached the Court. [*Messrs Synpol Products (P) Ltd.* v. *UoI* – 2019 VIL 628 GUJ CE]

Cenvat credit – Scope of definition of 'exempted goods': Bombay High Court has held that the goods are not to be considered as "exempted goods" even where basic excise duty is exempt in case other excise duties are not exempt. The Court did not acceptthe rationale of the Tribunal's decision that the expression used in the definition of "exempted goods" in Rule 2(d) of Cenvat Credit Rules being "duty of excise" and not "duties of excise", there being a distinction between them, the goods are to be treated as exempted if they are exempt from payment of basic excise duty as opposed to all excise duties. Judgement in *TVS Motor Co. Ltd v. UoI* was relied on where Supreme Court indicated that no distinction could be made between phrases 'duty', 'duties', 'duty of excise' and 'duties of excise'. It was held that it does not matter that these additional duties or cesses are not to be traced to the Central Excise Act or are provided for by other enactments such as Finance Acts, or that they are levied as an increment, or are expressed as a proportion, to basic duty of excise. Judgement of the Uttarakhand High Court in *Hero Motorcorp Ltd.*, holding that Rule 6 of Cenvat Credit Rules was intended to cover those cases, where the main duty, which is the basic excise duty was exempted, was disagreed with. The Court also held that 10% of the sale price referred to in clause (b) of sub-rule (3) of Cenvat Rule 6 was to be deducted from the assessable value for the purpose of computing excise duty, namely, Auto Cess and Education Cess in present case which were payable on goods exempted from basic excise duty. The Court in this regard upheld the view of the assessee that the amount payable under Cenvat Rule 6 was an exaction under the enactment. The High Court further held that Explanation – III added to Rule 6 (3)(b) of Cenvat Credit Rules w.e.f. 16 May, 2005 is clarificatory or declaratory and thus must apply retrospectively. [*Mahindra & Mahindra Ltd* v. *Commissioner* – 2019 TIOL 2769 HC MUM CX]

Stock transfer – Sale immediately by agent in another State – CST not imposable merely on presumption of pre-existing contract: Madras High Court has held that merely because timing of the sale by agent in another State is immediately on receipt of goods or in near future, it cannot be a ground to presume any pre-existing contract with the seller in another State and to hold the same to be an inter-State sale liable to Central Sales Tax (CST). The Court observed that assessee produced adequate proof of movement of goods from Tamil Nadu to Kerala by furnishing prescribed Form F in support of bank transfer/stock transfer. Noting that the Assessing Authority did not have record of any pre-concluded contract with the buyer, it was held that merely on the assumption or presumption of any such kind of pre-existing contract, the Assessing Authority could not have imposed the tax under the provision of Central Sales Tax Act. The Court's earlier judgement in the case of *Dy. Commissioner v. Tvl. P.M.P. Iron & Steel Ltd.*

was relied upon - *Advance Paints (P) Ltd.* v. *Commercial Tax Officer* – 2019 VIL 614 MAD]

Demand – Section 11A not invokable once refund order passed under Section 11B attains finality: Allahabad High Court has held that revenue cannot initiate proceedings under Section 11A of the Central Excise Act, 1944 for recovery of excise duty, once adjudication had been made by department making final provisional assessment and, thereafter, adjudicating application for refund under Section 11B, and no appeal was filed by the department challenging the said adjudication which had attained finality. The Court was of the view that after having allowed adjudication under Section 11B to attain finality, department does not have the remedy under Section 11A to proceed. It noted that it is always open to Principal Commissioner or Commissioner to examine the order passed by the adjudicating authority under Section 11B and direct the competent authority to file appeal against order of refund, however in the present case the order of refund was never taken to the higher authority and it became final. Quashing the SCN and the order for repayment of refund, the Court also noted that it was neither a case of fraud, nor where incidence of duty was passed on. [*Honda Siel Power Products* v. *UoI* – 2019 VIL 617 ALH CE]

No service if commission paid to MD considered as salary by Income Tax Authorities: CESTAT Allahabad has held that if entire remuneration including commission earned by Managing Director of a company stands considered by the Income Tax Authorities as salary, the same cannot be considered as for any service and be liable to Service Tax. The Tribunal noted that the Income tax authorities had assessed payment of TDS under the head salary. The matter was however remanded back as the adjudicating authority had not dealt with the said aspect and had not verified the fact of assessment by Income Tax Authorities. [*Vectus Industries Ltd.* v. *Commissioner* - Final Order No. 71942/2019, dated 26-11-2019, CESTAT Allahabad]

Ex-gratia charges for making good damages under a contract for unintended event not liable to service tax: Observing that the ex-gratia charges made by principal to assessee-appellant were towards making good losses or injuries arising from unintended events and did not emanate from any obligation on part of any of the parties to tolerate an act or a situation, CESTAT Allahabad has held that the payment cannot be considered to be for some services. The Tribunal was of the view that for invocation of Section 66E(e) of the Finance Act, 1994, there must be first concurrence to assume an obligation to refrain from an act or tolerate an act, etc., which was absent in the present case. The assessee-appellant was receiving ex-gratia charges in case the principal was not fully utilizing the former's capacity. The Tribunal noted that ex-gratia amount was not fixed and was mutually decided between the two, based upon the terms and conditions of the agreement and was in the nature of compensation. [*K.N. Food Industries (P) Ltd.* v. *Commissioner* – 2019 VIL 731 CESTAT ALH ST]

Rail transport - Spices covered under 'food stuff' for exemption on transport by rail: CESTAT Mumbai has held that 'food stuff' could be any substance that is used as food or to make food. Observing that the definition of 'Foodstuff' has not been provided anywhere in the Finance Act, 1994, the Tribunal allowed benefit of Clause (i) of Serial No. 20 of Notification No. 25/2012-ST to transportation of spices/masala by railways. It observed that the word 'food stuff' used in said Clause (i) was 'inclusive' and not 'exhaustive' which meant that the legislature did not intend to restrict the scope of the clause. It also observed that from time to time, spices have been held to

be food stuff by various courts including the Supreme Court. It also held that paying service tax under wrong accounting code or under wrong head cannot be a valid reason for denying valid refund of the service tax erroneously paid. [*Narendra Kumar and Company* v. *Commissioner* – 2020 TIOL 47 CESTAT MUM]

Refund of Cenvat credit – Debiting credit a/c. after filing of claim only a procedural violation: CESTAT Bangalore has reiterated that debiting the Cenvat credit account subsequent to the filing of the refund claim is only a procedural violation which cannot defeat the substantive right of the assessee to claim refund under Rule 5 of Cenvat Credit Rules, 2004. The Tribunal also held that it was not open to the Department to examine the eligibility of Cenvat credit while adjudicating the refund claim application, since in such matters of admissibility, the Department was mandated to take recourse under Rule 14. It was also held that rejection of entire refund claim only on the ground of violation of Condition 2H of Notification No. 27/2012 was also not sustainable in law. [*Gemini Software Solutions Pvt. Ltd.* v. *Commissioner* – 2020 VIL 14 CESTAT BLR ST]

Cenvat credit availed wrongly before 'use', regularized by payment of interest: In a case where the assessee took the balance 50% Cenvat credit, during the period before 10-9-2004, before putting the capital goods to use, CESTAT Kolkata has directed the assessee to pay interest from the date of taking credit till 10-9-2004 when the condition of 'use' was withdrawn. The Tribunal in this regard noted that capital goods were subsequently installed/put to use and that there was no time limit for taking the balance 50% credit. It also observed that the assessee was eligible for the credit on 10-9-2004. [*Nalco Limited* v. *Commissioner* – 2020 VIL 13 CESTAT KOL CE]

No franchise service when right of representation absent: Observing that the most important characteristic for any service to be called as 'Franchise Service' is the right of representation given by one company to another company against the consideration paid by the latter (franchisee) to the former (franchisor) for the same, CESTAT, Delhi has held that 'Retail Agent Agreement' between the assessee-appellant and its agents was not a franchisee service agreement. The Tribunal noted that the objective of the agreement was to merely appoint the agents as different from the franchisee. It observed that the agreement was to appoint someone who may undertake to collect the bills payment not absolutely on his own but on behalf of the appellant. The Tribunal was also of the view that words *principal to principal basis* cannot be read for the arrangement between appellant and his agents to be called as franchise service agreement. [*Easy Bill Ltd.* v. *Commissioner* – 2020 VIL 18 CESTAT DEL ST]

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