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Demand without challenging assessment – Is it sustainable?

By **Akhilesh Kangsia and Tridipa Banerjee**

The ruling of the Supreme Court in *ITC v. CCE, Kolkata* [2019 (368) ELT 216] **has been quite unsettling for** the assessees, as their refund claims are being rejected on account of non-challenge to the assessment. This ruling is going to be an issue to the department as well.

In this judgment, the Court has ruled that,

a) assessment within its meaning includes 'self-assessment';

b) a self-assessed bill of entry is an order of assessment Section 47 of the Customs Act, 1962 ("the Act");

c) a self-assessed bill of entry is an appealable order under Section 128 of the Act by 'any person' aggrieved; and

d) refund under Section 27 of the Act is not maintainable till self-assessment is modified under Section 128 of the Act or under other relevant provision of the Act.

Thus, the Court has concluded that there is no change in position post amendment to Sections 17, 27 and 47 of the Act *vide* Finance Act, 2011 with effect from 8-4-2011 and challenge to the assessment is a must for claim of refund. We feel that this was neither intended nor anticipated by the Central Government.

A reading to this judgment will give a feeling that it is a setback to the assessees as it is going to affect the cases where refund claims have been filed without challenge to the assessment by way of an appeal under Section 128 of the Act or without amendment or modification under other relevant provisions of the Act.

However, after reading the following paragraphs of this judgment, it will be realized that this poses significant challenge to the department also in raising demands:

> **"18. It was also urged that Section 27 is a remedy available to the assessee for the refund of duty paid and Section 28 is a remedy available to the Department on the recovery of duty not levied and short levied or erroneously levied. Both the remedies can be availed without filing appeals. It was further urged that no appeal can be filed under Section 128 of the Customs Act against the bill of entry**. As the scheme of assessment under Section 17 of the Customs Act is that of self-assessment and only when such a self-assessment is disputed by the proper officer, an order of assessment is passed then he may appeal to the relevant appellate authority within 60 days of the communication of the order. It is only in a situation where speaking order is passed then the assessee is required to file an appeal. Unless a speaking order of assessment is passed, no appeal can lie and the only option for refund of duty paid is to file a refund claim. The bill of entry is merely stamped to allow clearance of the goods. No reasons are provided in the bill of entry on account of which it can be regarded as an order which can be subjected to appeal

under Section 128 of the Customs Act."

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"43. As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression 'Any person' is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment. The order of self-assessment is an order of assessment as per Section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of re-assessment has to be passed under Section 17(4). Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no *lis*, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in *Escorts* (supra)." …….. [Emphasis Supplied]

The argument put forward by the assessee before the Court was that post amendment *vide* Finance Act, 2011, a direct route has been given for refund under Section 27 of the Act without a challenge to the assessment. It was further explained that Section 27 remedy is similar to remedy available with the department under Section 28 of the Act wherein recovery of duties not levied or not paid or short levied or short paid or erroneous refund can be made without challenge to the original assessment. The Court in paragraph 43 of the judgement negates the above argument by holding that under Section 128 of the Act, the department can also prefer an appeal being aggrieved by an order of assessment including in case of a self-assessed bill of entry. Thus, the Court has ruled that even the department needs to challenge the assessment by filing an appeal under Section 128 of the Customs Act, 1962 before coming to demand route under Section 28 of the Customs Act, 1962.

As we all know, under Section 28 normal period of limitation is two years and extended period of limitation is five years, however, as a result of this ruling, limitation period is reduced to 90 days [60 days for filing appeal before Commissioner (Appeals) plus 30 days which are condonable]. Now, this appears to be a setback to the department.

The above proposition has been applied by the Punjab and Haryana High Court in *Jairath International and Anr. v. UOI* [2019 (10) TMI 642]. The Court was addressing issue of recovery of erroneous sanction of drawback claim with respect to goods already exported out of India on account of alleged overvaluation. The shipping bills in question were self-assessed and pertains to period post amendment vide Finance Act, 2011. The Court in paragraph 15 held that the customs department does not have power to reassess the value of goods already exported in the absence of challenge to the original assessment and as a result of this, no recovery is possible with respect to drawback already sanctioned.

It is not out of context to refer to the judgment of the Supreme Court in *CCE v. Cotspun* [1999 (113) ELT 353] passed in context of Central Excise. The Court held that demand contrary to approved classification list is to be prospective from the date of show cause notice. This

judgment was further followed in another case of *Addl. CCE v. Mahindra & Mahindra* [2000 (120) ELT 290 (SC)]. These judgments are an authority under Central Excise that without challenge to classification list, demand cannot be raised.

Since the provisions of Section 28 are in *pari materia* with the provisions of Section 11A of the Central Excise Act, 1944, Supreme Court's judgment in *Cotspun's* case and *Mahindra & Mahindra's* case equally applies to Customs also.

Thus, *ITC* ruling, and other rulings cited above will certainly help the assessees in contesting the demand within normal period of limitation in the absence of challenge to the bills of entry by the department. However, applicability of the above rulings for demand beyond normal period of limitation needs to be tested by the Courts in light of the decision of the Supreme Court in the case of *UOI v. Jain Shudh Vanaspati Ltd* [1996 (86) ELT 460 (SC)], wherein it was held that demand proceedings under Section 28 can survive even without challenge to assessment.

As closing remark, the *ITC* ruling is a boon in disguise to the assessees for contesting the demand. However, it will certainly increase litigation rather than reducing the litigation. It would be interesting to see how the Courts deal with this issue.

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Goods and Services Tax (GST)

Notifications and Circulars

38th Meeting of the GST Council – Highlights: GST Council in its 38th Meeting on 18th of December has decided to restrict Input tax credit (ITC) to the recipient in respect of invoices or debit notes that are not reflected in his FORM GSTR-2A to 10% of the eligible credit available in respect of invoices or debit notes reflected in said form. Further, while late fee will be waived in respect of all pending FORM GSTR-1, from July 2017 to November 2019, if the same are filed by 10-1-2020, E-way Bill shall be blocked for taxpayers who have not filed their GSTR-1 for two tax periods. Due date for annual return in FORM GSTR-9 and reconciliation statement in FORM GSTR-9C for FY 2017-18 will also be extended to 31-1-2020. As per the Press Release issued after the meeting, the Council has also approved various amendments in the GST law, which will be part of the Budget 2020 proposals. On the rate side, a single rate of GST @ 28% on both State run and State authorized lottery has been approved and will come into effect from 1-3-2020. Further, rate of GST on woven and non-woven bags and sacks of polyethylene or polypropylene strips or the like, including flexible intermediate bulk containers (FIBC), once the changes are effective from 1-1-2020, will be 18%. Upfront amount payable for long term lease of industrial/ financial infrastructure plots by an entity having 20% or more ownership of Central or State Government, will be exempt.

E-invoicing mandatory for certain taxpayers with effect from 1-4-2020: Registered persons whose aggregate turnover in a financial year exceeds Rs. 100 crores, will be liable to prepare e-invoice as per new Rule 48(4) of the Central Goods and Services Rules, 2017, with effect from 1-4-2020 for supply of goods or services or both to a registered person. As per new sub-rule 48(4), these persons shall issue invoice containing particulars given in FORM GST INV-01 after obtaining Invoice Reference Number (IRN) by uploading the said invoice on common portal. Common Goods and Services Tax Electronic Portals for the purpose of preparation of the such e-invoice have also been notified. Further, with effect from 1-4-2020, registered person having aggregate turnover in a financial year more than Rs. 500 crores shall (for B2C supplies) issue the tax invoice with Quick Response (QR) code. Notifications Nos. 68 to 72/2019-Central Tax, all dated 13-12-2019 have been issued.

Supply of Information Technology enabled Services – Circular No. 107/26/2019-GST withdrawn *ab initio*: CBIC has withdrawn *ab initio* it's earlier Circular No. 107/26/2019-GST, dated 18-7-2019 relating to certain clarifications in relation to supply of Information Technology enabled Services to overseas entities. The circular had clarified that even where a supplier supplies ITeS to customers of his clients on clients' behalf, but actually supplies these services on his own account, the supplier will not be an intermediary, but will be eligible for export benefits. It had also clarified that supplier of backend services located in India who arranges or facilitates supply of goods/services by the client located abroad to customers of client, will, however, be covered under intermediary. Circular No. 127/46/2019-GST, dated 4-12-2019 has been issued for withdrawing the above circular.

Standard Operating Procedure to be followed in case of non-filers of returns: CBIC has issued guidelines to be followed by the authorities (proper officer) in case of non-furnishing of return under Section 39, 44 or 45 of the Central Goods and Services Tax Act, 2017. Circular No. 129/48/2019-GST, dated 24-12-2019 in this regard observes that no separate notice is required to be issued for best judgment assessment under Section 62 in case of failure to file return within 15 days of issuance of notice in Form GSTR3A. According to the guidelines, an assessment order under Rule 100 of the CGST Rules in Form GST ASMT-13 would then be issued, which would be deemed to have been withdrawn in case the defaulter furnishes a valid return within 30 days of service of assessment order.

Ratio decidendi

Seized goods to be released only as per mechanism prescribed under CGST Act and Rules: Setting aside the High Court Order directing release of seized goods subject to deposit of security other than cash or bank guarantee or indemnity bond, Supreme Court has held that High Court should not have entertained the writ petitions questioning the seizure of goods. The Apex Court was of the view that the High Court should not have issued directions to release the goods when a complete mechanism for release and disposal of seized goods is predicated under Section 67 of the CGST Act read with Rules 140 and 141 of the Central Goods and Services Tax Rules, 2017. According to the Supreme Court, the High Court should have relegated the assessees before the appropriate authority for complying with the procedure prescribed. The Court held that the orders passed by the High Court which are contrary to the stated provisions shall not be

given effect to by the authorities. [*State of Uttar Pradesh* v. *Kay Pan Fragrance (P) Ltd.* – Civil Appeal No. 8941/2019 and Ors., decided on 22-11-2019, Supreme Court]

Rectification of TRAN-1 when credit accumulated in pre-GST regime and entitlement to distribute not disputed: Observing that availment of credit by the petitioner and its entitlement to distribute the credit to its various branches was not disputed, Kerala High Court has directed the department to either permit the petitioner to file a rectified TRAN-1 Form electronically in favour of each of its branches in the country, or accept manually filed TRAN -1 Form with the appropriate corrections, on or before 30-12-2019. The application under Form TRAN-1 was earlier rejected by the department as the petitioner had erroneously shown the GSTIN pertaining to the input service distributor instead of the GSTIN of the assessee to whom the credit had to be transferred. The defect was stated to be non-rectifiable. Transfer of credit was also denied by the department as the assessee was unable to provide the details of the purchase invoices, on the strength of which credit was taken under the erstwhile regime. Directing filing of rectified form, the High Court observed that if the petitioner is permitted to file individual Form TRAN-1 in respect of each of the recipient branches, then the accumulated credit could be distributed to its various branches without having to furnish details of the invoices. Delhi High Court decision in the case of *Blue Bird Pure Pvt.Ltd.* was relied upon. [*South Indian Bank Limited* v. *Union of India* - 2019 VIL 569 KER]

Power of arrest not to be exercised at whims of any officer or for sake of recovery or terrorizing any businessman: Punjab & Haryana High Court has held that opinion expressed by Telangana High Court in *P.V. Ramana Reddy v. Union of India* cannot be made applicable to each and every case and cannot be treated as an authority to conclude that DGGI has power to arrest in every case during investigation and that too without determination of tax evaded and without finding if accused has committed an offence under Section 132 of CGST Act. The Court observed that the persons who are having established manufacturing units and paying good amount of direct or indirect taxes; persons against whom there is no documentary or concrete evidence to establish direct involvement in the evasion of huge amount of tax, should not be arrested prior to determination of liability and imposition of penalty. Further, observing that power of arrest should not be exercised at the whims and caprices of any officer or for the sake of recovery or terrorising any businessman or create an atmosphere of fear, whereas it should be exercised in exceptional circumstances during investigation, the Court illustrated the possible circumstances during which power of arrest may be exercised. [*Akhil Krishnan Maggu* v. *Dep Director, DGGI* – 2019 VIL 565 P&H]

Detention of goods on grounds of possibility of evasion is not correct: Kerala High Court has held that detention of goods cannot be made under Section 129 of the CGST Act on grounds that there was a possibility of evasion of payment of IGST and that consignee of the goods was indicated as an unregistered dealer at the time of detention of the goods. The High Court directed the tax authorities to release the goods and vehicle to the petitioner observing that the reasons stated in the detention order are wholly irrelevant for the purpose of Section 129. [*Polycab India Ltd.* v. *State of Kerala* – 2019 VIL 577 KER]

Detention of goods on ground that consignee was defaulter is not correct: Kerala High Court has held that detention claiming the consignee was a return defaulter for the last five months, is

not a valid ground to justify detention under Section 129 of the CGST Act. The High Court quashed the detention notice observing that the reason cited in the detention notice cannot be a ground for detaining consignment of goods in transit. [*Unitac Energy Solutions (P) Ltd.* v. *Asst. STO* – 2019 VIL 581 KER]

Anti-profiteering - Findings of DGAP cannot be construed as price regulation – No set prescriptions can be laid while computing profiteering: The National Anti-profiteering Authority (NAA) has held that the findings of DGAP cannot be construed as price regulation, as at no stage the assessee was directed to fix price and that only the ratio of ITC to turnover was computed to calculate the amount which the assessee should have passed on by commensurate reduction in prices. It also held that the assessee should have no objection on the methodology adopted by the DGAP since the mathematical methodology varies from case to case depending on the facts and that the procedure & methodology for determination of profiteered amount was notified. It observed that the NAA has power to 'determine' the methodology and not to 'prescribe' it as per the provisions and therefore, no set prescription can be laid while computing profiteering. It held that there should be no extra liability on the respondents on account of GST charged by the suppliers as the said suppliers were also enjoying benefit of ITC. Observing that ITC was being availed by the respondent every month, the NAA held that if the benefit of ITC was to be computed after completion of the project, then such benefit should also be availed after completion of the project. Further, the NAA was of the view that the present proceedings cannot be held in abeyance on the pretext that Group of Ministers have been constituted to examine the issues pertaining to real estate sector. [*Diwakar Bansal* v. *Horizon Projects (P) Ltd.* – Order dated 15-11-2019 in Case No. 56/2019, NAA]

Payment received as bonus paid/payable to persons deployed as security personnel liable to GST: The applicant was supplying security services to various hospitals and as per the agreement, the contractual security personnel were entitled for a bonus of 8.33% once in a year. Accordingly, the applicant raised a separate bill for claiming the bonus amount without GST. The West Bengal AAR in this regard held that the payment received by the applicant on account of the bonus paid or payable to the persons deployed as security personnel would not get covered under Para 1 of Schedule III to CGST Act, and therefore, the applicant was liable to pay GST on the same. It observed that the State Government was not recruiting any security personnel through the applicant, and that the applicant was the employer of the security personnel deployed and was responsible for paying all statutory dues, including employer's contribution to EPF, ESI etc. It noted that the applicant was entitled to pass this liability to the recipient, who, in terms of the agreement, was ready to bear the liability, and that such an agreement does not create a master and servant relationship between the recipient of the service and the security personnel. [In RE: *Ex-Servicemen Resettlement Society* – 2019 VIL 473 AAR]

GST leviable on damages for delay in supply when liability of payment of liquidated damages gets established: The advance ruling was sought on (a) whether 'liquidated damages' and other penalties like milestone penalties levied on suppliers/ contractors in the nature of making good the damages for any delay in supply of service or goods were exigible to GST or not; (b) what will be the time of supply in case liquidated damages were determined and

imposed upon the contractor after in-depth study and not when the delay occurred. The authority observed that as per the agreement the liability of payment of liquidated damages by the contractor was established, once the delay in execution of work was established on the part of the contractor. The same was being tolerated by an additional levy in the nature of liquidated damages. It was held that the amount received by the applicant in respect of tolerating the delay in execution of work would be a supply of 'service' by the applicant in terms of Para 5(e) of Schedule II to the CGST Act, 2017. With respect to question (b), the authority referred to the provisions of time of supply under Section 13(1) of the CGST Act, 2017 and the terms of the agreement. Based on the same, it was held that GST will be levied when the liability of payment of liquidated damages by the contractor gets established. [In RE: *Rashtriya Ispat Nigam Ltd*. – 2019 VIL 453 AAR]

GST on activity of land development under JDA and sale of plot: The applicant had entered into a Joint Development Agreement with landowners for development of land as residential layout and into an agreement with customers for sale of developed plots for consideration. The advance ruling was sought as to (1) whether the activity of development and sale of land will be liable to GST; (2) if GST is applicable, whether, for the purpose of taxable value, provision of Rule 31 of the CGST Rules, 2017 could be applied to ascertain the value of land and supply of service. Referring to JDA, the Karnataka AAR observed that the activities undertaken would be in the nature of development of land as residential layout, and since applicant had no right over the land, he cannot claim to be engaged in the activity of sale of land. It was held that the activities undertaken will not be covered under Entry 5 of Schedule III to the CGST Act, 2017 and would amount to a supply of service. With respect to valuation, it was held that Rule 31 of the CGST Rules will be applicable and the value of supply will be equal to the total amount received, which will be equal to 25% of the market value of each plot. [In RE: *Maarq Spaces Pvt Ltd.* – 2019 VIL 436 AAR]

Membership fees collected by club from its members when liable to GST: Applicant-respondent collected membership fees from their members in order to conduct social activities and meet their administrative costs. In addition, it also collected registration fees from its members for the training programs/workshops. The issue under consideration was whether it was liable to pay GST on the amount collected and consequently liable for taking registration under GST. The Advance Ruling Authority held that the respondent was not liable to pay GST and accordingly not liable for taking registration under GST law. AAAR Pune in its amended order however held that the membership fees collected by the respondent from its members would not be construed as consideration for levy of GST. However, the registration fees collected from members for organising skill-oriented workshops would be construed as consideration against the supply made by the respondent to its members and accordingly, the same will be leviable to GST. [In RE: *Lions Club of Poona Kothrud* – 2019 VIL 80 AAAR] [***Note: The above order of AAAR modified the previous order of AAAR issued on 23-4-2019***]

UK VAT - Digital newspapers are 'newspapers' within VAT provisions and accordingly zero rated: UK's Upper Tribunal (Tax and Chancery Chamber) has held that digital versions of newspapers published by the assessee are "newspapers" within the meaning of Item 2, Group 3 of Schedule 8 to the Value Added Tax Act 1994 and are therefore zero rated for VAT purposes. The Tribunal though observed that the concept of a supply of digital versions of

newspapers was not within the contemplation of the drafter of the legislation in 1972, however, it relied on the 'always speaking' doctrine of statutory interpretation to allow the appeal against the FTT decision which had held to the contrary. It noted that the digital versions of the newspapers were the same or very similar to the newsprint editions, with fundamentally same or similar content with only relatively minor additional content in the digital versions. [*News Corp UK & Ireland Limited* v. *Commissioner for HMRC* - Appeal number UT/2018/0065, decided on 24-12-2019, United Kingdom's Upper Tribunal (Tax and Chancery Chamber)]

Customs

Notifications and Circulars

Implementation of Auto Out of Charge under Express Cargo Clearance System (EECS): Courier Bills of Entry (CBE) filed for clearance of imported cargo under ECCS are subjected to Risk Management System, which either facilitates or interdicts a CBE. Based on a representation received from the Express Industry Council of India, the CBIC has in its Circular No. 40/2019-Cus., dated 29-11-2019 stated that ECCS should automatically give out-of-charge to goods covered under facilitated CBE which have been "cleared" on customs X-ray screening. This is based on the observation that sending a CBE after X-ray screening to the Shed Superintendent/Appraiser, merely for giving out of charge order, adds an avoidable step in the automated clearance process.

Mandatory uploading of invoice and Bill of Lading declared in B/E and mention of document code and IRN in B/E: With effect from 02-12-2019, for every Invoice and Bill of Lading / Airway Bill declared in the Bill of Entry, the reference of IRN generated from eSANCHIT with the relevant document code must be provided. The reference of prescribed document codes from eSANCHIT in the Bills of Entry has been made mandatory. As per Circular No. 42/2019-Cus., dated 29-11-2019, with regard to other supporting documents such as Country of Origin Certificate (COO), uploading through eSANCHIT either by the beneficiary or by the Participating Government Agency, is to be ensured administratively. The field offices have been directed to ensure that no physical copy of any supporting document is submitted, and every relevant document is submitted only electronically *via* eSANCHIT.

Registration under Steel Information Management System clarified: In respect of the Steel Information Management System introduced by DGFT Notification No.17/2015-2020, the CBIC has clarified *vide* Circular No. 38/2019-Cus., dated 21-11-2019 that while the declaration of SIMS registration number and other required details is mandatory in the Bills of Entry, Customs need not insist the importer to submit any further documentary proof of the registration at the time of verification or examination. The Circular reiterates the clarifications issued by the DGFT in Circular No. 29/2015-20 dated 04-10-2019, i.e.: -

(a) SIMS registration will not be applicable on air-freighted goods as this mode is used for emergency/small volume-high value goods required at short notice.

(b) Once SIMS registration has been obtained, any number of consignments can be imported by a single SIMS registration within the validity of the registration.

(c) SIMS is applicable to imports through Advance Authorisation, DFIA and imports to SEZs.

(d) SIMS shall not be applicable to returnable steel racks imported temporarily.

STP units to submit Service Exports Reporting Form monthly: Software Technology Park unit will now have to submit Service Exports Reporting Form (SERF) as in Annexure VI of Appendix 6E of Appendices for capturing services exports data for 137 specified services as listed in Annexure V to the said Appendix. This form must be filed every month to the designated officer in STP. Public Notice No. 45/2015-20, dated 26-11-2019 for this purpose amends Para 6.11(a) of the Handbook of Procedures Vol.1 and states that use of SERF would be limited to capturing information on services exports from STPs.

Gifts – Prohibition on import of goods where Customs clearance sought as gifts: Import of goods including those purchased from e-commerce portals, through post or courier, where Customs clearance is sought as gifts, has been prohibited except for life saving drugs and rakhi. However, according to Explanation in Para 2.25 of Foreign Trade Policy 2015-20 as now revised by Notification No. 35/2015-20, dated 12-12-2019, import of goods as gifts with payment of full applicable duties will be allowed. The explanation also clarifies that Rakhi (but not gifts related to Rakhi) will be covered under Section 25(6) of Customs Act.

Toys – Import Policy condition revised: DGFT has revised its import policy condition in respect of toys, with effect from 2-12-2019. Instead of certificate of conformance from the manufacture that representative sample of the toys being imported have been tested by an independent laboratory accredited by NABL and found to meet the required specifications, the revised policy condition states that a sample will be randomly picked from each consignment and sent to labs accredited by NABL for testing. Clearance, as per the revised condition, would however be given by Customs on the condition that the product cannot be sold in the market till successful testing of the sample. It also states that if the sample fails to meet the required standards, the consignment will be sent back or destroyed at the cost of the importer. Notification No. 33/2015-20, dated 2-12-2019 for this purpose revises Policy Condition No. 2(iii) in Chapter 95 of ITC (HS).

Peas – Import restrictions tightened: DGFT has revised the import policy of peas including yellow peas, green peas, dun peas and kaspa peas. According to the amendments in Chapter 07 of the ITC (HS) by Notification No. 37/2015-20, dated 18-12-2019, import of such goods will be restricted and subject to minimum import price (MIP) of Rs. 200/kg CIF. Further, the imports will only be allowed through Kolkata sea port.

Jewellery exports – Submission of self-attested copy of exporter's copy of shipping bill as proof of export: Self-attested copy of shipping bill is to be submitted as proof of export along with other documents instead of the Export Promotion copy of the shipping bill in respect of export of gold/ silver/ platinum jewellery and articles thereof. Para 4.68 of the Handbook of Procedures Vol.1 has been amended by Public Notice No. 48/2015-20, dated 18-12-2019.

Ratio decidendi

Ports specified in exemption notification not exhaustive – Exemption, when port notified subsequently: Madras High Court has allowed benefit of Notification No. 104/2009-Cus. (status holder incentive scheme) in a case where the imports were made before the addition of the name of the specific port in the said notification. It observed that the ports referred to in the exemption notification originally were not exhaustive as the notification was amended periodically by including other ports as well and one such inclusion was the specified port later. The Court was of the view that the list provided in the notification was only inclusive in view of the fact that the authorities included other ports by amending the said notification periodically. It also noted that the proviso in the said notification empowered the Commissioner of Customs to issue permission of import and export from other ports as well by issuing a special order. Contention of the Revenue department that power conferred on the Commissioner was only prospective and not retrospective, was also rejected by the High Court. [*Tube Investments of India Ltd* v. *UoI* – 2019 VIL 580 MAD CU]

Export benefit not deniable because of technical lapse – MEIS benefit available even if concerned box not checked in shipping bill: In a case where the exporter did not check the concerned box in the shipping bill to read "Yes" against the query with regard to intention to claim MEIS benefit, but in the column meant for description had clearly indicated his intention to avail the benefit of the said export promotion scheme, Kerala High Court has directed the department to consider claim for benefit under MEIS. The Court was of the view that the denial of a claim for export benefit could not be done in a mechanical manner merely because there was a technical lapse on the part of the exporter concerned in not checking a particular box in the web portal. [*Anu Cashews* v. *Commissioner* - W.P(C).No.25339 OF 2019(N) and others, decided on 13-11-2019, Kerala High Court]

EOU - Non-obtaining of permission from DC for clearance into DTA is procedural error: CESTAT Mumbai has held that non-obtaining of permission from the Development Commissioner does not take away the applicability of the notification allowing a concessional rate of duty. The Tribunal observed that assessee cleared the goods during Aug-Sep, 2003 and at that time the Notification No. 53/97-Cus. was not in currency and that only Notification No. 53/2003-Cus. was applicable under which there was no provision of obtaining permission. The Tribunal was of the view that even if such provision existed, the intent of the same was not to deny substantive rights to the assessee citing procedural infractions. It also held that when a Customs notification has given rate of depreciation, it is not free for the appellants to choose concessional rate of duty in terms of such notification and depreciation rates in terms of the policy stating that the providence of policy overrides the provision of customs. The Tribunal also observed that unused machinery cannot be termed as obsolete. [*Fontasey Engineering Exports Pvt. Ltd.* v. *Commissioner* – 2019 TIOL 3398 CESTAT MUM]

Writ petition also raising issue of competence of the concerned authority under ASEAN FTA, maintainable: Concessional duty benefit under the ASEAN FTA was denied on import of Tin Ingot imported from Malaysia. When the show cause notice (SCN) was challenged by way of a writ petition, the High Court dismissed the petition holding that the issues raised in the petition could

be appropriately addressed in adjudication proceedings before the authorities while responding to the SCN. The Supreme Court set aside the High Court order holding that the appellant had challenged the SCN not only on merits but had raised an issue regarding the efficacy of Article 24 of the Appendix D to the Treaty dated 30-08-2009 between the Republic of India and the Association of South East Asian Countries (ASEAN) which cannot be adjudicated by the competent authority and therefore, needs to be addressed by the High Court. [*Kothari Metals Ltd.* v. *Union of India* – 2019 TIOL 516 SC CUS]

Redemption fine to be determined according to market value of goods at time of seizure: CESTAT Bangalore has held that redemption fine is to be determined in consonance with the market value of goods at the time of seizure. The Tribunal reduced the amount of redemption fine imposed by the Commissioner in the de novo proceedings when it had also increased the value of seized goods. [*Sukumar Kondedan* v. *Commissioner* - Final Order No. 21194/2019, dated 29-11-2019, CESTAT Bangalore]

Aluminium Scrap 'Throb' is not aluminium ingots merely because of high aluminium content: CESTAT Allahabad has held that merely because high aluminium contents have been found in the goods, the same will not convert aluminium scrap into aluminium ingots. The assessee had imported certain goods declared as Aluminium Scrap 'Throb' in the Bill of Entry but the department was of the view that the goods were 'Aluminium Alloy Ingots'. Test report indicated the goods as Aluminium Metallic Ingots with the dominance of aluminium. The Tribunal, however, held that reliance on test reports was not indicative of the fact that the same were Aluminium Alloy Ingots, inasmuch as the said report only reflects on the high percentage of aluminium. It was further noted that the goods were described in export invoice as aluminium scrap and as per the definition of aluminium scrap, the goods should be re-melted into some shapes for the convenience of shipping. [*Jainik Enterprises Pvt. Ltd.* v. *Commissioner* - 2019 (368) ELT 1004 (Tri. – All.)]

Principles of natural justice violated if assessee not given enough time to respond to complete SCN: Petitioner was issued a show cause notice ('SCN') dated 15th December, 2016 calling upon the petitioner to file its reply within a period of 30 days from the receipt of the notice. However, the SCN did not have Annexures 'A' and 'B' annexed to it and the same were sent to the petitioner on 30th May, 2018 and received by the petitioner only on 4th June, 2018. The petitioner on 26th June, 2018 requested the Commissioner to grant further time of four weeks to file reply to the SCN since the complete notice was only received on 4-6-2018. However, the Commissioner fixed a personal hearing and proceeded to decide the issue and passed ex parte order. Observing that the objective of giving a SCN is to make the party aware of the case it has to meet, Bombay High Court held that reduction of time given to respond to SCN causes prejudice to the party. It was held that principles of natural justice were violated inasmuch as the petitioner was not given sufficient opportunity to meet the allegations. [*Riddhi Siddhi Collection* v. *Union of India* - 2019 (368) ELT 852 (Bom.)]

Central Excise, Service Tax and VAT

Circular

Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 – Clarifications: CBIC has issued Circular 1074/07/2019-CX, dated 12-12-2019 to clarify on certain issues raised in respect of Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 [SVLDRS]. It has been clarified that the amount paid after issuance of SCN but before adjudication can be adjusted against the amount payable under the Scheme, however, there would be no question of refund of excess deposit even if such payment was made 'under protest'. The circular also clarifies that eligibility under the Scheme will not undergo a change in case there is subsequent change of facts, and that status as on 30-6-2019 will prevail. According to the Circular, in case where audit report contains more than one para, the option is available with the taxpayer to file separate declarations for each para or file a declaration for two or more paras together. It has also been clarified that 'matter' under Section 129 of the Finance (No.2) Act, 2019 means a case for which the taxpayer intends to file a declaration under the Scheme.

Ratio decidendi

Exemption to Basic Excise duty not automatically extends to Cess and NCCD: Larger Bench of the Supreme Court has held that exemption to Basic Excise Duty will not automatically extend to cesses [Education Cess (EC) and Secondary and Higher Education Cess (SHEC)] and National Calamity Contingent Duty (NCCD). The Court observed that there was no reference in the exemption notification No. 71/2003-C.E. to the Finance Act, 2001, by which NCCD was imposed, and that Finance Acts 2004 and 2007, through which Education Cesses were imposed, were not in vogue at the time when the exemption Notification No. 71/2003-C.E. came into force and therefore, it could not have contemplated the inclusion of EC and SHEC within its fold. The Court also rejected the proposition that simply because one kind of duty is exempted, other kinds of duties automatically fall. It observed that there is no difficulty in making the computation of additional duties payable under NCCD, Education Cess, Secondary and Higher Education Cess. The earlier decisions in the cases of *SRD Nutrients (P) Ltd.* and *Bajaj Auto Ltd.* were held *per incuriam* as they did not consider the Larger Bench decision in *UoI v. Modi Rubber Ltd* which covered the present issue and was also followed by the judgement *in Rita Textiles (P) Ltd v. UoI*. [*Unicorn Industries* v. *UoI* - Civil Appeal No. 9237 of 2019 and Ors., decided on 6-12-2019, Supreme Court Larger Bench]

Cenvat credit not available on fuel inputs used in manufacture of exempted goods: Larger Bench of the Supreme Court has held that Cenvat credit would not be available on LSHS used as fuel in the manufacture of fertilizers which were exempt from Central Excise duty. The Court observed that the moment the inputs are intended to be used as fuel, such inputs would go outside the ambit of Rule 6(2) of the Cenvat Credit Rules, 2002 and in such scenario, the same would get covered under Rule 6(1) and would not get excluded from it. It also held that there was no conflict between the Supreme Court decisions in the cases of *Gujarat State Fertilizers and Chemicals Ltd.* and *Gujarat Narmada*

Fertilizers Ltd. It also held that the decision in case of *GSFCL* was not applicable in the present case since the issue in that case was in the context of Central Excise Rules, 1944 whereas the decision in *GNFCL* was rendered in the context of Cenvat Credit Rules, 2002 where the provisions were different. [*Commissioner* v. *Gujarat Narmada Valley Fertilizers Co. Ltd.* - Civil Appeal Nos. 4189-4196 of 2010, decided on 3-12-2019, Supreme Court Larger Bench]

Deemed sale - Use by charterer exclusively for six months is a contract of transfer of right to use: Supreme Court of India has held that Karnataka Sales Tax would be applicable on the deemed sale of the vessel by way of transference of right to use to Mangalore Port Trust in territorial waters of India. The Apex Court observed that the Charter Party agreement clearly made out that there was a transfer of exclusive rights to use the vessel which was a deemed sale and was liable to tax under the KST Act. It was observed that the use by charterer exclusively for six months was definitely a contract of transfer of right to use the vessel and that same was deemed sale as specified in Article 366(29A)(d), and that merely rendering service by the servants and crew to carry the goods will not make it a service contract. The Court held that the Charter Party Agreement qualified the test laid down by the Apex court itself in *BSNL v. UoI* that for effecting the transfer of right to use the goods, the same must be available at the time of transfer, must be deliverable and delivered at some stage. The argument based on the foreign courts' decisions that the charter agreements are only for service purpose, was held as not correct. The Court also reiterated that the situs of agreement was relevant in the present case. [*Great Eastern Shipping Co. Ltd* v. *State of Karnataka* – 2019 VIL 40 SC]

Cenvat credit can be availed on tour expenses of dealers: CESTAT Allahabad has held that Cenvat credit for service tax paid on tour packages, provided by assessee to its dealers, was available to the assessee. The Tribunal in this regard observed that it was possible for the assessee to pay for tour expenses in cash yet they provided tour packages to dealers and that the same can be considered as dealer's commission therefore qualifying to be in furtherance of business. Tribunal's decision in the case of *Simbhaoli Sugar Ltd. v. CCE,* where it was held that if commission was paid to sales commission agent for effecting sale of goods manufactured by the assessee then service tax paid on such commission would be available as input service credit to the manufacturer, was relied on. [*Merino Industries Ltd.* v. *Commissioner* – 2019 VIL 738 CESTAT ALH ST]

Scrapping not falls within ambit of Central Excise Rule 16 for availing Cenvat credit on goods brought back: High Court of Allahabad has held that scrapping of goods would not be covered within the ambit of Rule 16(1) of Central Excise Rules, 2002 which allowed Cenvat credit on goods brought back for being re-made, refined, re-conditioned, or for any other reason. The Court held that processes coming under for 'any other reason' must be akin to the processes that immediately precedes the phrase. It also held that "re-made", "refined" and "re-conditioned" are processes akin to manufacture, while scrapping involves destruction of the original identity of the goods, which was not the intent of legislature while framing the rule. The Court observed that assessee scrapped the goods and tried to pass it as refining and the transactions were devices to illegally avail Cenvat credit. [*Commissioner* v. *International Tobacco Co. Ltd.* – 2019 VIL 594 ALH CE]

Export of readymade garments – No following of procedure under Notification No. 42/2001-C.E. (N.T.) not fatal: CESTAT Ahmedabad has held that even though the assessee had not followed the procedure prescribed under Notification No. 42/2001-C.E. (N.T.) but on the basis of all the evidences and documents if it is established that the goods have been exported, demand of Central Excise Duty on export clearances will not sustain. The Tribunal observed that as regards readymade garment, there was a specific Circular No. 705/21/2003-CX, dated 8-4-2003, according to which the assessee was required to follow the simplified procedure as prescribed in the said circular, and hence the assessee was not required to follow the procedure as prescribed under Notification 42/2001-CE (NT). [*Cebon Apparels (P) Ltd* v. *Commissioner* – 2019 VIL 736 CESTAT AHM CE]

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