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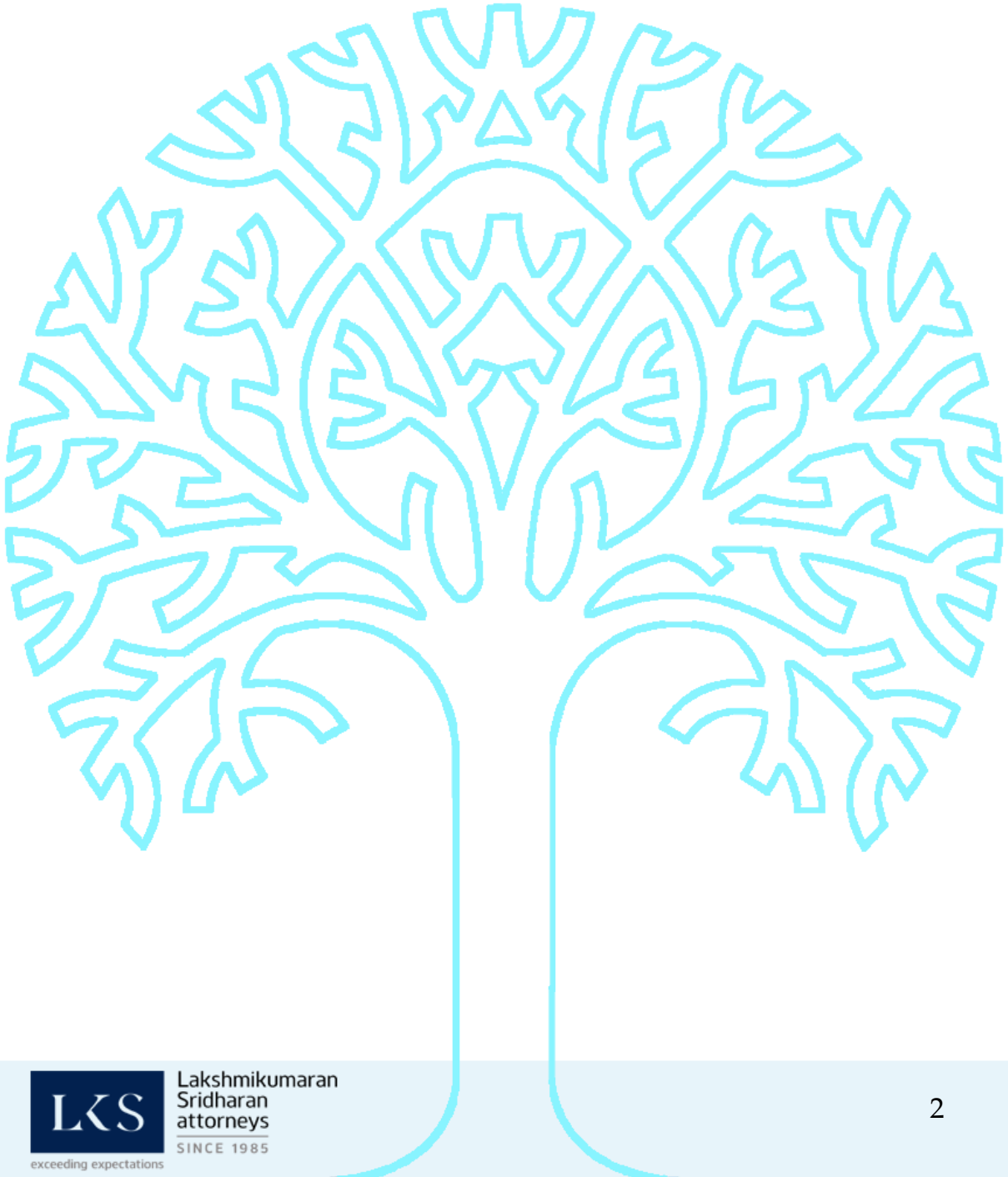

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Article

Blocking of ITC ledger: The havoc of Rule 86A

By **Shrishti Agarwal and Narendra Singhvi**

The article in this issue of Indirect Tax Amicus discusses Rule 86A of the Central Goods and Services Tax Rules, 2017 which empowers the Revenue department to block ITC ledger in cases involving fake ITC, so that the amount is not available for utilization against output tax liability or for claiming refund. Observing that the greater the power, the more dangerous the abuse; and it is no different in the case of Rule 86A, the authors deliberate on various case law as decided by different High Courts on number of issues including on 'borrowed satisfaction', 'temporary measure', 'negative blocking', etc. According to the authors, tax administrators must respect and follow the evolving judicial opinions on the subject and use their powers fairly, preserving both - the interests of the revenue and the rights of taxpayers.

Blocking of ITC ledger: The havoc of Rule 86A

By Shrishti Agarwal and Narendra Singhvi

The good and simple regime of GST is witnessing a great spur in cases involving fake invoicing to pass on fake Input Tax Credit ('**ITC**'). To block utilization of such fake ITC, Rule 86A of the Central Goods and Services Tax Rules, 2017 was introduced in 2019 empowering the specified officers to block ITC ledger so that such amount is not available for utilization against output tax liability or for claiming refund.

Fake Input Tax Credit itself invites proceedings under Section 73/74 of the Central Goods and Services Tax Act, 2017 for the purposes of adjudication of liabilities arising therefrom. However, blocking of ledger under Rule 86A can take place even before conclusion of adjudication under Section 73/74. The effect of both, however, is the same, as action under Rule 86A disables utilization of ITC and adjudication under Section 73/74 creates liability to pay such ITC. While adjudication under Section 73/74 is subject to various checks and controls as envisaged under the Act itself, very little is provided for exercise of power under Rule 86A.

The greater the power, the more dangerous the abuse; and it is no different in the case of Rule 86A. Anyone tracking the judicial developments on scope of Rule 86A can vouch for the great abuse to which powers under Rule 86A have been subjected to. Blocking of ITC ledger is being done without hearing the assesse, merely based on directions of some other departmental officers and without recording any independent reasons to believe. The ITC ledger is being blocked even in cases where either the balance in the ledger is nil or is not sufficient to cover the ITC under the dispute.

In *K-9 Enterprises* v. *State of Karnataka* [2024 TIOL 1739 HC KAR GST], the Karnataka High Court analysed the scheme of Rule 86A in detail and held that though the Rule does not envisage any hearing to the affected party, a *pre-decisional hearing* is mandatory before invoking Rule 86A, considering the drastic and draconian consequences of blocking of ITC ledger. It has further been held that since only specified officers have been empowered for exercising powers under Rule 86A, existence of situations specified thereunder must be independently analysed by such specific officers only, who must record his own reasons to believe for invocation of Rule 86A. That such specified officers cannot proceed to invoke Rule 86A based on *borrowed satisfaction*.

The situation of borrowed satisfaction also came up before the Rajasthan High Court in *Sumetco Alloys Pvt. Ltd.* v. *Union of India*

[2024 VIL 1105 RAJ], wherein interim relief was granted by ordering to keep the action of blocking of ITC ledger in abeyance.

In *Best Crop Science Pvt. Ltd.* v. *Principal Commissioner* [2024 TIOL 1625 HC DEL GST], the Delhi High Court has held that Rule 86A is merely a temporary measure to protect the interest of revenue, and not a provision to recover tax or other dues. It was further held that negative blocking of ITC ledger is not permissible under Rule 86A. The issue of *negative blocking* of ITC ledger has been addressed by many other High Courts also.

The law on scope and purport of Rule 86A, thus, has been evolving, and thankfully to check the abuse of powers thereunder. Blocking of ITC ledger creates a stumbling block on working capital of businesses, which is their regular diet required to keep them alive and running. Tax administrators must respect and follow the evolving judicial opinions on the subject and use their powers fairly, preserving both - the interests of the revenue and the rights of taxpayers.

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Goods & Services Tax (GST)

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Ratio Decidendi

Investigations – Transfer from State Authorities to Central Authorities permissible – CGST Section 6 and CBIC Circular dated 5 October 2018 do not cover all situations – SC approves Delhi HC decision

The Supreme Court has dismissed a Special Leave Petition filed by the assessee against the Delhi High Court decision wherein the lower court had held that there is no prohibition in the CGST Act or the SGST Act to transfer of investigation from State Authorities to the Central Authorities. The action, in this dispute, was initiated by the State Tax Authorities but the same was later transferred to the Central Authorities which was contested by the assessee relying on the Section 6 of the CGST Act, 2017 and the CBIC Circular dated 5 October 2018. The Delhi High Court in its Judgement dated 11 January 2022 had observed that Section 6 and the said circular cannot be given an overarching effect to cover all the situations that may arise in the implementation of the CGST and the SGST Acts. [*SSM Exports* v. *Commissioner* – Order dated 12 November 2024 in Petition(s) for Special Leave to Appeal (C) No(s). 13683/2022, Supreme Court]

Secondment of employees – Delhi HC sets aside demand and penalty relying upon CBIC Circular 210/4/2024-GST

Relying upon CBIC Circular No. 210/4/2024-GST, which clarifies in case no invoice is raised by the related domestic entity in respect of services of secondment of employees rendered by its foreign affiliate, the value of such services would be 'deemed' to have been declared as 'Nil', the Delhi High Court has set aside the SCNs demanding GST. The Court was also of the view that once the position to govern all assessees pan-India came to be clarified by the CBIC, the continuation of penalty proceedings or for that matter the imposition of interest would not sustain. It was noted that in light of the stand taken by the CBIC, the assessee-petitioner, would have stood absolved of all tax liabilities and implications flowing from the GST provisions. ***One of the petitioners-assessees here was represented by Lakshmikumaran &***

Sridharan Attorneys. [*Metal One Corporation India Pvt. Ltd.* v. *Union of India* – 2024 VIL 1161 DEL]

Appeal – Pre-deposit under Section 107(6) can be paid by utilizing Electronic Credit Ledger

The Madras High Court has held that 10% pre-deposit under Section 107(6) of the CGST Act, 2017 can be paid by utilizing the Electronic Credit Ledger. The Court for this purpose relied upon Section 49(4) of the CGST/TNGST Act and noted that the word used in the provision, prescribing utilization of amount in credit ledger, is 'may' and not 'shall'. It was also noted that if 10% of the disputed tax has to be paid, it means that the deposit is made only towards discharging liability of output tax. The Court also relied upon CBIC Circular dated 6 July 2022 to observe that ITC can be utilized not only for payment of the self-assessed output tax but also for amount payable as a consequence of the proceeding instituted under the provisions of GST laws. Circular dated 2 November 2023 prescribing special procedure for filing appeals beyond the specified time period, and statutory appeal form APL-01 providing for the mechanism to pay pre-deposit by utilizing the Electronic Credit Ledger, were also relied upon for the purpose. ***A few of the petitioners-assessees were represented by Lakshmikumaran & Sridharan Attorneys here.*** [*Ford India Private Limited* v. *Joint Commissioner* – 2024 VIL 1262 MAD]

Transitional credit – Pendency of enquiry on eligibility of Cenvat credit cannot disentitle transition of credit to GST regime

The Andhra Pradesh High Court has held that mere issuance of a show-cause notice [in respect of eligibility of Cenvat credit] which was subsequently kept in abeyance, cannot disentitle the assessee from claiming the transition of the said available Cenvat credit as on 30 June 2017 to the GST regime. The Court hence rejected the submission of the Department that the pendency of an enquiry, on the eligibility of the assessee to claim such Cenvat credit, is sufficient to hold that the transition of credit under Section 140(1) of CGST Act is not permissible, as the said provision stipulates that it is only eligible Cenvat credit that can be transitioned. Allowing the petition, the Court also noted that as on the date of transition, that is 1 July 2017, there was no show-cause notice or any doubt raised against the claim of the assessee for availing such Cenvat credit. ***The assessee was represented by Lakshmikumaran & Sridharan Attorneys here.*** [*KCL Limited* v. *Joint Commissioner* – 2024 VIL 1260 AP]

Interest for delayed refund on exports is payable even for time-period during which exporter was in 'risky exporters list'

The Bombay High Court has held that the assessee-exporter is entitled to interest under Section 56 of the CGST Act, 2017 for the period starting from the expiry of 60 days from the date of filing the shipping bill up to the date of grant of refund, although during the interregnum, the exporter's name was red flagged in the 'risky exporters list' on the Department's portal. The Court in this regard noted that Section 56 does not provide for excluding the period during which the Department is investigating the grant of refund. Further, observing that Circular No.16 of 2019 and Circular No.131/1/2020 were issued to complete the investigation within the time frame specified therein, with the objective to make Indian businesses internationally competitive and for ease of doing business, the Court noted that the delay in refund was attributable to the inaction of the Department in not completing the investigation within the specified time frame. However, it may be noted that the Court held that in calculating the period of delay, the 30-day period provided in CBIC Circular No.16 of 2019 needs to be excluded as a reasonable period provided for completing the investigation. [*Anita Agarwal* v. *Union of India* – 2024 VIL 1218 BOM]

ITC in case of advance payments – Restrictions under Sections 16(2)(b) [receipt of goods/services] and 16(2)(a) [possession of tax invoice] are not applicable

In a case involving advance payments for the services to be received where the Department had denied Input Tax Credit citing Section 16(2)(b) of the CGST Act, 2017, the Bombay High Court has held that the words 'intended to be used in the course' or 'furtherance of his business' in Section 16(1) would mean / include the deferred receipt of goods or services or both. Also, according to the Court, the word 'intended' as used in Section 16(1) is required to be given its due meaning in applying the provisions of Section 16(2)(b), when it prescribes that the credit of any input tax would *inter alia* be available when the registered person has received the goods or services or both. The High Court was also of the view that otherwise there would be an anomalous situation on operation of Section 13(2) [Time of supply] thus creating a complete dichotomy, disturbance or friction in the interplay between Section 13(2) and Section 16.

Similarly, the denial of ITC citing Section 16(2)(a) concerning possession of tax invoice was also overruled by the High Court, while it accepted the position as taken by the GST Council when the Counsel appearing for the GST Council submitted that the 'Receipt Voucher' is a tax paying document. The Department had denied credit reading Section 31 of the CGST Act with Rule 36 of the Central Goods and Service Tax Rules, 2017. The Court in this regard relied upon provisions of sub-section (3)(d) of Section 31 and held that when the assessee satisfied the requirements of Section 31(3)(d) as also accepted by the revenue to be a tax paying document, it would not be correct in law that he is denied ITC merely because of non-compliance with the part of the provisions, namely Section 31(1) read with Rule 36. [*L & T IHI Consortium* v. *Union of India* – 2024 VIL 1219 BOM]

No provision to issue letter advising assessee to make voluntary payment – Department directed to be cautious

The Allahabad High Court has quashed the letter issued by the Revenue department advising the petitioner-assessee to make voluntary payments. The Court in this regard noted that no show cause notice/demand notice/recovery notice was issued against the assessee. Holding that the entire procedure is unknown in law, the Court noted that the Department was not able to indicate any provision under which such a letter could be issued by the authorities. Setting aside the letter, the Court also directed the authorities to be cautious in future and not issue such letters that are tantamount to pressure tactics by the Department. [*Shree Kunj Bihari Infracon Private Ltd.* v. *State of U.P.* – 2024 VIL 1182 ALH]

Demand proceedings under Section 74(1) are wrong if assessee subsequently informed that their reply to notice under Section 61(1) was satisfactory

The Punjab & Haryana High Court has quashed and set aside entire demand proceedings initiated under Section 74 of the CGST Act, 2017 by the Department in a case where subsequent to the issue of intimation under Rule 142(1)(A) in Form GST DRC 01A, the Department had *vide* GST ASMT-12 intimated the assessee that the latter's reply to the notice under Section 61 was found satisfactory and no further action was required to be taken in the matter for the concerned financial year. The intimation under GST DRC 01A had mentioned that the reply to the notice under Section 61 was *not* found to be satisfactory.

The High Court was of the view that it can be presumed that after the notice was given under Section 74(5), the Authority reached the conclusion that no additional demand is payable/chargeable and therefore, the proceedings were dropped. [*J.S.B. Trading Co.* v. *State of Punjab* – 2024 VIL 1190 P&H]

Refund – Second application filed after rectification of defects is not barred by limitation even if filed after the prescribed time-period

The Kerala High Court has set aside the rejection of assessee's refund application which was based on the ground that the second application filed by the assessee, after rectification of defects, was barred by limitation. The Court in this regard noted that Rule 90(3) of the CGST Rules, 2017 does not contemplate that the date of the fresh application has to be considered for the purposes of determining the period of limitation for filing an application for refund under Section 54(1) of the CGST/SGST Act. The refund application was directed to be treated as one filed on the date of earlier original application. [*Sali P. Mathai* v. *State Tax Officer* – 2024 VIL 1195 KER]

Audit permissible for prior period even if registration stood cancelled on date when audit ordered

The Bombay High Court has answered in affirmative the question as to whether the provisions of Section 65 of the CGST/SGST Act, dealing with the audit, would apply to a person who was registered under the said provisions during the period for which the audit is ordered but who ceases to be registered on the date the audit is ordered. The High Court was of the view that the phrase 'registered person' for the purpose of Section 65 and on a holistic reading of all the connected provisions would mean a person who was registered at some point of time under the GST provisions even though, subsequently, such registration was cancelled. Differing with the Madras High Court decision in *Tvl. Raja Stores* v. *Assistant Commissioner*, the Court took note of Section 29(3) which provides that the cancellation of registration shall not affect the liability. Observing that an audit is always a post-mortem of a particular event or thing that happened in the past, the Court held that the phrase 'at such frequency' in Section 65(1) would not mean that an audit should be conducted concurrently or regularly. Further, taking note of the phrase 'for such period' in Section 65(1) qualifying the phrase 'registered person'

preceding it, read along with Rule 101(1), the Court was of the view that whether a person is registered or not is to be examined for the financial year/period for which an audit is conducted. [*LJ - Victoria Properties Private Limited* v. *Union of India* - 2024 (11) TMI 912 - Bombay High Court]

GST payable on royalty paid for mining concession granted by State

The Himachal Pradesh High Court has dismissed the petitions filed for consideration of the question as to whether there can be levy of GST on the royalty paid by the mineral concession holder for any mining concession granted by the State. The High Court in this regard relied upon the Nine-Judge Bench of the Supreme Court in *Mineral Area Development Authority & anr.* v. *Steel Authority of India & anr.*, wherein it has been held that royalty is not a tax. The High Court hence held that the Department was hence well within its rights to levy GST on the royalty paid by the mineral concession holder for any mining concession granted by the State. [*Lakhwinder Singh Stone Crusher* v. *Union of India* – 2024 VIL 1183 HP; See also, *Matri Stone Crusher & Ors.* v. *Union of India* – 2024 (11) TMI 375 - Himachal Pradesh High Court]

Classification of hand sanitizers – Union not competent to direct judicial/quasi-judicial authorities to decide classification in a particular manner – Finance Ministry's Press Release dated 15 July 2020 quashed

The Bombay High Court has set aside the Ministry of Finance Press Release dated 15 July 2020 which purported to classify alcohol-based hand sanitizers as 'disinfectants' attracting a GST rate of 18%, instead of 'medicaments' attracting a lower GST rate. Quashing the Press Release so that the judicial and quasi-judicial authorities could decide on the issue of classification, the Court noted that the issue of classification is essentially an issue of interpretation and that the Union (in exercise of Executive power) is not competent to direct judicial and quasi-judicial authorities to decide the issue of classification of products in a particular manner.

The High Court was of the view that the issue of whether a product falls within a particular class, after the law is already enacted and the classification is already made, falls within the province of the judicial and quasi-judicial authorities created under the Act and such powers must be exercised by the

judicial and quasi-judicial authorities independently. Further, noting that if the Parliament becomes *functus officio* when it comes to the interpretation of the law made by it, without undertaking the whole process of law-making, it was held that the Union, in the exercise of its executive powers, cannot claim powers which even transgress the powers of the Parliament in this regard. [*Schulke India Pvt. Ltd.* v. *Union of India* – 2024 VIL 1197 BOM]

Demand – Summary of show cause notice is not a substitute of show cause notice

The Gauhati High Court has held that non-issuance of a proper and prior show cause notice, as contemplated under Section 73(1) of the CGST Act, 2017 and issuance of only summary of show cause notice and attachment to determination of tax cannot be said to be in compliance with Section 73(1) and Rule 142(1) of the CGST/AGST Rules, 2017. According to the Court, summary of show cause notice is not a substitute of a show cause notice, contemplated by the provisions of Section 73(1) to set the demand proceeding in motion. [*Udit Tibrewal* v. *State of Assam* – 2024 VIL 1205 GAU]

Appeal – Insistence on submission of certified copy of impugned order is regressive if same can be obtained directly from website of judicial and quasi-judicial bodies

The Gujarat High Court has observed that in today's day and age, insistence on 'certified copy' of orders which can be obtained directly from the website of judicial and quasi-judicial bodies is regressive in nature and puts a premium on needless archaism. In a dispute where assessee's appeal was dismissed for non-submission of certified copy of the order impugned before the Joint Commissioner, the Court noted that when the order which is appealed against is issued or uploaded on the common portal and the same can be viewed by the Appellate Authority, there could be no requirement whatsoever of submitting a certified copy of such uploaded order to test its authenticity. The High Court for this purpose also relied upon its earlier decision holding that the amendment to Rule 108 of the CGST Rules, 2017 from 26 December 2022 is clarificatory in nature. The amended Rule required submission of order appealed against only if the same is not uploaded on the common portal. [*Venus Macro Prints Pvt. Ltd.* v. *State of Gujarat* – 2024 VIL 1213 GUJ]

Revisional Authority's order, placing in abeyance refund order, based on intelligence inputs (on ITC claims) received after the refund order, is not sustainable

The Delhi High Court has quashed an order of the Revisionary Authority under Section 108 of the CGST Act, 2017 which had placed in abeyance an order of refund. Answering in negative the issue as to whether the Revisionary Authority's doubt regarding ITC claimed by the assessee during the specified tax period would justify invocation of Section 108, the Court noted that the allegation of wrongful availment of ITC was based on intelligence inputs received subsequent to the passing of the refund order. It was also noted that the allegation was clearly distinct and unconnected with the order sanctioning refund. According to the Court, while that allegation may ultimately lead to the creation of prospective liabilities, it has no correlation with the question of whether the order sanctioning refund was rendered invalid or was liable to be corrected under Section 108. [*HCC VCCL Joint Venture* v. *Union of India* – 2024 VIL 1208 DEL]

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Customs

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Notifications and Circulars

Investigation of customs evasion cases – Guidelines issued for investigating cases related to commercial intelligence and fraud

The Central Board of Indirect Taxes and Customs ('**CBIC**') has issued Instruction No. 27/2024-Customs dated 1 November 2024 to establish a set of guidelines specifically for investigating cases related to Commercial Intelligence and fraud. Unlike cases of outright smuggling, these investigations focus on instances of potential fraud, evasion, or regulatory issues involving non-compliance with the provisions of Customs and allied laws. According to the Instruction, even after the initial decision for conduct of investigation has been made by the Commissioner, the general principles of ease of doing business, including those driven by common prudence must be kept in view while undertaking investigations. A detailed analysis of the Instruction along with relevant comments from the **LKS Investigations Team** is available here.

IGCR and MOOWR – Simultaneous availment permissible; MOOWR unit can be intermediate goods manufacturer and claim benefit of IGCR for further supply

The CBIC has reiterated that the MOOWR unit can avail IGCR exemption along with duty deferment under MOOWR simultaneously, provided that the importer undertakes to comply with the additional conditions prescribed in the concessional notification and Customs (Import of Goods at Concessional Rate of Duty) Rules, 2022 ('**IGCR**'), including time-limit etc., in addition to MOOWR stipulations.

Similarly, Circular No.26/2024-Customs, dated 21 November 2024 also clarifies that in case of imports by the intermediate goods manufacturer who is MOOWR unit, for further supplying after some manufacturing/ value addition to the final manufacturer of Cellular mobile phones, the benefit of concessional rate of duty under IGCR Rules, 2022 [under Notification No. 57/2017-Cus., Sl. No. 5C to 5E] would be available, as long as all other conditions are met.

It may be noted that the Circular also clarifies that the

expression '*for use in manufacture of cellular mobile phones*' in the abovementioned notification is intended to convey that the component should be used in manufacturing process for cellular mobile phones and does not mean that the components should be imported by manufacturer of cellular mobile phones.

IGCR Returns – Manual filing allowed till 31 January 2025

The CBIC has allowed importers who are facing difficulties on electronic filing of their IGCR-3 monthly statement, to do so manually before jurisdictional officers till 31 January 2025. Circular No. 25/2024-Cus., dated 21 November issued for the purpose states that the monthly statement is to be filed online from the month of February 2025. It may be noted that the Circular also states that an excel utility will also be made available by DG Systems, CBIC by 15 December 2024 for filing IGCR-3 monthly statement.

QCOs notified by Ministry of Heavy Industries need not be complied for imports by Advance Authorization holders, EOUs and SEZs

The DGFT has amended Appendix-2Y of the Handbook of Procedures to add Ministry of Heavy Industries in the list of Ministries/Departments whose notifications on mandatory QCOs are exempted by the DGFT for goods to be utilised/consumed in manufacture of export goods, i.e., imports by Advance Authorisation holders, EOUs and SEZ units. Public Notice 31/2024-25, dated 5 November 2024 has been issued for this purpose.

Clear float glass having only a tin layer on one side is classifiable under Customs TI 7005 29 90

The CBIC has clarified that clear float glass which is not wired, not coloured, not reflective and not tinted and has only a tin layer on one side while there is no other metal oxide layer on it, cannot be said to have any absorbent layer; and therefore, will be correctly classified under Tariff Item 7005 29 90 of the Customs Tariff Act, 1975. According to the Circular, getting a 'tin layer' on one side of the glass by default does not mean that it satisfies the condition under Note 2(C) of Chapter 70.

Coking and non-coking coal – Mandatory additional qualifiers notified in import declarations

The CBIC has notified mandatory additional qualifiers in import declarations in respect of import of coking and non-

coking coal. The additional qualifiers covering different grades based on ash percentage in case of coking coal and based on gross calorific value (GCV) in case of non-coking coal are required to be declared with effect from 15 December 2024. According to CBIC Circular No. 24/2024-Cus., dated 20 November 2024, issued for the purpose, declaration of additional qualifiers would improve quality of assessment and intervention and increase facilitation.

Synthetic or Reconstructed Diamonds – Mandatory additional qualifiers notified for export/import declarations

The CBIC has notified mandatory additional qualifiers for export/import declarations in respect of synthetic or reconstructed diamonds. The additional qualifiers pertain to certain specified lab grown diamonds – chemical vapour deposition, high pressure high temperature, and other and will apply from 1 December 2024. Circular No. 21/2024-Cus., dated 30 October 2024 has been issued for the purpose.

Ratio Decidendi

DRI's jurisdiction to issue show cause notice under Customs Act – Supreme Court reviews its earlier decision

The Supreme Court has upheld the jurisdiction of officers of the DRI and the Customs Preventive to issue show cause notices under Section 28 of the Customs Act, 1962. Allowing Revenue department's review petition against its earlier decision which had held that DRI officer is not 'the' proper officer to issue SCN under Section 28, the Apex Court rejected the view that the vesting of the functions of assessment and re-assessment under Section 17 is a threshold, mandatory condition for a proper officer to perform functions under Section 28.

It may be noted that this decision however does not disturb the findings of the Court in its earlier decision (which was reviewed here) on the issue of limitation.

Further, the Supreme Court also gave directions for appropriate disposal of the cases where maintainability of show cause notices issued by officers of DRI, Customs (Preventive), DGCEI and other similarly situated officers, was challenged on the ground of want of jurisdiction for not being the proper officer, which remain pending before various forums. ***The assessee was represented by Lakshmikumaran & Sridharan Attorneys here.*** [*Commissioner* v. *Canon India Pvt. Ltd.* – Judgement dated 7 November 2024 in Review Petition No. 400 of 2021 in Civil Appeal No. 1827 of 2018 and Ors., Supreme Court]

Social Welfare Surcharge is not payable when BCD paid using MEIS scrips – Duty liability is not discharged when exemption obtained

Disagreeing with the view taken by the Madras High Court Division Bench in *Gemini Edibles and Fats India Pvt. Ltd.* v. *Union of India*, the Orissa High Court has held that the assessee-petitioner was not required to pay Social Welfare Surcharge ('**SWS**') calculated on customs duty which was exempted under the MEIS scrip used by it. Noting that the charging provision by sub-section (3) in Section 110 of the Finance Act, 2018 for SWS is a percentage of customs duty paid, as collected by the Central Government, the Court held that the duty paid

being zero, collection is zero and percentage of it must also be zero. The High Court in this regard was of the view that upon a person obtaining exemption, he cannot be said to be discharging liability to pay duty, and that there is no fact of collection following the levy. According to the Court, debits in the scrip was for purpose of measure of quantum of exemption utilized under it. ***The assessee here was represented by Mr. V. Sridharan, Co-founder of Lakshmikumaran & Sridharan Attorneys.*** [*Dalmia Cement (Bharat) Ltd.* v. *Union of India* – 2024 VIL 1255 ORI CU]

1) Exemption – Effect of non-use of terms 'only', 'exclusively', 'wholly' or 'entirely' before the words 'for medical use'

2) Speaking order is required under Customs Section 17(5) in respect of each Bill of Entry

The CESTAT Mumbai has allowed assessee's appeal in a case involving exemption under Sl. No. 563 of Notification No. 50/2017-Cus. on imports of massagers. Rejecting the Department's contention that the goods were not meant for medical use and hence exemption was not available, the Tribunal noted that description of goods in column no. 3 of the notification did not use the terms 'only', 'exclusively', 'wholly' or 'entirely' before the words 'for medical use'. Further, regarding use of the word 'only' in the Explanation to said Sl. No., the Tribunal was of the view that it was to emphasise that the word 'goods' refers to the instruments, or appliance and not to their parts. It was noted that the word 'only' cannot be read before the words 'for medical use'.

Further, the Tribunal also held that a speaking order is required to be passed under Section 17(5) of the Customs Act, 1962 in respect of each Bill of Entry. The Adjudicating Authority had passed a speaking order only in respect of one Bill of Entry while not doing the same for seventy-six remaining B/Es. According to the Tribunal, it was necessary for the Additional Commissioner of Customs to pass speaking orders in respect of all the seventy-six Bills of Entry and the Commissioner (Appeals) could not have dismissed the appeal only for the reason that in respect of one Bill of Entry a speaking order had already been passed and so the view of the department was known. ***The assessee was represented by Lakshmikumaran & Sridharan Attorneys here.*** [*Lifelong Online Retail Pvt. Ltd.* v. *Commissioner* – 2024 VIL 1472 CESTAT MUM CU]

Drawback – Computation of brand rate of drawback – Reverse calculation based on SION when correct – Non-furnishing of data on actual quantity is not fatal

The CESTAT Chennai has held that the application for fixing brand-rate of Drawback based on calculation of consumption of inputs for a particular export based on SION and then by arithmetical reverse calculation, and not the actual quantity of duty paid inputs, etc., is correct. Department's contention that since the application had not furnished proof of duty paid inputs declared in DBK III and IIIA statements, the Commissioner's direction for fixation of brand rate was wrong, was thus rejected. The Tribunal was also of the view that SION being an established norms prescribed even by DGFT for the purpose of export-import commerce, there is no infirmity in applying the same norms when the exact quantity of inputs consumed out of the purchased quantity cannot be ascertained. Dismissing the Department's appeal, the Tribunal also noted that there was no assertion by the Revenue department of non-usage of materials or non-exports of manufactured goods and also no allegation of any statutory violation. ***The assessee was represented by Lakshmikumaran & Sridharan Attorneys here.*** [*Commissioner* v. *K.G. Denim Ltd.* - 2024 (11) TMI 413 - CESTAT Chennai]

SAD refund – Parts imported sold as such or in different form

The CESTAT Ahmedabad has allowed assessee's appeal relating to refund of Special Additional Duty ('**SAD**') in a case where the Revenue department had denied refund holding that the goods imported were parts of the Micro Irrigation System, but they were sold as Micro Irrigation System. The Tribunal in this regard noted that the Department did not notice the fact that the parts were sold separately, and installation charges were separately indicated in the invoice. It also observed that though the assessee-importer had given a different nomenclature while reselling the goods, but no further process was carried out, and that the parts were sold as individual by raising invoice giving details of individual parts. Allowing benefit of Notification No. 102/2007-Cus., the Tribunal also rejected the Department's contention that the benefit is not available as VAT was not paid on the resale, being nil. It in this regard observed that even if the goods attract nil rate of VAT, it is to be treated as VAT was paid appropriately. ***The assessee***

was represented by Lakshmikumaran & Sridharan Attorneys here. [*Netafim Irrigation India Pvt. Ltd.* v. *Commissioner* – 2024 VIL 1497 CESTAT AHM CU]

Processing of amended shipping bills at DGFT portal – HC imposes costs on DGFT and directs it to tune its electronic handling systems

The Bombay High Court has allowed assessee's petition in a case where the DGFT had raised objection for the issue of the MEIS Scrips to the assessee-petitioner as there was difficulty in the systems to process the petitioner's corrected shipping bills. The Court was of the view that the assessee cannot be made to suffer because the DGFT portal systems cannot process such amended shipping bills. It was noted that the petitioner's Customs brokers made an inadvertent error while filing the shipping bills and did not claim the benefit under the MEIS scheme, however, applications were made for correction soon after this error was discovered. The Customs Authorities also accepted such applications, and amendments both in manual and electronic form were eventually permitted.

Further, directing the DGFT to tune its electronic handling systems to align with the directions issued by the Court in *Technocraft Industries (India) Limited* and the Directorate General of Systems and Data Management (CBIC) Advisory No.7 of 2023, dated 11 April 2023, the High Court observed that what the law grants cannot be denied or unduly delayed by technology meant only to assist in implementing the law. The DGFT was also directed to pay INR 50,000 as costs to the petitioner. The Court for this purpose noted that the DGFT cannot adopt an attitude that its technological systems are not geared to deal with such situations and that its officials will not deal with such situations. [*Larsen & Toubro Limited* v. *Union of India* – 2024 VIL 1250 BOM CU]

MEIS benefit when revised ITC HS Codes not included in Table 2 of Appendix 3B

The Gujarat High Court has allowed assessee's petition in a case where the benefit of MEIS was denied to the assessee for Para Cumidine and Diaminostilbene 2, 2- disulphonic acid (DASDA) with their revised ITC HS Codes of 2921 49 20 and 2921 59 40 respectively. The Department had denied the benefit submitting that Code Nos.2921 49 20 and 2921 59 40 were not included in the Appendix 3B Table 2 of the Scheme under FTP-Handbook of Procedures by Public Notice no. 12/2015- 2020 dated 10 July 2020. Allowing the benefit, the Court noted that the products namely Para Cumidine bearing Code No. 2921 49 20 (old CTI 2921 49 90) and Diaminostilbene-2, 2- disulphonic

acid under Code No.2921 59 40 (old CTI 2921 59 90) were part of the Appendix 3B Table 2 of the MEIS scheme and Notification No.38/2015-2020, giving new Codes, was issued only with a view to synchronise with the Finance (No.2) Act, 2019.

It was also noted that Public Notice No. 12/2015-20 did not include the new ITC HS Codes 2921 49 20 and 2921 59 40 in Table B which denies the MEIS benefit to entries covered therein as they had ceased to exist. Accordingly, it was held that Code Nos. 2921 49 20 and 2921 59 40 continued to be part of Appendix-3B Table 2 of the scheme having old CTI 2921 49 90 and 2921 59 90 respectively. [*Deepak Nitrite Limited* v. *Union of India* – 2024 VIL 1176 GUJ CU]

Conversion of shipping bill – Examination which led to sanction of drawback can be relied upon for Advance Authorisation

The Kerala High Court has held that examination of the exported products, which had led to the sanction of drawback, can be relied upon for the purposes of the Advance Authorisation Scheme. The High Court was of the view that while there is a different level of examination envisaged at the time of export for each of the Schemes, the examination already done on the exported products needs to be revisited only if it is established that the earlier examination did not look into aspects that were crucially relevant for exports under the Advance Authorisation Scheme.

The assessee had by mistake mentioned in the shipping bills the Duty Drawback Scheme, instead of the Advance Authorisation Scheme, even though it had imported the inputs without payment of duty using the latter scheme. Disposing the petition, the Court asked the exporter to refund the drawback along with interest and Customs to issue a receipt evidencing such payment which should be produced before the DGFT. The DGFT was then directed to consider the exports as under Advance Authorisation, subject to other conditions. [*Shine Flexible Prints and Packs Private Limited* v. *Commissioner* – 2024 (11) TMI 69 - Kerala High Court]

Central Excise, Service Tax and VAT

Ratio decidendi

- Cenvat credit available on mobile towers and pre-fabricated buildings installed for providing output services – Tests for immovability and credit eligibility reconstructed – *Supreme Court*
- Value for re-packing of cosmetic products when not includible – SC affirms CESTAT decision – *Supreme Court*
- Sabka Vishwas (LDR) Scheme – Quoting of higher figure in application is not fatal – *Bombay High Court*

Ratio Decidendi

Cenvat credit available on mobile towers and pre-fabricated buildings installed for providing output services – SC reconstructs tests for immovability and credit eligibility

The Supreme Court has held that the telecom companies are entitled to avail Cenvat credit of the central excise duty paid on towers and shelters/pre-fabricated buildings procured by them and installed/erected for providing output services of telecommunication services.

The Court was of the view the towers and shelters were 'goods' as were not immovable. It was opined that merely because certain articles are attached to the earth, it does not *ipso facto* render these immovable properties, if such attachment to earth is not intended to be permanent but for providing support to the goods concerned and make their functioning more effective, and if such items can still be dismantled without any damage or without bringing any change in the nature of the goods and can be moved to market and sold. The Supreme Court, for this purpose, noted the various tests/principles like nature of annexation, object of annexation, intendment of the parties, functionality test, permanency test, and marketability test, as applied by various Courts for determining nature of the property.

Further, the Apex Court held that a mobile tower can be treated to be an accessory of antenna and BTS and accordingly in terms of sub-clause (iii) of Rule 2(a)(A) of the Cenvat Credit Rules, 2004, can also be treated as 'capital goods'. It was noted that without the tower, it is not possible to hoist the antenna at the requisite height and without it being securely fastened to the tower, antenna cannot be kept firm and steady for proper receipt and transmission of radio signals. Similarly, the Court noted that the PFBs house electric cables, other equipment related to antenna, BTS and generator and thus enhance the efficacy and functioning of mobile antenna as well as BTS, and accordingly, PFBs can also be considered as accessories to the antenna and BTS which are 'capital goods'.

Also, the tower and the pre-fabricated buildings were held to be 'inputs' for the purpose of credit availment. The Court noted that any item so long as it qualifies as a 'goods' and is 'used' for providing output service, would come within the purview of 'input' under Rule 2(k) of the Cenvat Credit Rules, and excise duty paid on such items can be claimed as Cenvat credit. It, in this

regard, observed that the use of tower and PFB cannot be said to be so remotely connected with the output of service that these goods will go beyond the ordinary meaning of 'use'. It was thus held that tower and PFBs being essential to rendering of output service of mobile telephony, these items certainly can be 'inputs' akin to antenna. ***One of the assessees was represented by Lakshmikumaran & Sridharan Attorneys here.*** [*Bharti Airtel Ltd. and Ors.* v. *Commissioner* – Judgement dated 20 November 2024 in Civil Appeal Nos. 10409-10410 of 2014 and Ors., Supreme Court]

Value for re-packing of cosmetic products when not includible – SC affirms CESTAT decision

The Supreme Court has affirmed the CESTAT Order which had in turn allowed assessee's appeal in respect of demand of central excise duty on alleged re-packing of various herbal and cosmetic products. The assessee here was fixing the holograms and the barcode on the products to avoid duplicity and placing an outercover to ensure safe transit, after receiving duty paid goods from the manufacturers in a packed form mentioning the retail price. Holding the activity as not that of 'manufacture', the Tribunal had held that for sake of Section 4 of the Central Excise Act, 1944, the value of the activity cannot be included in the value of the goods. Dismissing the Department's appeal, the Apex Court noted no error in the findings of the CESTAT. ***The assessee was represented by Lakshmikumaran & Sridharan Attorneys here.*** [*Commissioner* v. *WWS Sky Shop (P) Ltd.* – Order dated 14 November 2024 in Diary No.40982 of 2024, Supreme Court]

Sabka Vishwas (LDR) Scheme – Quoting of higher figure in application is not fatal

In a case where the assessee had admitted a particular quantification in the course of investigation though filed application under the Sabka Vishwas (Legacy Dispute Resolution) Scheme quoting higher amount as provided for in the SCN issued subsequent to the cut off date of 30 June 2019, the Bombay High Court has set aside the rejection of benefit of the scheme. The Court in this regard firstly observed that even if an assessee admits in the course of investigation prior to 30 June 2019 and arrived at the quantification, same would fall within the meaning of the term 'quantified' as defined under Section 121(r) of the Finance (No. 2) Act, 2019. The Court also noted that merely because a higher figure is mentioned in the application by way of abundant caution, the assessee cannot be deprived of the benefit of the Scheme moreso, when the object of the scheme is to reduce litigation. [*Kuber Health Food and Allied Services Pvt. Ltd.* v. *Union of India* – 2024 VIL 1256 BOM]

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