Lakshmikumaran & Sridharan attorneys

TAX

amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

August 2019 / Issue – 98

Contents

August
2019

Articles

Conundrum of employer-employee relation – HR policies and GST implications

By **Astha Sinha and Nirav S. Karia**

Flow of consideration in any form to an employee from his employer has always been a subject of dispute as far as taxation laws are concerned. While exemption from indirect taxes on services provided by the employee to the employer is well codified, there is always ambiguity in the reverse transaction due to deeming provisions in taxation laws. The situation has become grave with the "related party" status provided to the "employer-employee" relationship under the GST regime. The thumb rule that activities covered under "perquisites" do not attract GST has not remained relevant anymore.

Background

When an employment contract is signed between an employer and employee, there are various facets to it besides merely the job description and compensation component. The employer agrees to provide various services/facilities/amenities to its employee during the course of employment and the employee also agrees to certain code of conduct. This includes bus services, food services, gifts, notice pay conditions, etc. Monetary recoveries are made for some of these services while others are provided free of cost as a part of employment services.

Position under Service Tax regime

Under the service tax regime, Section 65B (44) of the Finance Act, 1994 defined the term "Service", which explicitly excluded "provision of service by an employee to the employer in the course of or in relation to his employment". Also, there was no deeming provision treating an employer and employee as a related party.

Thus, the thumb rule was that if any service provided by the employer was a part of the perquisites of the employee, then the same would not be subject to service tax. Issues such as "Notice Pay" were also contested in various cases where the same was disputed as a service of "Agreeing to tolerate an act". Recent decisions provided clarity on the said issues as well.

Law under the GST regime

However, the GST regime changed the game on taxing such transactions. While there exist clear exemption entries under Schedule III of the CGST Act for services supplied by an employee to the employer, the same cannot be said about the services supplied by the employer to the employee.

Explanation to Section 15 of the CGST Act defines an employer and an employee to be "Related Persons" for the purpose of GST. This deeming provision comes with its own set of implications. Related party transactions are tricky in nature as anything and everything, either with or without consideration, become subject to GST at appropriate valuation as per the valuation rules.

When the law was introduced to this effect, the questions arising in every company's mind was whether they would have to pay GST on the 'free bus services' provided to the employees or

whether GST would be attracted on the 'corporate gifts' given to the employees on a regular basis. With no clarity, this deeming provision seemed draconian to the companies.

Amidst the said uproar, GST Authorities released a GST Press Release dated July 10, 2017 with respect to "Gifts provided to employees". As per the same, it was clarified that gifts upto Rs. 50,000/- given by employers to employees shall be exempt from GST. Further, services provided by the employer to the employee shall not be subject to GST provided the same were provided to all the employees of the company and appropriate GST was paid by the employer at the time of procurement.

This lead to two-fold implications to be considered. First, the eligibility of credit on services procured by the employer and second, the GST implication on services provided by the employer to the employee.

However, it may be noted that this still did not bring about any synergy between the HR departments and Tax departments of the companies. HR department has, from time immemorial, formulated their standardised policies with some consultation with the income tax team, if any. This shall have to change in the new era of GST. It is becoming imperative for the HR department to seek advice from their indirect tax department about their existing and proposed policies.

Policies such as bus services, canteen services, mobile rxpenses, housing allowance/provisions, insurances, car lease policy, issue of coupons, education assistance policy, policies on deputation, loan policies to employees and notice pay recovery are just some of the policies that require analysis from the GST perspective.

Attention is invited to recent ruling passed by Authority for Advance Ruling in the case of *Posco India Pune Processing Centre Private Limited*, wherein the authority held that input tax credit shall not be eligible on GST paid for hotel stay in case of rent free hotel accommodation provided to General Manager (GM) and Managing Director (MD). Further, it was held that recovery of parent's health insurance expenses from the employee does not amount to "supply of service".

Further, in the case of *Caltech Polymers Pvt. Ltd.*, the authority held that that recovery of food expenses from the employees for the canteen services provided by company would come under the definition of 'outward supply' as defined in Section 2(83) of the Act, 2017, and therefore, taxable as a supply of service under GST.

While these issues have still been addressed by the authorities, most issues related to HR policy have still have no precedent in the GST regime.

An example of the same is "Car Lease Policy". Let us take an example of a company having the policy of providing different types of cars based on rank and designation of the employees. This usually forms part of the CTC and the rental of the same is deducted from their salary. There is no precedent on such transactions under the GST regime, however, it demands analysis under GST.

Similarly, notice pay recovery has been a disputed topic since the erstwhile regime. In the service tax regime, there were precedents both for and against the said notice pay recovered from employees. And this was the scenario when employer-employee relationship was not treated as "related party" and money flow had to be proved as a valid "consideration" for the supply of service. There are no precedents on this issue in the GST regime. The issue arises because with the related party provisions and Schedule I of the CGST Act, even if the pay does not qualify as "consideration" towards "Agreeing to tolerate an act", the same may still be subject to GST.

Final return and impact of ambiguities

With everyone is busy finalising the reconciliation between their books of accounts and GST returns, the issue of GST implications on various HR policies may create an issue. With no clarity on the GST implications of the same, a lot will be dependent on the audited statements to filed as GSTR – 9C.

Attention is drawn to the language used in the declaration of GSTR – 9C which states that the information given is "True and correct" to the registered person's knowledge. This is different from the general accounting difference of information being "True and fair" to one's knowledge.

This minute difference at first glance may not hold much significance, but one can wonder whether this declaration of "True and correct" will impact future litigation on these issues. If a third-party auditor does not identify the issues on GST implications on HR policies, will an enquiry by the department two years later attract penalty or will they be absolved due to such a declaration, is not clear.

There are many open-ended questions on this front, and the only way to safeguard the company from such litigation is to turn back and have one last look at the HR transactions before filing of the final returns.

Conclusion

In conclusion, it is emphasised that it has become imperative for all companies to delve into their HR policies to analyse any possible GST implications of the same. HR policies like car provided to employees, medical assistance, mobile phones given to employees, guest house services, notice pay recovery, training, etc., have to be minutely scrutinised in light of the deeming provisions under GST law. While solace is provided by the press release released by the GST department, one may wonder as to the authority of the same. Would the same hold its ground against the exposure created by the deeming provisions of GST law or will the company be dragged into litigation? Either way, the companies should be prepared for such scrutiny in the future.

[The authors are Senior Associate and Joint Partner, respectively in Tax Practice, Lakshmikumaran and Sridharan, Mumbai]

Amendment to Section 12(8) of the IGST Act – Simplifying or complicating?

By **Jayesh Talreja and Chaitanya Bhatt**

Goods and Services Tax, which was touted as a single tax reform, has completed two years in the country. It is needless to say that GST was never a perfect taxation system. There were a number of shortcomings with respect to the GST provisions and on the administration front. In order to highlight these shortcomings, there were several representations made by industry, time and again. Resultantly, CBIC amended various provisions of Central Goods and Services Tax Act, 2017 and Integrated Goods and Services Tax Act, 2017 through Central Goods and Services Tax (Amendment) Act, 2018 and Integrated Goods and Services Tax (Amendment) Act, 2018 respectively.The purpose of this article is to analyse the proviso inserted in Section 12(8) of IGST Act, 2017 through the IGST (Amendment) Act 2018.

Position before amendment

Section 12 of IGST Act, 2017 provides for determination of place of supply in case both the service provider and service receiver are located in India.As per sub-section (8) of Section 12, place of supply of services by way of transportation of goods shall be the location of recipient, if registered. Accordingly, when a registered person used to export goods by procuring transportation services from an Indian shipping line then the Indian shipping line used to charge GST from the exporter.

On the other hand, Section 13(9) of IGST Act, 2017 prescribes that in case either the service provider or service recipient is located outside India, then the place of supply of services by way of transportation of goods shall be the destination of such goods. Therefore, when a registered person located in India used to export goods by procuring transportation services from a foreign shipping line then such transaction was not leviable to GST. This inconsistency in taxability lead to proclivity of exporters towards foreign shipping lines.

After representation made by aggrieved exporters, the Government vide Notification No. 2/2018-IT (Rate) dated 25.01.2018 inserted Sr No. 20B to the table in Notification No. 9/2017-IT (Rate) as a result of which the rate of tax for *'Services by way of transportation of goods by a vessel from customs station of clearance in India to a place outside India',* was reduced to 'Nil', up to 30.09.2018. This rate was further made effective till 30.09.2019 by Notification No. 15/2018-IT (Rate) dated 26.07.2018.

Simultaneously, an amendment was also made in Rule 43 of CGST Rules, 2017 vide Notification No. 03/2018-CT dated 23.01.2018, to exclude the value of supply of services by way of transportation of goods by a vessel from the customs station of clearance in India to a place outside India from the value of exempted services to be considered for reversal under Rule 42 and Rule 43. As a result, ITC was not required to be reversed in respect of such transportation service. These amendments proved to be a prominent relief for Indian shipping lines.

Position after amendment

Integrated Goods and Services Tax (Amendment) Act, 2018 was made effective from 01.02.2019 by Notification No. 01/2019-IT dated 29.01.2019. Among other amendments, a proviso was inserted in Section 12(8) of the IGST Act. The relevant provision is extracted as under:

"Provided that where the transportation of goods is to a place outside India, the place of supply shall be the place of destination of such goods."

Before the insertion of the proviso, the place of supply for transportation services was dependent on the location of the service recipient. If the service recipient was in the same state as that of service provider, then the supply was treated as intra-state supply and if the service recipient was in a different state, then the supply was considered as inter-state supply. Due to insertion of the proviso, the place of supply for exports shall always be outside India and thus supply shall always be inter-state supply, irrespective of the location of recipient.

The GST Council also published a draft proposal for amendments in GST law on 15.07.2018 inviting comments from the public at large. The said proposal was published with rationale for the amendments proposed. As per the rationale, the government intended to bring the taxability of transportation services of export goods by a transporter located in India at par with a transporter located outside India.

However, while inserting the proviso and providing the above rationale, the government did not envisage that the location of recipient **and** location of supplier still continues to remain in

India. Therefore, such supply of service does not fulfil the criteria of export of service and accordingly, the intention of government does not get fulfilled.Further, as the place of supply of transportation services and the location of recipient are different, the department may dispute the availability of input tax credit.

It is needless to say that, by inserting the above proviso taxability has been made more ambiguous and the purpose of bringing the Indian shipping line with that of foreign shipping line at par, has been defeated.

[The authors are Senior Associate and Joint Partner, respectively in Tax Practice, Lakshmikumaran and Sridharan, Mumbai]

Goods and Services Tax (GST)

Notifications and Circulars

Due date for filing GST annual return for 2017-18 postponed to 30-11-2019: Central Board of Indirect Taxes and Customs (CBIC) has postponed the due date for filing GST annual return for the period from 1-7-2017 to 31-3-2018. This return can now be filed till 30th of November, 2019 instead of the earlier extended date of 31st of August, 2019. As per Order No. 7/2019-Central Tax, dated 26-8-2019, certain technical problems are being faced by the taxpayers and as a result said annual return could not be furnished by registered persons. CGST (Seventh Removal of Difficulties) Order, 2019 amends the explanation in Section 44 of the CGST Act, 2017, for this purpose.

State and Area Benches of Goods and Services Tax Appellate Tribunal in specified States and Union Territories notified: Central Government has, on 21st of August, notified the creation of State and Area Benches of the Goods and Services Tax Appellate Tribunal (GSTAT). The notification also provides for GSTAT Benches for Union Territories of Andaman & Nicobar, Dadra & Nagar Haveli, Daman & Diu, Lakshadweep, Chandigarh. At present, Area Benches have been notified only in 4 States, namely, Andhra Pradesh, Gujarat, Maharashtra and West Bengal. It may be noted that the State Benches have not been notified for the States of Rajasthan, Uttar Pradesh and Madhya Pradesh at present.

GST rate reduced on electrically operated vehicles from 1-8-2019: Electrically operated vehicles, including two and three wheeled electric vehicles and charger or charging station for such vehicles are liable to GST @ 5% from 1-8-2019. Further, exemption has been provided for hiring electric operated vehicle meant to carry more than twelve passengers by local authorities. Notification Nos. 1/2017-CT (Rate) and 12/2017-CT (Rate) have been amended by notifications issued on 31-7-2019. It may be noted that such reduction in rates was approved by GST Council in its 36th meeting.

Composition scheme - Due date for Form CMP-08 extended till 31-8-2019: Due date for furnishing the statement containing details of payment of self-assessed tax in Form GST CMP-08, for the quarter April, 2019 to June, 2019, has been extended till 31-8-2019. CBIC has issued

Notification No. 35/2019-Central Tax, dated 29-7-2019 for this purpose. Form CMP-08 is required to be filed by persons paying tax under composition scheme or under Notification No. 2/2019-Central Tax (Rate). It may be noted that CBIC had on 18-7-2019 extended the last date of furnishing the said return for such period from 18th of July to 31st of July.

Blocking of e-way bill generation for non-filers of returns, postponed: Rule 138E of CGST Rules relating to restriction on furnishing of information in Part A of Form GST EWB-01 will now be effective from 21-11-2019 instead of 21-8-2019. Hence, no person (including a consignor, consignee, transporter) will be allowed to furnish information in Part A of Form GST EWB-01 and generate e-way bill if he has not furnished the returns for two consecutive tax periods. Notification No. 22/2019-Central Tax, dated 23-4-2019 has been amended by Notification No. 36/2019-CT, dated 20-8-2019.

GST on monthly subscription charged by RWAs, clarified: CBIC has clarified that ceiling of Rs. 7500 per month per member for GST exemption is to be applied per residential apartment and not per person. Circular No. 109/28/2019-GST, dated 22-7-2019 also states that if such ceiling is crossed and RWA's annual aggregate turnover exceeds Rs. 20 lakh, GST is payable on full amount and not on amount exceeding Rs. 7500. As per this circular, RWA will be entitled to ITC on capital goods (generators, water pumps etc.), goods (taps, pipes, hardware, etc.) and input service such as repair and maintenance services.

Ratio decidendi

Lapsing of ITC accumulated due to inverted rate structure on fabrics – Proviso in notification and circular quashed: Gujarat High Court has quashed the relevant proviso (ii) in Notification No. 5/2017-Central Tax (Rate) as inserted by Notification No. 20/2018-Central Tax (Rate) and Circular No. 56/30/2018-GST by which ITC accumulated due to inverted tax structure as on 31-7-2018 was to be lapsed for manufacturers of fabrics. . It observed that Section 54(3)(ii) of Central GST Act, 2017 does not empower the department to frame rules for lapsing of ITC. The High Court for this purpose noted that members of writ applicant had vested rights to unutilized ITC accumulated on account of rate of tax on inputs being higher. Supreme Court judgements in *Dai Ichi Karkaria* and *Eicher Motors Ltd.* were relied on. [*Shabnam Petrofils* v. *UoI* - R/Special Civil Application No. 16213 of 2018, decided on 17-7-2019, Gujarat High Court]

Show cause notice is sine qua non to proceed with recovery under GST: Karnataka High Court has reiterated that issuance of show cause notice is *sine qua non* to proceed with the recovery of interest payable under Section 50 of Central GST Act, 2017 and penalty imposable under CGST Act or the Rules. The High Court observed that notion of the authority that Section 75(12) of CGST Act empowers them to proceed with recovery without issuing SCN is misconceived, as said section is only applicable to self-assessment and not to quantification or determination made by the authorities. The Court in this regard also noted that notice was also not issued before attaching the bank account. [*LC Infra Projects (P) Ltd.* v. *UoI* - 2019 VIL 365 KAR]

Summons – High Court rejects plea that summons can only be issued after decision under CGST Section 73: Madhya Pradesh High Court has rejected the plea that proceedings under Section 70 of the CGST Act, 2017, relating to summons, can only be taken recourse to after decision under Section 73, relating to demand of tax. The High Court in this regard declined to quash the notice for personal hearing. It also observed that the petitioner evaded from

responding to earlier notices despite repeated reminders sent by the department. The Court further was of the *prima facie* opinion that the petitioner had evaded tax. [*Om Shiv Associates* v. *UoI* – Order dated 26-6-2019 in WP-11822-2019, Madhya Pradesh High Court]

Power of arrest to be exercised with lot of care and circumspection: Gujarat High Court has reiterated that the power to arrest under Section 69 of the Central GST Act is to be exercised with lot of care and circumspection and that prosecution should normally be launched only after completion of adjudication. The Court directed that no coercive steps of arrest against the writ petitioner should be taken. It observed that there must be first a determination that a person is liable to penalty and that till that time the entire case proceeds on the basis that there must be an apprehended evasion of tax by the assessee. [*Vimal Yashwantigiri Goswami* v. *State of Gujarat* – 2019 VIL 391 GUJ]

ITC on vehicle for carrying cash – AAAR Order declining ITC set aside: Bombay High Court has set aside AAAR Maharashtra Order holding that ITC is not available on purchase of motor vehicles to carry cash by assessee engaged in cash management service. Pointing out the flaw in decision-making process of AAAR, the petitioner had submitted that goods would include cash being transported in vehicles as it is not a legal tender. The Court was of the view that GST Council recommending ITC on vehicles used for transportation of money, would not by itself conclude that prior thereto, money was not included within definition of goods. The Court restored the question before the AAAR for fresh disposal. [*CMS Systems Info.* v. *Commissioner* – Order dated 9-7-2019 in Writ Petition No. 5801 of 2019, Bombay High Court]

ITC - Mere reflection of transitional credit in ledger is not an act of availment: Patna High Court has held that mere reflection of transitional credit in the electronic credit ledger cannot be treated as an act of availment or utilisation, for drawing a proceeding under Section 73(1) of the Bihar GST Act. The Court noted that legislative intent reflected from reading of Section 140 alongside Section 73 and Rules 117 and 121 is that even a wrongly reflected transitional credit in the electronic ledger on its own is not sufficient to draw penal proceedings until the same is put to use. Supreme Court's judgement in *Ind. Swift Laboratories* was distinguished. [*Commercial Steel Engineering Corporation* v. *State of Bihar* – 2019 VIL 348 PAT]

Interest on delayed payment of GST & filing of returns – Larger Bench to consider scope of CGST Section 50: Madras High Court has referred to Larger Bench the dispute as to whether interest under Section 50 of the CGST Act, for delayed filing of returns, arises automatically or on assessment and after considering the explanation offered by the assessee. The Court also put the question, as to whether at all the explanation by the assessee must be considered by the assessing officer and then pass further orders. While one Judge dismissed the departmental appeal, other Judge was of the view that the point requires deeper consideration of the scope of Section 50. [*Asstt. Commissioner* v. *Daejung Moparts* – 2019 VIL 387 MAD]

Seizure - Unaccounted goods at disclosed place of business are 'secreted': Allahabad High Court has held that once it was admitted that the assessee had not recorded goods found stored at his disclosed place of business, in his books of account, a presumption of goods having been 'secreted' as per CGST Section 67 did arise. Upholding seizure of undisclosed goods found at disclosed place, the High Court also observed that there was nothing to restrict meaning of words 'in any place' in Section 67 to only undisclosed place of business. The

assessee had contended that goods found at disclosed place of business were not 'secreted'. [*Rajeev Traders* v. *State of UP* – 2019 VIL 356 ALH]

Anti-profiteering - Stay on *suo motu* notice seeking information on all products: Delhi High Court has stayed the *suo motu* notice issued by the Director General of Anti-Profiteering (DGAP), seeking information on all products of the petitioner. The petitioner had pleaded that without a report of DGAP on the complained product followed by an order of National Anti-Profiteering Authority (NAPA) under CGST Rule 133(5)(a), DGAP cannot *suo motu* issue a notice requiring submission of information on all its products which were approximately 3500 in number. The Court held that the petitioner had made out a *prima facie* case for grant of limited interim relief. [*Reckitt Benckiser India Pvt. Ltd.* v. *UoI* – Order dated 19-7-2019 in W.P.(C) 7743/2019, Delhi High Court]

ITC need not be reversed in case of post purchase discount: Appellate AAR of Tamil Nadu has held that ITC of full GST charged on undiscounted supply invoice is available to buyer and that proportionate reversal is not required to be done in case of post purchase discount given by the supplier. The case involved issuance of commercial credit note subsequently through automated arrangement using software. Overruling the AAR ruling, Appellate AAR observed that the discount was not recorded in invoice or agreement, and hence value would continue to be the value as determined under CGST Section 15(1). It held that if GST charged and paid is not reversed, ITC need not be reversed. CGST Section 16(2) was held as not applicable. [In RE: *MRF Ltd.* - 2019-VIL-62-AAAR]

Valuation – Supply to distinct person – Applying 2nd proviso to Rule 28 directly not sustainable: Tamil Nadu AAR has referred to Rule 28 of CGST Rules, 2017 and held that in case where 'open market value' as per Rule 28(a) was available in respect of supplies made to distinct person (branches), there is no necessity to go further down to Rule 28(b) or (c). Further, it was held that if the applicant does not use option provided under 1st proviso to Rule 28, he has to supply at 'open market value' as per Rule 28(a). The Authority held that the applicant's contention to skip Rule 28(a) and first proviso to go directly to second proviso to adopt invoice value was unsustainable. The AAR held that both provisos were to be read together and not independently, and that the applicant cannot choose whichever proviso was favorable to it. [In RE: *Specsmakers Opticians Private Limited* – 2019 VIL 233 AAR]

Hotel accommodation booking service – GST payable @ 5% without ITC: Observing that the applicant is covered under the definition of agent, supplier and taxable person, AAR Delhi has held that the applicant, booking hotel accommodation in foreign countries for its Indian clients, is required to pay GST on value of hotel accommodation service. Option to pay GST @ 18% (with ITC) was held as not available. The AAR held that value of 'hotel accommodation' paid by client to them, which is remitted to foreign hotel / hotel aggregator, cannot be included in taxable value, provided conditions of pure agent are satisfied. [In RE: *Tui India (P) Ltd.* - 2019 VIL 230 AAR]

No composite supply if all ingredients are equally important: Maharashtra AAAR has held that the supply of electroink along with other consumables is not a composite supply. It observed that the printing cannot take place with the ink (contended to be principal supply) alone and the products like developer or plate are equally important. The Appellate Authority in this regard observed that the products may be supplied together initially but not subsequently, and that providing customer an option of a tier

programme is not an industry practice. It also noted that the supply involved compulsion which should not be there in a composite supply. [In RE: *HP India Sales* – 2019 VIL 53 AAAR]

Supply of food at occasional events taxable @ 18% GST: West Bengal Appellate AAR has held that supply of food at events which are occasional in nature like social get-togethers in the premises of the club is taxable under Serial No. 7(v) of Notification No. 11/2017-Cental Tax (Rate) @ 18% GST. Upholding the AAR ruling, the Appellate AAR observed that social get-togethers and parties are occasional in nature and that services provided by the club at such get-togethers are not regular restaurant services. The AAAR observed that provisions of Sl. No.7(v) are not restricted to exhibition or marriage halls and include all indoor and outdoor functions. [In RE: Bengal Rowing Club - 2019 TIOL 59 AAAR GST]

No ban on separate GST registration to multiple firms in a co-working space: Kerala AAR has held that separate GST registration can be allowed to multiple companies providing services only and operating from a 'co-working space'. It noted that there is no prohibition for registration to a shared office space or virtual office and that since GST registration is PAN based, identification of taxpayer is not difficult. The Authority observed that such companies need to upload rental agreement or sub-lease as proof of address of principal place of business showing respective suite or desk number. It also stated that in addition, the applicants can upload a copy of 'monthly utility bill' in connection with payment towards electricity charges, water charges or other common services availed by the respective suite or desk number. [In RE: *Spacelance Office Solutions* – 2019 TIOL 255 AAR GST]

GST liability on residential flats constructed partially before and partially after introduction of GST – Time of supply: Karnataka AAR while referring to time of supply of service under Section 13 of CGST Act, 2017 on applicability of GST on works contract service pertaining to partially completed flats, has held that GST is not applicable if customers are identified post completion of flats and post issuance of completion certificate. The AAR observed that in case customers were identified prior to implementation of GST, applicant would be liable to pay service tax proportionate to services provided prior to GST regime and GST proportionate to services provided under GST regime. In case customers are identified after introduction of GST regime, the applicant was held liable to GST. The AAR, for this situation, also rejected the plea that the value of supply under GST shall be only the value of the work carried out after the appointed date. [In RE: *Durga Projects & Infrastructure Pvt. Ltd.* – 2019 VIL 236 AAR]

Valuation - Amortization cost not includable in transaction cost if tools on FOC supplied under contract: On the question of applicability of GST on tools amortization cost where tools were received for free on returnable basis from the customer under contract, Karnataka AAR referring to Circular No. 47/21/2018-GST, has held that tools amortization cost need not be included in the value of supply of parts. It noted that as per contract/purchase order, the applicant was not under any obligation to use its own tools/moulds for manufacture of components supplied. The applicant was engaged in manufacture, sale and design of plastic moulds as per customers. The AAR also held that the ruling will apply to other contracts if the terms and conditions contained therein are the same. [In RE: *Toolcomp Systems Private Limited* – 2019 VIL 235 AAR]

Customs

Notifications and Circulars

Re-import of goods earlier sent out for exhibition – IGST when not payable: Relying on recent GST Circular holding that sending/taking goods out of India for exhibition, in the absence of consideration, is neither supply nor zero rated supply, CBIC has clarified that Sl. No. 1(d) of Notification No. 45/2017-Cus., requiring payment of IGST on re-import, is not applicable. According to the circular, Sl. No. 5 instead is relevant. Circular No. 21/2019-Cus., dated 24-7-2019 also observes that Sl. No. 5 will apply even in cases where exports are made to related/distinct persons or to principals/agents, for participation in exhibition or on consignment basis.

Re-imports – Recovery of export benefits taken under reward schemes: Importers are required to provide a no incentive certificate from RA of DGFT at the time of re-import of exported goods on which benefit under Chapter 3 of FTP was availed at the time of export. CBIC Instruction No. 3/2019-Cus., dated 13-8-2019 clarifying so, reiterates that before allowing clearance in cases of such re-imports, a no-incentive certificate is to be ensured by Customs field formations. Instruction notes that Para 3.24 of Handbook of Procedures Vol.1 prescribes the procedure for obtaining such certificate.

IGST refund to exporters – Mis-match between GSTR-1 and 3B during FY 2018-19 – Verification procedure extended: CBIC has clarified that the solution provided in Circular No. 12/2018-Cus., in case of payment mismatch between GSTR-1 and GSTR-3B during the period from July 2017 till March 2018, would also be applicable for the period from April 2018 till March 2019. According to Circular No. 25/2019-Cus., dated 27-8-2019, corresponding CA certificate evidencing no discrepancy between the amount refunded and actual amount paid, must be furnished by 30th of October 2019. Circular No. 12/2018-Cus. had provided for mechanism to verify IGST payments in such cases.

IGST refund in invoice mismatch issue – Officer interface facility extended: Alternative mechanism with an officer interface to resolve invoice mismatches errors for IGST refund to exporters, has been extended for shipping bills filed till 31-7-2019. The mechanism was earlier available for shipping bills filed till 15-11-2018 only. Circular No. 26/2019-Cus., dated 27-8-2019, issued for this purpose, notes that despite wide publicity and outreach programmes to make exporters aware about the need to have identical details in invoices given in shipping bills and GST returns, few exporters continue to commit such errors.

Fees for excess utilization of duty saved amount can be paid within 2 years: Regional Authorities have been granted power to condone delay in payment of fee for excess utilisation of duty saved amount. As per the new provisions inserted in Para 5.16(a) of the Handbook of Procedures Vol.1, RA may accept additional fee to cover the excess imports, if the same is furnished beyond one month but within two years of the excess imports. This will however be subject to payment of composition fee of Rs. 5000/- per authorization. DGFT Public Notice No. 22/2015-20, dated 31-7-2019 has been issued for this purpose.

CBIC directs gradual relaxation in percentage of physical examination of exports: CBIC has asked its field formations to gradually taper down the percentage of physical examination in cases

wherever the earlier examination has validated the declaration made in the shipping bill. RMCC shall for this purpose consider the feedback received from field formations. Circular No. 22/2019-Cus., dated 24-7-2019 notes that CBIC has received representations wherein exporters have raised the issue of repeated opening of export containers for 100% examination related to risky exporters under the new procedure laid down in Circular 16/2019-Cus.

AIR drawback when not applicable for calculation of Brand Rate: Observing that since central excise duty on inputs and service tax on input services used in the manufacture of export goods have been subsumed in GST for which input tax credit/refund is available, CBIC has clarified that contents of para 3(a) and 3(b) of Circular Nos. 83/2003-Cus. and 97/2003-Cus. are not applicable for exports made in post GST era. Para 3(a) and 3(b) of earlier circulars pertain to brand rate fixation for leather articles, complete bicycles and complete buses. Circular No. 24/2019-Cus., dated 8-8-2019 has been issued for this purpose.

Refund of IGST paid on imports by specialized agencies clarified: Customs field formations will provide refund of IGST paid on import of goods by the specialized agencies notified by Central Government under Section 55 of CGST Act, 2017. Circular No. 23/2019-Cus., dated 1-8-2019 while clarifying so, observes that Section 3(7) of Customs Tariff Act, 1975 provides for a parity between the integrated tax rate attracted on imported goods and the integrated tax applicable on the domestic supplies of goods. It notes that in case of UN and specialised agencies, GST notifications envisage payment and then refund of taxes paid, and therefore, on this principle of parity, specialised agencies ought to get the refund of IGST paid on imported goods.

Global Authorization for Intra-Company Transfer (GAICT) of SCOMET Items/Software/Technology – Procedure specified: Para 2.79F has been inserted in the Handbook of Procedures Vol.1, 2015-20 for laying down the procedure for issuance of Global Authorization for Intra-Company Transfer (GAICT) for SCOMET Items/ Software / Technology. Pursuant to the introduction of the said para, no pre-export authorization will be required for re-export of imported SCOMET items, software and technology (excluding SCOMET Categories 0, 1B, 1C2, 3A401, 5 and 6) subject to the conditions laid down therein. DGFT Public Notice No. 20/2015-20, dated 24-7-2019 has been issued for this purpose.

Ratio decidendi

Customs not to recover from legal heirs of deceased noticees/assessees: Customs Department cannot proceed against legal heirs of a deceased noticee/assessee against whom there may be proceedings for recovery of customs duty. The Delhi High Court while holding so, observed that there is no machinery provision in the Customs Act, 1962 whereby the dues owed by a proprietary concern or a partnership firm can be sought to be recovered from legal heirs of proprietor/partner of such concern/firm. The Court in this regard relied upon a Supreme Court judgement in the case of *Shabina Abraham v. Collector* which was related to Central Excise. [*Amandeep Singh Sehgal* v. *Commissioner* – 2019 TIOL 1693 HC DEL CUS]

Seizure, absence of SCN – Right to unconditional release when not available: Delhi High Court has observed that second proviso to Customs Section 110(2), stating that in case of provisional release, period of 6 months for SCN would not apply, is to make sure that at least seized goods are provisionally released quickly. The Court held that 2nd proviso, inserted

by Finance Act, 2018, did not take away what was already available to assessee and hence the proviso was not applied retrospectively. It also held that right for release of goods might have accrued if no provisional release order was passed before 6 months from seizure. [*Wide Impex* v. *Pr. Commissioner* – 2019 TIOL 1819 HC DEL CUS]

Classification of goods – Similarity of contents when not a criterion: CESTAT New Delhi has observed that assorted birthday candles with Chlorate, Potassium, Aluminium, etc., (material for fireworks) only in material contents of the central wig, are not classifiable as fireworks. The Tribunal for this purpose, relied upon Rule 3(a) of Interpretative Rules and the essential use criteria. It observed that if similarity of contents is the criteria, even matchstick is a firework. The Tribunal also held that although CHA is obligated with CBLR Regulations but not every breach leads to revocation of license. [*Jaiswal Cargo Imports Services Ltd.* v. *Commissioner* - Final Order No. 51004/2019, dated 7-8-2019, CESTAT New Delhi]

Classification of goods - No estoppel to raise dispute in subsequent import: Mumbai Bench of CESTAT has held that there is no estoppel in raising classification dispute in subsequent import of a product and that in the absence of appropriate classification there was nothing binding to treat previous classification as the sole option. The Tribunal observed that Granola bar comprised of various products including oats and its character is altered post baking and mixing, and therefore it would not be appropriate to fit it in category of cereals or prepared food in the absence of coverage by residuary entry under Heading 1904. [*General Mills India Ltd.* v. *Commissioner* - Final Order No. A/86392 / 2019, dated 13-8-2019, CESTAT, Mumbai]

Valuation - Declared value cannot be revised just because it is lower than in NIDB database: CESTAT Chennai has held that the difference in the declared value and the value in the NIDB database does not constitute in itself a "reasonable doubt" needed to reject the transaction value under Rule 12 of Customs Valuation (Determination of Value of Imported Goods), 2007. It was held that simply because the value declared by the appellant is lower than the value found in the NIDB database, the value cannot be revised by the department. [*Sai Exports* v. *Commissioner* - Final Order No. 40992/2019, dated 1-8-2019, CESTAT, Chennai]

Effective date of STP approval cannot be amended to an earlier point of time, once imports made: The petitioner was granted permission for setting up a 'Software Technology Park' and a communication dated 29-11-2005 was sent by the Ministry. Since their imports had already arrived during October-November 2005, an amendment of the effective date of approval to 4-4-2005 was sought, to avail the benefit under Notification No.153/93-Cus. Observing that the petitioner had jumped the gun and made imports even before approval, the Madras High Court held that having imported without any document with regard to approval of application for STP, the effective date of approval cannot be advanced to an earlier point of time. [*Khivraj Tech Park Pvt. Ltd*. v. *Union of India* – 2019 TIOL 1812 HC MAD CUS]

Demand of duty and interest when delay on part of authorities processing necessary redemption certificate: The assessee was exempted from payment of customs duty by Notification No. 96/2009-Cus. subject to condition that evidence of discharge of export obligation was produced within sixty days of expiry of the

period allowed for fulfilment of EO. However, the redemption certificates in proof of fulfilment of such export obligations were issued to the assessee belatedly. Allowing the writ petition, the High Court of Telangana and Andhra Pradesh held that the authorities should put in place a proper mechanism to see that certificates are issued promptly. [*Hetero Labs Limited* v. *Assistant Commissioner* - 2019 (8) TMI 339 Telangana and Andhra Pradesh High Court]

Denial of cross examination of Directors not violative of principles of natural justice in all cases: Delhi High Court has held that the statement of the directors of the company who were the co-noticees cannot be in every case need to be cross examined under Section 9D of the Central Excise Act, 1944 or Section 138 of the Customs Act, 1962. It was held that the statement of directors cannot be called as statement simplicitor but a statement as that of the company. The Court also held that as these statements are made to the Customs officer, these are out of the ambit of Section 24 of Indian Evidence Act and are readily admissible as evidence. The dispute pertained to alleged mis-declaration and payment of royalty. Statements of Directors of appellant company were recorded, and differential customs duty was proposed to be recovered. The High Court also held that the co-noticee, if his statement amounts to confession, cannot be compelled to be cross-examined and there would be no violation of principles of natural justice. [*Silicone Concepts International Pvt. Ltd.* v. *Principal Commissioner* – 2019 VIL 511 DEL CU]

EPCG scheme – No interest payable on composition fee as same not duty under Customs Section 28: CESTAT Bangalore has held that composition fee paid for extension in export obligation beyond two-years period is not duty under Section 28 of the Customs Act, 1962. It was held that the final duty under EPCG scheme was yet to be assessed and hence, the interest was not liable to be paid on it. The assessee, importing under EPCG scheme, could not fulfil export obligation within the stipulated time and requested for extension. JDGFT directed the assessee to pay 50% duty for unfulfilled export obligation as pre-condition to consider request for extension. The assessee paid the amount with interest on it but subsequently submitted application of refund which was denied holding it as applicable on delayed payment of duty. [*Lulu International Convention Centre Pvt. Ltd.* v. *Commissioner* – 2019 VIL 514 CESTAT BLR CU]

Cabling of various parts of agriculture machine is not 'manufacture' – Benefit available as full machine and not as parts: CESTAT Delhi has held that mere cabling of various parts of agricultural machine (laser level transmitter, laser receivers, control boxes connecting cables and rechargeable battery packs) so as to let them function as a complete machine does not amount to manufacture and hence benefit of Sl. No. 399(A) of Notification No. 12/2012-Cus. cannot be denied. Department's plea of putting the goods under Sl. No. 399(B) as parts was rejected. The appellant was in the business of trading of parts and components of laser land leveller and the department had alleged that importer had wrongly classified the goods as agriculture machinery. [*SPL Technologies Pvt. Ltd.* v. *Principal Commissioner* – 2019 VIL 529 CESTAT DEL CU]

Central Excise, Service Tax and VAT

Notification and Circular

Sabka Vishwas (Legacy Dispute Resolution) Scheme 2019 effective from 1-9-2019 – CBIC clarifies on coverage of the scheme: Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 will come into effect from 1st of September 2019. As per Sabka Vishwas (Legacy Dispute Resolution) Scheme Rules, 2019 notified on 21-8-2019 and effective also from 1st of September, 2019, a declaration under the scheme can be made on or before 31st of December 2019, electronically at https://cbic-gst.gov.in. Rules in this regard also prescribe various forms to be filed electronically. Constitution of designated committee and procedure for verification of the declaration by the designated committee, have also been provided. Notification Nos. 4 and 5/2019-C.E. (N.T.), both dated 21st of August 2019 have been issued for this purpose.

It may be noted that CBIC has on 27-8-2019 issued an elaborate Circular No. 1071/4/2019-CX, which by way of illustration states that in a case where the amount of duty (including the Cenvat credit) being litigated, or involved in an investigation or audit, is Rs. 50 lakhs, the taxpayer needs to pay only Rs. 15 lakhs to settle the case. Clarifying on various issues pertaining to the scheme, the Circular also lists type of cases which are excluded from the coverage of the scheme. The exclusions provided are,

- Cases in respect of goods still liable to Central Excise duty.
- Cases for which the taxpayer has already been convicted in Court of law.
- Cases under litigation where the final hearing has taken place before 30-6-2019.
- Cases of erroneous refunds.

Cases which are pending before Settlement Commission.

Central Excise and Service Tax – Monetary limit for departmental appeals before CESTAT, High Court and Supreme Court raised: Central Board of Indirect Taxes and Customs (CBIC) has revised the monetary limits for the department to file appeals to the CESTAT, High Court and Supreme Court in cases relating to Central Excise and Service Tax. The new monetary limit will be Rs. 50 lakh for CESTAT, Rs. 1 crore for the High Court and Rs. 2 crore for the Supreme Court and will apply to all pending cases as well. CBIC Instruction issued on 22-8-2019 is in line with the revised monetary limits prescribed by the Central Board of Direct Taxes (CBDT) for Income Tax appeals recently.

Ratio decidendi

Excise valuation – No basis for adopting cost inflation index of Income Tax: CESTAT Delhi has held that there was no legal basis for adopting cost inflation index of Income Tax department for determination of assessable value under Section 4 of the Central Excise Act read with the Central Excise Valuation Rules, 2000, for valuation of captively consumed goods. The Tribunal also noted that cost of manufacture as certified by the Cost Accountant in CAS-4 cannot be rejected based on vague reasons and that Commissioner (Appeals) should have provided tenable grounds for rejecting assessable value. [*Shri Krsna Urja Project* v. *Commissioner* – 2019 TIOL 2256 CESTAT DEL]

Commercial training or coaching service - Only institute issuing certificate for course recognized by law not liable to Service Tax: CESTAT Larger Bench has held that merely because Principal of Junior College also signed the certificate with college stamp, it did not mean that the certificate was issued by the college. The Tribunal observed that the certificate was issued by the Board of Intermediate Education and not by the junior college of the assessee. The assessee imparted education for intermediate courses and along with the same coaching was provided, in an integrated manner, for appearing in examinations for engineering/medical colleges. It observed that emphasis on *imparting education for obtaining recognized certificates* was misconceived. It noted that legislature drew distinction between two institutes, excluding only those which award certificates recognized by law. [*Sri Chaitanya Educational Committee* v. *Commissioner* – Misc. Order No. 30344/2019, dated 23-7-2019, CESTAT Larger Bench]

Cenvat credit available on product liability insurance: CESTAT Chennai has allowed Cenvat credit on product liability insurance availed by the manufacturer for covering the risk of manufacturing defect arising in finished products. The Tribunal for this purpose observed that the insurance was directly connected with manufacturing activity and was also an input service used in relation to manufacture of finished products. The department had contended that the services were availed as a post-manufacturing activity since liability was sought to be covered for vehicles that have already been sold. [*Wheels India Ltd.* v. *Commissioner* – 2019 VIL 455 CESTAT CHE CE]

Rebate on exports – No condition for export goods to be manufactured inside country: Allahabad High Court has held that there is no specification under Excise Rule 18 that for the purpose of rebate, goods need to be manufactured inside country. The Court held that the rule talks about *any* goods, which includes both manufactured inside the country and received from outside. The High Court observed that LCD panels and parts were specified in schedule to Central Excise Tariff and had suffered countervailing duty. It also noted that the word *factory* used in clause 2(a) of rebate notification only means that goods must be exported from a *factory*. [*Samsung India Electronics* v. *Union of India* – 2019 TIOL 1810 HC ALL CUS]

Refund of Cenvat credit – EOU unit is in DTA in respect of SEZ unit: Observing that the definition of DTA under SEZ Act includes everything located outside SEZs, CESTAT Hyderabad has held that 100% EOU located outside SEZ, constitutes DTA as far as SEZ Act is concerned. It also observed that Section 51 of the SEZ Act makes it clear that this Act prevails over any other law. The Tribunal held that the appellant (EOU) is entitled to refund of Cenvat Credit under Cenvat Rule 5 in respect of the goods which they had sold to SEZ units. CESTAT Chennai Order in case of *Orbis India (P) Ltd.* was relied on. [*Mylan Laboratories* v. *Commissioner* – 2019 TIOL 2103 CESTAT HYD]

Leasing of work-wear – Maintenance does not mean effective control retained: In a case where the assessee undertook to deliver, wash and service work-wear to his clients, CESTAT Chandigarh has rejected the department's contention that since goods always remained in the control of assessee, there was no transfer of effective control and hence the transaction is out of the purview of deemed sale and liable to service tax. According to the Tribunal, washing and maintenance of work-wear did not mean that

effective control was retained. It held that exclusive possession remained with the clients as use of goods was not controlled by assessee. [*Lindstrom Service India* v. *Commissioner* – 2019 VIL 524 CESTAT CHD ST]

GTA exemption for transport of fruit - Any produce of a tree as a result of ripened ovary is 'fruit': CESTAT Hyderabad has allowed exemption under Notification No. 33/2004-S.T. to assessee taking service of GTA for transport of palm oil fruit. Contention of the department that anything which is not edible cannot be classified as fruit, was hence rejected. The Tribunal, relying on Stroud's Judicial dictionary of words, held that any produce of a tree which is a result of ripened ovary, is a 'fruit', irrespective of nature of it being edible or not. [*Nava Bharat Agro Products Ltd.* v. *Commissioner* – 2019 TIOL 2111 CESTAT HYD]

Subsequent curtailment of an incentive scheme – Promissory estoppel: Relying upon principles of promissory estoppel, Bombay High Court has allowed the petition filed against the curtailment of validity period of incentive scheme (New Package Scheme of Incentives, 1993). The scheme incentivised setting up of industrial unit in remote areas of Maharashtra. The Court observed that only liberty available with the State was to modify the Incentive Scheme in such a way that it is consistent with the new tax structure while not reducing or restricting the benefits under the scheme. [*K. M. Refineries and Infraspace* v. *State of Maharashtra* – 2019 VIL 377 BOM]

NEW DELHI
5 Link Road, Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014
Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave
New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing,
Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden, 2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Ph: +91(80) 49331800
Fax:+91(80) 49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church,
Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail :lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road,
Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail :lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building
41, Chowringhee Road,
Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59,
Sector 26,
Chandigarh -160026
Phone : +91-172-4921700
E-mail :lschd@lakshmisri.com

GURGAON
OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,
Sector 25-A,
Gurgaon-122001
phone: +91-0124 - 477 1300
Email: lsgurgaon@lakshmisri.com

ALLAHABAD
3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.R)
phone . +91-0532 - 2421037, 2420359
Email:lsallahabad@lakshmisri.com