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Articles

Liability to pay interest – An interesting interpretation

By **Rahul Jain & Rohan Muralidharan**

Under the GST regime, the rate of interest levied for failure on the part of the assessee to pay the tax within the due date is a staggering 18% as opposed to interest on delayed refunds at 6%. The issue which arises for consideration in the present article is whether interest is required to be paid on input tax credits which the assessee has availed but not utilized and which has been subsequently reversed by the assessees.

The credits under CGST Act have accrued to taxpayers under two situations. The first being credit availed under the Cenvat Credit Rules, 2004 or the respective VAT legislations which have been transitioned into GST as CGST and SGST credits respectively. It is to be noted that many have transitioned cesses[1] which were lying unutilized in their returns and the eligibility of such transitioning has been a subject matter of dispute due to interpretation of the provisions, the subsequent retrospective amendments and the confusing circulars issued from time to time purporting to clarify the eligibility. Many assessees are now saddled with notices which require them to reverse such credits. Further, credits have accrued due to fresh procurements under the GST regime. In some cases here, it is seen that though all GST forms are not made active,[2] few assessees have received notice alleging mismatch.[3] While credits are being reversed by the assessee, the moot point which requires deliberation is whether interest is required to be discharged for such reversals in all scenarios or can interest be leviable only when the credits have been utilized for making payment of output liability.

Under the erstwhile law, this issue is yet to be fully settled as courts[4] have interpreted Rule 14 of Cenvat Credit Rules, 2004 differently.[5] While the Supreme Court had held that interest would be payable on availment itself, subsequent High Court decisions that have considered the Apex Court judgement have held that mere taking of credit would not trigger interest liability unless the same has been utilized.

Taking into consideration these decisions, we shall analyse whether interest is payable on mere availment[6] of credit under GST. Chapter X of the CGST Act, 2017 enumerates the provisions relating to 'payment of tax'. Section 50 in this Chapter lays down the circumstances in which interest would be required to be paid. The Section provides for payment of interest in two circumstances: -

a) Where a person liable to pay tax fails to pay the same [Section 50(1)]

b) Where a person makes an undue or excess claim of input tax credit under the provisions relating to matching of ITC [Section 50(3)]

[1] Education cess, SHE Cess And Krishi Kalyan Cess.
[2] GSTR 2 and GSTR 3 are not available on portal.
[3] The credits are not reflected in the recipient's Form GSTR 2A.

[4] Ind-Swift Laboratories [2012 (25) S.T.R. 184 (S.C.)]; M/s. Bill Forge Pvt. Ltd. [2012 (26) STR 204 (Kar)]; Strategic Engineering Private Limited [2014-TIOL-466-HC-MAD-CX].
[5] Rule 14 as existed upto 16th March 2012 provided that interest is to be paid on availment or utilization of credit.
6 By way of transitioning.

In appears that the first provision (a) would cover all cases where there is a shortfall in payment of tax which *inter alia* may be on account of payment of tax using irregularly availed credit. In other words, there may be short payment of tax by utilization of ineligible credits. Mere availment of credit, without utilization, may not fall within the scope of this provision at it would get triggered only due to failure to pay the tax.

The second provision provides for levy of interest where undue or excess claim of input tax credit has been made because of mismatch in the returns.[7] This provision would not cover a scenario wherein an ineligible credit has been availed by an assessee for reasons other than that of excess availment. For example, credit in relation to purchase of motor vehicles has not been allowed under Section 17(5) of the CGST Act, 2017. If an assessee avails such credit, though the credit is ineligible, it will not be covered under the provision (b) above. In respect of actual mismatch cases also, one can argue that in the absence of the non-availability of returns, the provision itself is unworkable and hence, there would be no requirement to reverse any credit.

Having discussed the relevant provision pertaining to interest under GST law, the specific scenario involving recovery of wrongly availed credit requires discussion. Section 73 of the CGST Act, 2017 contains the machinery provision which empowers the department to demand irregularly availed credit. For better appreciation of the legal issue involved, this provision is reproduced below: -

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilized for any reason, other than the reason of fraud or any willful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder;

As per the above provision, the proper officer can issue a notice for wrongly availed credit and demand interest only where interest is payable under Section 50. From the above discussion, it can be said that Section 50 does not provide for payment of interest for mere wrongful availment of credit. Once there is no interest payable under section 50, an argument can be advanced that the CGST Act does not provide for a provision to demand interest in cases where availment of credit is irregular.

At this juncture, reference can be made to the settled jurisprudence on this issue. In ***India Carbon Ltd.* v. *State of Assam*,** [(1997) 6 SCC 479], the Supreme Court was examining whether the provisions of the CST Act authorized imposition of interest for delayed payment of central sales tax. Based on the relevant provision, as it existed during that time the Court held that the provision relating to interest in the latter part of Section 9(2) can be employed by the States' sales tax authorities only if the Central Act makes a substantive provision for the levy and charge of interest on central sales tax. The principle which one can infer from this decision is

[7] Matching of GSTR 1 and 2 which has been deferred.

that unless the law clearly provides for a provision for recovery, no interest can be recovered.

As the provisions relating to recovery of interest under CGST Act does not envisage the scenario of irregular availment of credit, it appears there cannot be any levy of interest on mere wrongful availment of credit for reasons other than those covered under Section 50(3) viz. wrongful availment on account of mismatch.

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Revision of returns & forms – Need for amendments

By **Nipun Arora**

GST is about to complete twenty months since implementation. Initially, it was expected that it will take an approximate time-period of two years for the industry to fully comprehend GST and be compliant with the provisions of GST law. However, it seems that more than the industry, tax administration appears to be lagging behind. Various steps are being taken by the government day in and day out such as amendments in law, series of GST Council meetings, multiple rate changes, detailed return filing processes being kept in abeyance, etc. It was anticipated that within a time span of two years, the essential procedures will get settled but with the present pace, it seems that it will take a longer time for streamlining of business processes under GST. Issues related to lack of facility for revising of returns filed and a recent judgement by High Court of Calcutta [*Optival Health Solutions* v. *UOI*, Order dated 7-2-2019] are discussed in the present article.

In GST, from the first day itself, it has been a point of discussion that the compliance burden is huge and the process is cumbersome requiring a lot of efforts and manpower. This was countered on the ground that automated software will take care of compliance burden and will aid in removal of manual intervention and ease the compliance process. However, due to lesser reach of software and affordability issues for a range of small taxpayers, many taxpayers are preparing their returns manually. Moreover, software also requires manual intervention such as extracting data, validation before filing of returns, etc.

Any incorrect input in the original data may also result in furnishing inappropriate information in returns. However, manual intervention increases this risk and there arises a need for revision. When we talk about returns, the context is not limited to monthly, quarterly or annual returns but also extends to all the forms required to be filed with the authorities for intimating the state of affairs at the end of taxpayer. All forms filed by taxpayers may be prone to error sometimes for which the taxpayers will have to seek correction through revision of such form. However, the system of revision as it existed under the erstwhile regime is not available in the GST regime in respect of most of such forms. In GST regime, in respect of certain forms, certain details filed in a particular return may be amended in subsequent returns / forms and only to such limited extent facility to revise has been provided.

In the erstwhile regime, whereas service tax law and VAT law in most of the States contained provisions in relation to revision of return, the provisions under excise laws were inserted from a later date for revision of returns. The provisions in relation to revision of return were something very common. The concept of "*amendment*" of particular entry in a return was something new for taxpayers.

Judgment of Calcutta High Court in the case mentioned in the first para wherein writ petition filed seeking revision of a particular form highlights the issue of absence of provisions and also requirement to amend the law to provide for the same. The facts of this case are that petitioner had filed form GST TRAN 2. However, later the petitioner observed that some mistakes have been made while filing such form and revision of the same was required. However, in the absence of any legal provisions and any options available on the portal, the petitioner sought a direction to the department to allow them for revise/rectify their form GST TRAN 2 electronically or manually. The petitioner further contended that whereas Rule 120A of CGST Rules contained relevant provisions regarding revision of Form GST TRAN-1, similar provisions are not available with respect to Form GST TRAN-2.

The department contended that the transitional provisions are one time benefits given to persons entitled to avail such benefits and that a concessional provision was required to be strictly construed and that TRAN 2 was not a return and it was distinct and separate from TRAN-1. It was also contended that TRAN-1 was a vested right while TRAN-2 cannot be construed so and therefore, an assessee cannot be allowed to revise TRAN-2 form on the same reasoning and standing as that of TRAN-1 form.

The High Court observed that the law permits a person making an admission, the liberty of explaining the same, if he so chooses and Form GST TRAN 2can be considered as an admission to inform the state of affairs of the petitioner. It noted that neither the Act or rules can be read to mean as excluding the right of a person making admission, to forfeit the opportunity to explain it and to substantiate that such admission was made by mistake or was untrue. It directed that the petitioner should be provided an opportunity to explain Form GST TRAN 2. It saw no reason as to why a person filing form GST TRAN-2 should not be allowed to revise the same after the initial filing.

The above judgement may enable aggrieved taxpayers to move respective High Court and seek judicial redressal wherever the provisions are too harsh causing difficulties. However, it is pertinent to note that relief has been granted by the High Court to the petitioner only in the present case and in case any other taxpayer aggrieved similarly seeks such remedy, separate petition shall be required to be filed in jurisdictional High Court seeking redressal.

It is the time for the taxmen to understand the hardships faced by the taxpayers and provide for a proper method for revision of all forms and not only returns required to be filed as per law. This will not only benefit the taxpayer in ensuring better compliance but will also help the government in terms of increased revenue collections. Taxpayers also need to analyse the issues / cases where there exists a good merit for filing writ petition when provisions are absent in the law but the difficulties faced are genuine.

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Goods and Services Tax (GST)

Amendments, Notifications and Circulars

GST rates on under-construction residential property to be lowered: GST Council in its 33rd meeting held on 24-2-2019 has recommended lowering of the GST rates on under-construction residential property to 5%, without ITC, in case of housing other than what is categorised as 'affordable housing'. Rate of tax on under-construction affordable housing would however be 1%, also without ITC. Definition of affordable housing has also been expanded to cover houses in specified metro regions, with carpet area up to 60 m^2 and priced up to Rs. 45 lakh. The carpet area can be up to 90 m^2 in non-metro cities. Upper limit for the cost of house however remains same (Rs. 45 lakh) for non-metro cities. As per Press Release issued by Ministry of Finance, metropolitan cities are Bengaluru, Chennai, Delhi NCR (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurgaon, Faridabad), Hyderabad, Kolkata and Mumbai (whole of MMR). The new rates will be implemented from 1-4-2019.

CGST credit to be utilised before SGST/UTGST credit for payment of IGST: Utilisation of CGST credit for payment of IGST has been prioritised as against utilisation of SGST/UTGST credit for IGST payment. Section 20 of CGST (Amendment) Act 2018 in this regard amends Section 49(5) of CGST Act 2017. As per the amendments which came into force from 1st of February, 2019, input tax credit (ITC) on account of SGST or UTGST shall be utilised towards payment of IGST only where the balance of ITC on account of CGST is not available for payment of IGST. As per the newly inserted Section 49A, ITC in respect of CGST, SGST or UTGST shall be utilised for payment of IGST, CGST, SGST or UTGST only after ITC of IGST has been fully utilized for such payment.

ITC on motor vehicles for transportation of persons – Amendments in Section 17(5): Input Tax Credit will now be disallowed only on motor vehicles for transportation of persons having seating capacity of thirteen person (including driver) or less, except when vehicle is used for supply of such motor vehicle, transportation of passengers or for imparting training. Amendment in CGST Section 17(5) in this regard came into force from 1-2-2019. This amendment also creates separate exclusion of vessels and aircrafts. ITC was not available till 31-1-2019 on all motor vehicles and other conveyances, except in specified cases.

GST on supplies from unregistered suppliers – Liability on notified persons: GST under reverse charge mechanism on receipt of supplies from unregistered suppliers [Section 9(4) of CGST Act], by registered person, will be applicable on specified goods or services in case of certain notified classes of registered persons only. CGST Section 9(4) has been amended in this regard from 1st of February 2019. Consequently, Notification No. 8/2017-Central Tax (Rate), providing exemption in respect of such reverse charge liability on registered persons, has been rescinded from 1-2-2019. This exemption was available till 30-9-2019. The class of registered persons for this purpose and the specified supplies for this purpose, are yet to be notified.

Budgetary support to units in hilly States clarified: CBIC has issued an elaborate circular on budgetary support (refund to units availing area-based exemption in Central Excise regime)

to eligible industrial units located in J&K, Himachal Pradesh, Uttarakhand and North Eastern States including Sikkim. As per the circular, time limit for disposal of claims filed by eligible units should be 2 weeks extending maximum up to 30 days. Clarifying various issues, the circular observes that the scheme is for grant and not refund. Circular No. 1068/1/2019-CX, dated 10-1-2019 also states that decision of sanctioning authority is final and there is no requirement for appellate forum.

GSTR-7 for period October 2018 till January 2019 to be filed on or before 28-2-2019: Form GSTR-7 for tax deducted at source for the period from October 2018 till January 2019 can now be filed till 28th of February 2019. Notification Nos. 7/2019-Central Tax, dated 31-1-2019, for periods October to December 2018 and No. 8/2019-Central Tax, dated 8-2-2019 for January 2019, respectively, have been issued for the purpose.

Separate registration of each place of business – CGST Rule 11 substituted: Central GST Rule 11 has been substituted consequent to the amendment in CGST Act with effect from 1-2-2019. New Rule 11 provides for and prescribes the manner of obtaining separate registration for multiple places of business within a State or Union territory by a taxpayer. Further, Rule 41A has been inserted to provide the manner of transferring of input tax credit on obtaining separate registration for multiple places of business within a State or Union territory. ITC shall be transferred in the ratio of value of assets held at the time of registration. Notification No. 3/2019-Central Tax, dated 29-1-2019 has been issued in this regard.

In-bond sale of goods during July, 2017 to March, 2018 – Deemed compliance of transaction not reported correctly: Considering that facility to correctly report the nature of transaction in Form GSTR-1 furnished on the common portal was not available during the period July, 2017 to March, 2018, in respect of supply of warehoused goods while being deposited in a customs bonded warehouse, CBIC has clarified that, as a one-time exception, suppliers who have paid CGST and SGST on such supplies, during the said period, would be deemed to have complied with the provisions of law as far as payment of tax on is concerned. Circular No. 91/10/2019-GST, dated 18-2-2019 observes that as long as the amount of tax paid as CGST and SGST is equal to the due amount of IGST on such supplies, the provisions would be deemed to have been complied with.

GST invoices to mandatorily mention place of supply: CBIC has reiterated that all registered persons making supply of goods/services in course of inter-State trade or commerce shall specify the place of supply along with the name of the State in the tax invoice. Circular No. 90/9/2019-GST, dated 18-2-2019 states that contravention of any of the provisions of CGST Act or the Rules made there under attracts penal action under the provisions of Sections 122 or 125. It further notes that number of registered persons (especially in banking, insurance and telecom sectors) are not mentioning place of supply.

GST Appellate Tribunal with National Bench at New Delhi approved: Union Cabinet has, on 23-1-2019, approved creation of National Bench of Goods and Services Tax Appellate Tribunal (GSTAT). Being a common forum of second appeal in GST laws, GSTAT will ensure that there is uniformity in redressal of disputes and therefore in implementation of GST across the country. According to official press release, the National Bench of the Appellate Tribunal shall be situated at New Delhi. GSTAT shall be presided over by the President and shall consist of one Technical Member (Centre) and one Technical Member (State).

Ratio decidendi

Electricity transmission – Para 4(1) of Circular No. 34 struck down: Gujarat High Court has struck down Para 4(1) of the CBIC Circular No. 34/8/2018-GST as *ultra vires* the provisions of CGST Section 8 as well as Notification No. 12/2017-Central Tax (Rate), serial No. 25. It observed that meaning of 'transmission and distribution of electricity' does not change either in the negative list regime or the GST regime. It was also held that services which stood included within the ambit of transmission and distribution of electricity during the pre-negative list regime, as per 2010 circular, cannot now be sought to be excluded by merely issuing a clarificatory circular. It observed that all the services related to transmission and distribution of electricity are naturally bundled in the ordinary course of business of the petitioner and are required to be treated as provision of the single service of transmission and distribution of electricity which gives the bundle its essential character. In the said circular, CBIC had clarified that GST was payable on application fee for new connection, rental charges for meter, testing fee for meters / other equipment, labour charges for shifting of meters or lines and charges for duplicate bill. [*Torrent Power Ltd.* v. *Union of India* - 2019-TIOL-15-HC-AHM-GST]

GST TRAN-2 - Calcutta High Court allows revision: Observing that there is no ground as to why a person filing Form GST TRAN-2 should not be allowed to correct and file such revised form, Calcutta High Court has allowed filing of revised Form GST TRAN-2. It observed that authorities can retain the original and then confront the assessee seeking explanation for revision. The Court in this regard observed that assessee be given an opportunity to explain, as Form GST TRAN-2 is an admission and the law permits a person making an admission, the liberty of explaining the same if he so choses. [*Optical Health Solutions Pvt. Ltd.* v. *UoI* – 2019 SCC online Cal 171]

Goods detained due to multiple invoices in single e-way bill – Kerala High Court grants interim relief: Kerala High Court has provided interim relief, releasing goods and vehicle on a simple bond in a case involving detention on account of multiple invoices under a single e-way bill. The Court provided interim relief after observing that the department may find it practically difficult in tracking multiple invoices with respect to a single e-way bill. It noted that it was not a case where the e-way bill did not mention all the invoices. [*Stove Kraft (P) Ltd.* v. *Asst. STO* - 2019-VIL-61-KER]

GST on TCS collected under Income Tax – CBIC Circular No. 76 stayed: Kerala High Court has directed the State authorities not to act on clarification at Sl. No. 5 of the CBIC Circular 76/50/2018-GST pending disposal of the writ petition. The circular states that TCS collected under Income Tax Act is includible since value to be paid by buyer is inclusive of said TCS. According to petitioner, a motor vehicle dealer, he acts only as agent for the State to collect income tax under Section 206C(1F), and the amount will eventually go to vehicle purchaser's credit. The High Court observed that the petition raises *prima facie* issue which needs attention. [*PSN Automobiles* v. *UOI* - 2019-TIOL-14-HC-KERALA-GST]

Non-production of goods is not a ground for imposition of penalty: Kerala High Court has held that penalty cannot be imposed for not producing the goods (before the officer) after release on bond, when there is a security equivalent to value of goods which could be invoked. Observing that confiscation proceedings under Section 130 of Central GST Act are possible only if the dealer fails to pay the applicable tax and penalty, the Court held that production of goods under CGST Rule 140 is

only for invocation of confiscation, which is not necessary if security is furnished. It noted that there was no question of tax and penalty being not paid as bank guarantee could be invoked at any time. [*Noushad Allakkat* v. *Stata Tax Officer* - WA. No. 2070 of 2018, decided on 8-11-2018, Kerala High Court]

Profiteering even when increased base price still lower than pre-GST price: In a case of increase in the base price of product after GST rate reduction, where base price was still lesser as compared to pre-GST price, National Anti-profiteering Authority has held that benefit of price reduction was not passed on. The Authority in this regard observed that not increasing MRP when tax rates were increased after implementation of GST was a business call taken by the respondent and therefore no concession on this ground would be available. It held that the benefits from rate reduction cannot be denied just because the MRP was not changed earlier by the assessee to extend extra benefit to consumers. [*Surya Prakash Loonker* v. *Excel Rasayan Pvt. Ltd.* - 2019-VIL-02-NAA]

Recovery of part of premium from employees for insurance is not "supply": Maharashtra AAR has held that payments received by the applicant-company from its employees for payment to insurance companies cannot be treated as a supply of service. The Authority in this regard was of the view that recovery of parents health insurance expenses from the employees was not supply of service by the applicant. It was also held that ITC would not be available since assessee was not the one providing such services. Further, AAR also held that ITC cannot be claimed by assessee in respect of hotel accommodation for its expatriate GM/MD since it was for their personal comfort and if they had stayed in other residential flat, GST would not have been paid as renting service in such case was exempted. [In RE: *POSCO India* – Order No. GST-ARA-36/2018-19/B-110, dated 7-9-2018, Maharashtra AAR]

Services of sales promotion to principal – Coverage under intermediary service: Karnataka Appellate AAR has held that appellant providing services of business marketing, sales promotion and post sale support services in India for a principal company in Germany will be termed an 'intermediary' under Section 2(13) of the IGST Act since it was not supplying said services on its own account. KAAAR while holding so upheld the AAR ruling that post sale services are not required in every case therefore such supplies which are not naturally bundled does not constitute 'composite supply'. [In RE: *Toshniwal Brothers (P) Ltd.* – Order No. KAR/AAAR/06/2018-19, dated 9-1-2019, Karnataka AAAR]

Filling tea bag pouches is 'manufacture' of distinct product: West Bengal AAR has held that filling of tea into tea bag pouches amounts to manufacture of a product commercially different from blended tea leaves and that said manufactured tea bags are classified under Tariff item 0902 40 40. In an advance ruling wherein the applicant was engaged in contract packaging of tea bags from the physical inputs supplied by principal, the AAR was of the view that manufacturing and packaging of tea bags would be a composite supply where manufacturing is principal supply classifiable under SAC 9988 and taxable at 5% under Notification No. 11/2017-Central Tax (Rate). [In RE: *Vedika Exports Tea Pvt. Ltd.* – Order No. 36/WBAAR/2018-19 dated 28-1-2019, West Bengal AAR]

Providing information on Indian market falls under Market Research Services: Maharashtra AAR has held that services of conducting survey and collecting information on trends of Indian market by subsidiary company in India for its flagship in Japan are in the nature of marketing research services and not intermediary services.

Research services on accounting, finance and personnel were held to be covered under 'other support services'. It was observed that the principal service was vital for recipient company. It also held that said services would be covered under export of services as per IGST Section 2(6). [In RE: *Asahi Kasei India (P) Ltd.* - 2019-VIL-10-AAR]

Exemption not available to all activities delegated by a govt. entity: In an advance ruling relating to applicability of lower GST rate on a works contract entrusted by a govt. entity, the AAR has held that concessional rates cannot be extended to all activities entrusted by a govt. entity, and that such activity should be in public interest. Madhya Pradesh AAR held that construction of a residential colony entrusted to the assessee by Madhya Pradesh Power Generating Co. has no relation to principal work of power generation entrusted by State govt. to it. The activity was held as attracting GST @ 18% instead of 12%. [In RE: *Shreeji Infrastructure India* – Order No. 15/2018, dated 18-10-2018, Madhya Pradesh AAR]

Company within indirect Govt. 'control' to comply with TDS provisions: West Bengal AAR has ruled that where Central/State Govt. or both have 'control' of a company as per Section 2(27) of the Companies Act, the said company is liable to deduct TDS @ 1% as per CGST Section 51(1). The applicant was a joint venture company where two govt. companies together held 62.29% of shares. The AAR observed that since the Government has majority of board members, Central and the State Governments, acting through the government companies, are in a position to indirectly control management or policy decisions of applicant. [In RE: *WEBFIL Ltd*. – Order No. 32/WBAAR/2018-19 dated 8-1-2019, West Bengal AAR]

Works contract by Govt. entity for commercial purpose to attract 18% GST: AAR West Bengal has ruled that works contract service for construction of Multi-Modal Inland Waterway Transport Terminal at Haldia by the applicant is meant for commerce and business, and therefore attracts 18% GST under Sl. No. 3(XII) of Notification No. 11/2017-Central Tax (Rate). Observing that the user fees collected is not credited to the Consolidated Fund of India therefore does not amount to revenue but proceeds from business, the AAR rejected the plea of 12% GST under Serial No. 3(vi)(a) applicable in respect of govt. entities. [In RE: *ITD Cementation India Ltd.* – Order No. 33/WBAAR/2018-19 dated 8-1-2019, West Bengal AAR]

UK VAT – Input tax deduction of deal partner fees paid for honouring reward: In a case involving supply of rewards by deal partners to Clubcard members for reward tokens supplied by the assessee, UK's Upper Tribunal (Tax and Chancery Chamber) has allowed input tax deduction of fees paid to deal partner by the assessee. The Tribunal in this regard observed that fees paid to deal partner was the consideration for the latter agreeing to honour rewards provided by the assessee to members in the course of its business. [*Commissioner* v. *Tesco Freetime* - Appeal number UT/2017/0174, decided on 24-1-2019, UK Upper Tribunal (Tax and Chancery Chamber)]

EU VAT - Leasing a restaurant with all tangible assets is not transfer of business: Court of Justice of the European Union has held that leasing of a restaurant along with its capital equipment and inventory for commercial purpose will constitute supply under VAT wherein the principal supply will be supply of the immovable property. The Court, for this purpose, negated argument of the owners of restaurant who refused to adjust VAT deducted on the works

carried out by them calling it a 'transfer of business'. CJEU opined that letting of a building with capital equipment does not constitute 'transfer of business' even if the lessee pursues activity of the lessor. [*Virgil Mailat* - In Case C-17/18, decided on 19-12-2019, CJEU]

EU VAT – No VAT on royalty payable based on resale right: Court of Justice of the European Union has held that by imposing VAT on royalty payable to author of original work of art on the basis of resale right, Austria failed to fulfil its obligations under Article 2(1) of EU's Council Directive. The court noted that legal relationship existed only between buyer and seller. According to Austria, VAT was imposable as per principle of neutrality, and as author provided service by tolerating act of resale. European Council however believed that such royalty was not consideration for supply by author when first placed on the market. [*European Commission* v. *Republic of Austria* – Judgement dated 19-12-2018 in Case C-51/18, CJEU]

Customs

Notification and Public Notice

All Industry Rates of duty drawback amendments effective from 20-2-2019: Ministry of Finance has clarified amendments made to All Industry Rates (AIRs) of duty drawback by Notification No. 12/2019-Cus. (N.T.), effective from 20-2-2019. Changes include enhanced AIRs/caps of drawback on leather sofa cover including automobile upholstery, synthetic filament tow, carpets, silk articles, boots, gold jewellery and mobile phones. Drawback has been rationalised for silver jewellery/articles. Certain new tariff items have been created to allow better differentiation of exports. CBIC Circular No. 5/2019-Cus., dated 20-2-2019 has been issued for the purpose.

Advance authorisation - Removal of pre-import condition for IGST exemption: Pre-import condition to avail exemption from IGST and Compensation Cess for imports under Advance Authorisation has been removed. CBIC Notification No. 01/2019-Cus., dated 10-01-2019 in this regard amends Notifications Nos. 18/2015-Cus. and 20/2015-Cus., where an additional condition has, however, been inserted in respect of imports made after discharge of export obligation in case IGST exemption is availed. As per the new additional conditions, in case of imports after discharge of export obligation in full, if IGST exemption is claimed and if the facility of Input Tax Credit (ITC) has been availed in respect of inputs used for manufacture and supply of goods exported, then the importer needs to furnish a bond, binding himself to use the imported material in his factory or in the factory of his supporting manufacturer. Additionally, the importer is now required to submit a certificate from a chartered accountant certifying that the inputs have been so used.

Further, export obligation in such cases (case of IGST and Cess exemption) can now also be fulfilled by certain specified domestic supplies in addition to physical exports. According to the amendments, domestic supplies mentioned at Sl. No. 1, 2 and 3 of Notification No. 48/2017-Central

Tax (relating to deemed exports) would also be eligible for fulfilling export obligation in such cases. Suitable amendments have also been made in Para 4.14 of the Foreign Trade Policy 2015-20 for this purpose.

Clubbing of Authorisations issued only within 18 months - HoP amended: DGFT has amended Para 4.38 of FTP Handbook of Procedures relating to Facility of Clubbing of Authorisations. Only authorisations issued within 18 months from the date of earliest authorisation can be clubbed subject to condition that imports are made within 30 months of the earliest authorisation. Any import made beyond 30 months of the earliest authorisation shall be regularised as per Para 4.49 of HoP. All cases clubbed as per earlier provisions are not to be reopened. Public Notice No. 70/2015-2020, dated 30-01-2019 has been issued for this purpose.

Ratio decidendi

Essential parts can be treated as complete goods for customs but not Motor Vehicle Act: In a case involving import of essential parts for assembling e-rickshaw, Delhi High Court has held that Rule 2(a) of Interpretative Rules, treating unfinished articles as complete, is applicable for Customs Tariff only and not for treating goods as complete e-rickshaw under Central Motor Vehicles Rules. The High Court observed that legal fiction created by a statute cannot be extended beyond the purpose for which it is created. It directed Customs to clear goods withheld because of absence of type certificate required under Motor Vehicles Act. [in *Ramakrishna Sales* v. *UOI* - W.P.(C) 1232/2018, decided on 31-1-2019, Delhi High Court]

Mere fact of excess wastage not sufficient to conclude non-use: Gujarat High Court has set aside demand on imported raw material contained in wastage in excess of input-output norms, in a case where export obligation was fulfilled. Absence of allegations that goods were not consumed in manufacturing or were clandestinely removed, were noted. It held that mere fact of excess wastage was not sufficient to conclude that goods were not used. The High Court also observed that Notification No. 13/81-Cus., did not indicate that imported raw material contained in waste in excess of norms was ineligible for the benefit. [*Goodluck Garments* v. *Commissioner* - 2019-TIOL-207-HC-AHM-CUS]

No duty on non-foundry item cleared after segregation from imported scrap: In a case of segregation of imported brass scrap by an EOU into foundry and non-foundry scrap, where non-foundry scrap cleared in DTA on payment of central excise duty covered plastic, rubber, etc., Gujarat High Court has held that such non-foundry scrap was not the article imported as such as it was brass scrap which was imported for the manufacture of brass articles. The Court hence upheld the CESTAT order rejecting the demand of Customs duty on such imported scrap alleged to be cleared 'as such'. It was held that the essential character of the scrap, viz. brass was absent in such non-foundry scrap. [*Commissioner* v. *Pooja Metal Industries* - R/Tax Appeal No. 1344 of 2018 and others, decided on 14-12-2018, Gujarat High Court]

Restricted imports without authorisation can be cleared on redemption fine: In a case involving import of restricted goods without authorisation, Larger Bench of Supreme Court has held that merely because earlier similar consignments were cleared by Customs on payment of redemption fine, parity cannot be demanded for present consignment. The Court however, observing that Multi-Function Devices (Digital Photocopiers and Printers) were not prohibited but restricted from import, upheld the view that importer was entitled to redemption of MFDs having utility period, on payment of market

price. It upheld the High Court order classifying the goods as 'other wastes' under Rule 3(1)(23) of the Waste Management Rules, as they had utility at the time of import. [*Commissioner* v. *Atul Automation* - Civil Appeal No. 1057 of 2019, decided on 24-1-2019, Supreme Court]

Drawback on re-exports - GR declaration when not required: Delhi High Court has held that non-commercial re-export of duty-paid goods would be entitled to drawback under Section 74 of the Customs Act and that requirement of Guaranteed Remittance was not necessary in a case where the exporter and owner of the goods were one and the same. The High Court in this case, where petitioner's aircraft leased to Kingfisher Airlines was cannibalized and subsequently an aircraft engine was imported so that the aircraft chassis could be flown back, held that the petitioner was entitled to drawback on re-export of aircraft engine. [*International Lease Finance Corporation* v. *UOI* - W.P.(C) 6344/2018, decided on 10-1-2019, Delhi High Court]

Demand of anti-dumping duty for imports under Advance Authorisation: Rejecting the plea that bond/LUT executed by assessee-importer did not cover the anti-dumping duty leviable on material imported under Advance Authorisation, CESTAT Mumbai has upheld the demand of anti-dumping duty in a case of non-fulfilment of EO. The Tribunal observed that the bond executed did not make any distinction between the duties leviable. Larger Bench order in *Caprihans* and Bombay High Court decision in *Dharampal Lalchand Chug* were distinguished. The case was also found fit for category (d) of Explanation 1 of Customs Section 28 (relevant date). [*Kopran Ltd*. v. *Commissioner* - Order No. A/85037/2019, dated 10-1-2019, CESTAT Mumbai]

Clarification issued by Ministry to assessee is not a circular: CESTAT Delhi has held that a clarification issued by the Ministry to the assessee cannot be treated as a circular and that the same is not binding on the adjudicating authority who can differ on well-reasoned arguments. The Tribunal upheld the order of Commissioner (Appeals) extending exemption under Notification No. 12/2012-Cus., to a manufacturer of power bank where the appellate authority ignored the clarification issued by Ministry and asserted that power bank was a battery charger of mobile handsets. Judgment of the Supreme Court in *State of Punjab v. Nokia India* was relied. [*Commissioner* v. *S B Industries* - 2019-VIL-37-CESTAT-DEL-CE]

Central Excise and Service Tax

Circular

Service Tax exemption to services provided by ADB & IFC: CBIC through Circular No. 211/1/2019-ST dated 15-01-2019 has clarified that the services provided by Asian Development Bank (ADB) and Indian Financial Corporation (IFC) are exempted from service tax too. Relying on Circular No. 83/2/2019-GST which clarified that exemption is available to ADB and IFC from GST in terms of provisions of ADB Act and IFC Act, the current circular states that GST circular shall apply *mutatis mutandis* to service tax also. The exemption will not be available to any entity appointed or working on behalf of ADB or IFC.

Ratio decidendi

Warehouse in foreign land can be a place of removal to avail Cenvat Credit: CESTAT Mumbai has held that Cenvat credit can be availed on foreign warehouse services received by a company in India for which service tax was paid under reverse charge mechanism. Rejecting department's plea that port of export was the place of removal, the Tribunal allowed Cenvat credit on warehousing services received in Spain. It relied upon assessee's own case concerning warehousing in USA where it was held that denial of credit would amount to double taxation. [*Eaton Industrial System (P) Ltd.* v. *Commissioner* - 2019-TIOL-470-CESTAT-MUM]

No recovery on the basis of self-assessment - Bank accounts defreezed: Observing that merely because there was self-assessment, the petitioner cannot be saddled with the recovery notices, Bombay High Court has set aside forfeiture of bank accounts of the petitioner. The accounts were frozen under Section 87 of the Finance Act, 1994 because of unpaid service tax. The High Court ruled that the petitioner be given a chance to make a case before the authorities. The petitioner had contended that tax was not paid due to outstanding overheads and non-liability due to various reasons. [*Arambhan Hospitality Services Ltd.* v. *UOI* - Writ Petition No. 802 of 2019, decided on 29-1-2019, Bombay High Court]

Cenvat credit on guest house - CESTAT's formula set aside: Bombay High Court has held that rough and ready formula as formulated by CESTAT regarding availability of Cenvat credit on guest houses, that credit was available only on guest houses situated near the manufacturing unit, was not entirely satisfactorily. The High Court in this regard held that even in relation to guest house not situated close to the manufacturing unit, if the use was not for personal use or consumption of the employees, exclusion clause in definition of input service, may not apply. [*ACG Associated Capsules P. Ltd.* v. *Commissioner* - Central Excise Appeal No. 55 of 2018, decided on 5-12-2018, Bombay High Court]

CAG cannot carry compulsory service tax audit of private agencies, after GST: Relying on Central GST Section 174(2), Gujarat High Court has held that there was no saving of Rule 5A of Service Tax Rules, 1994 such that fresh audit proceedings under the said rule cannot be initiated by CAG. It was observed that with the enactment of GST, Finance Act 1994 and Service Tax provisions stood repealed. The High Court in this regard stayed CAG audit of a private limited company providing warehouse and logistical support services in SEZ. CAG was directed not to carry out any further Service Tax audit of petitioner. [*Oil Field Warehouse and Service Ltd* v. *UOI* - R/Special Civil Application No. 16232 of 2018, decided on 17-10-2018, Gujarat High Court]

Cenvat credit on maintenance charges for common area of business premises: CESTAT Delhi has allowed Cenvat credit on maintenance charges for common area of a business premises taken on rent by assessee. The charges were related to roads, street lights, drainage, etc., provided beyond the manufacturing premises but were charged based on per square meter of business premises occupied. The Tribunal observed that these charges were indirectly related to business and were covered in the main part of definition of input services. Judgment of the Supreme Court in the case of *Karnani Properties* was relied on. [*Mahle Engine Components* v. *Commissioner* - Final Order No. 50046/2019, dated 15-1-2019, CESTAT Delhi]

Interest can accrue on refund of duty, not on restoration of Cenvat credit: CESTAT Mumbai has held that interest will not accrue on

restoration of Cenvat credit. It observed that credit cannot be monetized therefore the same is bereft of any time value. The Tribunal in this regard was of the view that mere reference in provisions of law for refund will not enable such debit entries to be adorned with mantle of duty and be eligible to interest under Excise Section 11BB. The appeal for interest on restoration of credit was dismissed where Cenvat credit was earlier erroneously debited under Rule 6 on clearance of electrical energy and boiler ash. [*Shri Ambalika Sugars (P) Ltd.* v. *Commissioner* - Order No. A/85001/2019, dated 3-1-2019, CESTAT Mumbai]

DTA clearance by EOU - Inclusion of basic customs duty not required: CESTAT Ahmedabad has held that there was no need to include the basic customs duty in the assessable value for arriving at the value of similar goods manufactured outside Export Oriented Unit (EOU) in a case of DTA clearance. It noted that duty leviability on like goods produced or manufactured outside EOU should be considered. Inclusion of basic customs duty to arrive at an assessable value was denied relying on Notification No. 23/2003-CE which prescribes exemption from the duty 50% in excess of the duty leviable under Excise Section 3. [*Sterling Enterprise* v. *Commissioner* - Final Order No. A/10002/2019, dated 2-1-2019, CESTAT Ahmedabad]

Cenvat reversal on inputs cleared as such – FIFO system to be followed: In a case involving removal of inputs as such, CESTAT Ahmedabad has held that first-in first-out (FIFO) system must be applied and removal of inputs from the old stock of a manufacturer must be considered. The demand for differential Cenvat credit considering that the inputs removed as such was out of the current purchase, was hence set aside. It noted that that the quantity removed from time to time was carried forward from the old stock and the stock balance of the input was much more than the quantity cleared. [*Wimplast Ltd.* v. *Commissioner* - Final Order No. A/12948/2018, dated 13-12-2018, CESTAT Ahmedabad]

'Lead generators' are not equivalent to 'Insurance agents': CESTAT Mumbai has held that services rendered by a 'Lead generator' are not that of an 'Insurance agent' and that assessee was not liable to service tax on reverse charge mechanism for the commission paid to such entities. Period involved was from October 2008 to March 2011. It dismissed appeal observing that canvassers cannot be brought within definition of agents. It was held that transfer of burden of tax under Section 68 was limited and would not extend beyond the specific definition as per CBEC Circular No. 137/21/2011-ST. [*Commissioner* v. *Reliance Life Insurance Co.* - Order No. A/88166/2018, dated 21-12-2018, CESTAT Mumbai]

No suppression when non-maintenance of records found out by audit party: CESTAT Mumbai has held only because audit party had found non-maintenance of separate records (leading to demand of 6% under Cenvat Rule 6), suppression cannot be alleged. It took note of the purpose of audit, as available in the manual published by the Institute of Chartered Accountants of India in respect of EA audit and CERA audit. The Tribunal also reiterated that non-intimation of exercise of option under Cenvat Rule 6(3A) can only be treated as mere procedural lapse. [*Accura Valves Pvt. Ltd.* v. *Commissioner* - Order No. A/88054/2018, dated 6-12-2018, CESTAT Mumbai]

Value Added Tax (VAT)

Ratio decidendi

Sale of goods when in bonded warehouse, not exempt from CST: Bombay High Court has held that sale made by transfer of documents while goods are in bonded warehouse would not qualify as exempt under Section 5(2) of the Central Sales Tax Act, relating to high sea sales. Relying on the Customs Act, it held that storage of imported goods in warehouse, as not cleared after unloading, did not mean that for the purposes of CST Act the goods have not crossed customs frontiers of India. Observing that concept of crossing the customs frontiers of India is distinct from customs barriers of India, the High Court termed such sale as local sale. [*Commissioner* v. *Radhasons International* - 2019-VIL-62-BOM]

Sales tax on replacements during warranty period – Matter referred to Larger Bench: Supreme Court has referred to its Larger Bench the issue as to whether sales tax was payable based on credit note issued for replacement of spare parts of automobile under warranty. It expressed reservations on propositions laid down in *Mohd. Ekram Khan & Sons.* The Court in this regard observed that price included cost of spare parts and that sales tax was paid on car as well as spare parts inventory with the dealer. [*Tata Motors* v. *Dy. Commissioner* – Judgement dated 5-2-2019 in Civil Appeal No. 1822 of 2007 and Ors., Supreme Court]

Edible oil, vanaspati and sugar are 'agricultural produce' for market fee: Supreme Court has upheld High Court Order holding that edible oil, vanaspati and sugar are covered under the definition of agricultural produce under Section 2(1)(a) of the Maharashtra Agricultural Produce Marketing (Regulation) Act, 1963, for the purpose of levy of market fee. The Apex Court concurred with the High Court that absence of 'manufacture' in the definition of agricultural produce would not affect status of sugar as agricultural produce. It also agreed with the lower court that oil remains oil even if it is processed. [*Britannia* v. *Bombay Agricultural Produce Marketing Committee* - Civil Appeal No. 1746 of 2010, decided on 24-1-2019, Supreme Court]

Market Fee leviable by State is not abolished after introduction of GST: Rajasthan High Court has held that Timber (Imarti Lakdi) is an agricultural produce exigible to 'Mandi fee' under Rajasthan Agriculture Produce Markets Act, 1961. The High Court rejected the plea that after introduction of GST, the levy of cess under the said Act cannot continue. The Court observed that though various taxes, duty and cesses have been clubbed under GST, the combined effect of Section 174 of CGST Act and RGST Act abolishes only taxes mentioned in those provisions. [*Imarti Lakdi Vyapari Sansthan Jodhpur* v. *State of Rajasthan* - D.B. Civil Writ Petition No. 1451/2018, decided on 29-10-2018, Rajasthan High Court]

No liability under VAT on consumables used in hospital for treatment: Three Judge Bench of the Kerala High Court has held that medicines, implants, consumables, and surgical tools used in a particular procedure, as part of treatment of patient in a hospital, are not 'sold' to the patients even when price is recovered from patients. It

was held that such transaction formed part of service rendered by the hospital and hence not covered under Kerala VAT provisions. The High Court held that sale was inseparable part of service provided by hospital and was not intended to create any separate rights on such consumables. [*Sanjose Parish Hospital* v. *CTO* – W.A. No. 1896/2012, decided on 18-1-2019, Kerala High Court]

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