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Articles

Inverted duty structure in exports – Perplexity in refund

By **Chaitanya R. Bhatt & Saurabh Malpani**

The GST regime adopted by India is a uniform system which follows multi-rate tax structure due to socio-economic considerations. Such structure gives rise to a situation of "inverted duty / tax structure" wherein the rate of tax on procurements / inward supplies is higher than the rate of tax paid on outward supplies. For instance, in the case of fertilizers, the output tax rate is 5%. However, the raw materials required to manufacture the final product (such as ammonia and sulphur) are taxable at the rate of 18%. This leads to a situation of credit accumulation in the hands of the supplier, which in turn leads to capital blockage. Similarly, manufacturers of railway locomotives, fabrics, pharmaceuticals, steel utensils, etc., also face the same issue.

The legislators of the new tax regime anticipated the above discussed trade concern and included relevant provisions in the CGST Act to provide appropriate relief to the industry. In such cases, refund can be applied under Section 54(3) of the CGST Act, 2017 for the accumulated credit. Section 54(3) reads as under:

> *"(3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:*
>
> *Provided that* ***no refund of unutilised input tax credit shall be allowed in cases other than—***
>
> *(i) zero rated supplies made without payment of tax;*
> *(ii)* ***where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies),*** *except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:*
>
> *Provided further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:*
>
> ***Provided also that no refund of input tax credit shall be allowed****, if the supplier of goods or services or both avails of drawback in respect of central tax or* ***claims refund of the integrated tax paid on such supplies****."*

Section 54(3) allows refund of unutilized input tax credit only in 2 scenarios:

(i) zero rated supplied without payment of GST; and
(ii) credit accumulation on account of inverted duty structure.

In this article, we are concerned with the second scenario i.e. situation of credit accumulated on account of inverted duty structure.

Further, the above provision also safeguards the government revenue from certain situations

wherein the exporter could claim double benefit. The safeguards are:

1. No refund of accumulated credit if exported goods are subject to export duty
2. No refund of accumulated credit if exporter claims drawback of CGST
3. No refund of accumulated credit if exporter claims refund of IGST paid on exported goods

The third safeguard is the primary concern of this article.

Prior to discussing the same, reference is drawn to Section 16 of the IGST Act, 2017 which incentivizes exporters as regards payment of GST. The said section allows the exporter to claim refund of the GST paid on export of goods. In this regard, two options are given to an exporter to claim refund of taxes paid on exports (either of which can be opted by the exporter) as under:

a) Non-payment of tax on goods which are exported under bond / LUT and claiming refund of unutilized input tax credit.
b) Payment of tax on goods which are exported and claiming refund of such tax.

Now, the exporting community who is exporting goods under the second option is facing a unique situation which is discussed hereunder.

Let us consider the following scenario: An exporter (engaged only in exports) of fertilizers which attracts GST at the rate of 5%, has exported his goods under the option to pay IGST on his outward supply and claim refund of the same in terms of Section 16 of the IGST Act. He has received the said refund of IGST paid on his supplies automatically after his export details provided in monthly return are matched with the shipping bill filed at the customs port. However, he still has accumulated input tax credit in his ledger as the tax paid on output supplies and received as refund was at the rate of 5% whereas his inputs were taxed at the rate of 18%. For the remaining balance of credits, it can be argued that the exporter should be granted refund on account of inverted duty structure.

Here, we would like to make a reference to the third safeguard outlined above [i.e. third proviso to Section 54(3)] which makes refund of input tax credit on account of inverted duty structure ineligible to the supplier in cases *where the supplier has claimed refund of the integrated tax paid on such supplies*.

A literal reading of the above proviso would make the above exporter ineligible for refund of his credits lying in unutilized since the exporter has already paid IGST on goods exported. This would lead to blockage of capital for the said exporter.

It may be noted that the intention of the third proviso under Section 54(3) is to bar the exporter of goods from claiming refund of the same amount of tax under two different mechanisms and thereby receive undue benefit under the law. However, it seems that the draftsmen have not considered the situation of inverted duty structure arising in case of exports made under the option to pay output tax and claim refund.

The Government has always intended to provide full refund of taxes to an exporter of goods or services and thereby encourage exports. Therefore, considering the intention of the law, it can be argued that the aforesaid safeguard should be read in the spirit of the law and the denial of credit should ideally be restricted only to such an amount as has been utilized for payment of IGST on outward supply

and claimed as refund; accordingly, the remaining balance of credit should be granted as refund. In other words, it can be contended that the aforesaid third proviso to Section 54(3) above should be read in context and not literally.

It is hoped that a suitable clarification addressing the above issue will be issued by the Government at the earliest to provide relief to the export community.

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Treatment of value of moulds & tools in GST regime

By **Astha Sinha, Nivedita Agarwal & Nirav Karia**

The issue of inclusion or otherwise of amortised value of tools and moulds in the supplies made by contract manufacturers and job workers has once again been raked up after the advent of the GST regime. This article aims to analyse the difficulties faced by the contract manufacturing industry in this regard.

Background

It is a common practice in the manufacturing industry to outsource a part of their manufacturing activity to third parties such as contract manufacturers/job-workers. This is cost-efficient for the manufacturers and enables them to focus on the core activities of the business. Such contract manufacturers constitute a significant sector in the Indian economy and a large part of the country's SME is involved in the manufacturing process through this route. The original equipment manufacturers (OEM) often provide the contract manufacturers (CM) with moulds and tools to be used for the activity of manufacturing so as to maintain quality and standardise the production process. Let us first walk through the treatment of moulds and dies in the hands of the contract manufacturer in the pre-GST regime.

Position under Central Excise

Rule 6 of the Central Excise Valuation Rules, 2006 provided that in case price is not the sole consideration, the money value of the additional consideration from the buyer to the seller was also liable to be included to the value for the purpose of levy of central excise duty. It was a well settled jurisprudence that in cases where moulds and dies are given free of charge to the CM by OEM, price cannot be said to be the sole consideration for supply of goods by CM, as part of the cost of manufacturing of the finished goods supplied is borne by OEM (cost of mould) and the value of the moulds were liable to be included in the products manufactured by the CM. Thus, the amortized value of moulds, dies and jigs provided free of cost was deemed to be an "additional consideration" for the supply made by the CM in the excise regime.

Position under VAT/Sales Tax law

The Supreme Court in the case of *Moriroku UT* v. *State of UP* [2008 (224) ELT 365 (S.C.)] examined the issue of inclusion of amortised cost of tools in the sale price of auto components. The Apex Court held that sales tax was leviable on the agreed consideration for transfer of the property in goods and in such a case cost of manufacture was irrelevant. It further held that

the transaction value under the excise regime aimed at taking into consideration all items of cost of manufacture and all expenses which lead to value addition and Rule 6 provided for notional value additions and such concept was not applicable in the case of sales tax. The Court held that the amortised cost of moulds was not required to be included in the sale price for the purpose of sales tax/VAT. This position of law has, however, changed with the implementation of GST.

Provisions in the GST regime

In the GST regime, GST is payable on the value of supply as determined under Section 15 of the CGST Act, 2017 which is reproduced below:

15(1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.

(2) The value of supply shall include —

(a) ……

(b) any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both;"

On a plain reading of the above, it is evident that the value of a supply shall be the transaction value. However, Section 15(2)(b) specifically provides that the value of a supply shall include any amount that is payable by the supplier but has been incurred by the recipient of the supply and has not been included in the value of the supply. On a literal reading of this provision, a view can be taken that the value of moulds and dies shall be included in the value of supplies of CM only in case the OEM was liable to incur the expenses for the moulds but the same has been incurred by the CM.

A clarification with regard to moulds and dies has also been issued by CBIC by way of Circular No. 47/21/2018–GST on 8-6-2018. Para 1.2 of this circular clarifies that the value of moulds and dies are not to be included in the value of supply by CM when the cost of the moulds and dies are not to be incurred by the CM contractually. Para 1.3 clarifies that the value of the moulds and dies are to be included in the value of supplies by CM if the contract between CM and OEM specified that CM is liable to supply moulds but the same have been supplied by the OEM.

Thus, it seems that the contractual arrangements may have to be examined to determine the inclusion of the value of moulds in the supplies of CM for the purpose of GST. Even though the above circular has provided a certain degree of clarification regarding the inclusion of amortised value of moulds in the supply of component manufacturers, an industry wide apprehension continues to exist regarding the applicability of Section 15(2)(b) in the case of moulds and dies. The confusion has also grown manifold with contrary rulings of the AAR on the said issue.

Amortized value of mould includible in all cases - AAR

As per the facts involved in an advance ruling [In Re: *Nash Industries Pvt. Ltd*., 2018-VIL-266-AAR], CM was responsible for manufacture of mould and he invoiced the OEM for supply of the moulds although the physical possession was retained by the CM. Subsequently, the same was used to manufacture finished goods and make supplies to OEM. The Advance Ruling Authority was of the view the value of supply of finished goods by CM to OEM must include the amortized value of the mould provided on FOC basis,

irrespective of the contractual arrangement between the parties.

The Authority, while interpreting Section 15(2)(b) of the CGST Act, 2017 held that that no goods can be manufactured without a "customized mould". Thus, the CM has to either procure the said mould from a third party or manufacture it himself. In cases where the goods are procured from a third party, the value of the same is included in the value of supply. Thus, no different position must be taken in case where the said mould is manufactured by CM, irrespective of the fact that the same has already been supplied to OEM and returned on FOC basis.

Ruling holding amortized value not includible

The Maharashtra Advance Ruling Authority placed reliance on the above stated circular and held that the amortized value of mould was not required to be included in the value of finished goods manufactured and supplied by the CM to the OEM in cases where the agreement between the parties clearly stated that the cost of mould must be incurred by the OEM [In Re: *Lear Automotive India Private Limited*, 2018-VIL-318-AAR]. However, the facts of this case are different as compared to the case discussed in the previous paragraphs.

Concluding remarks

It has become imperative for the contract manufacturing industry to revisit their agreements with the OEMs in light of the clarification issued by the CBEC and the rulings of the Advance Ruling Authority to safeguard themselves from any avoidable exposure and GST liability in the future.

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Goods and Services Tax (GST)

Notifications and Circulars

GST registration threshold for supply of goods proposed to be doubled: GST Council in its 32nd meeting held on 10-1-2019 has recommended increase in the GST registration threshold for supply of goods from Rs 20 lakh to Rs 40 lakh with effect from 1-4-2019. States would be given flexibility to choose either Rs. 20 or Rs. 40 lakh. GST registration threshold for supply of services however remain same, i.e. Rs. 20 lakh. This threshold will also be doubled for the special category States from Rs. 10 lakh to Rs 20 lakh.

GST Composition Scheme set to be broadened: GST Council has recommended increase in turnover threshold for Composition Scheme for goods to Rs 1.5 crore from the present limit of Rs. 1 crore. The scheme will also be available in respect of supply of services or supply of both goods and services, but the threshold in this case will be Rs. 50 lakh. The tax rate under such scheme for services will be 6%. According to the new scheme approved by the GST Council in its 32nd meeting held on 10-1-2019, those who choose to use the scheme from 1-4-2019 will be required to pay GST quarterly, but file returns annually.

Cenvat credit of Service Tax available as transitional credit under GST: CBIC has clarified that Cenvat credit of service tax paid is

available as transitional credit under GST. Observing that there was no intention to disallow such credit, Circular No. 87/6/2019-GST states that credit of service tax was available as transitional credit under Section 140(1) of the Central GST Act and that the legal position has not changed due to an amendment by the CGST (Amendment) Act 2018. The circular dated 2-1-2019 notes that the word 'duties' is used interchangeably with the word 'taxes' and in the present context, the two words should not be read in a disharmonious manner. It has thus been clarified that expression "eligible duties" in Section 140(1) which are allowed to be transitioned would cover within its fold the duties which are listed as "eligible duties" at Sl. No. (i) to (vii) of Explanation 1, and "eligible duties and taxes" at Sl. No. (i) to (viii) of Explanation 2 to Section 140.

Exemption to services provided by ADB and IFC clarified: Services provided by the Asian Development Bank (ADB) and the International Finance Corporation (IFC) are exempt from GST in terms of provisions of the ADB Act and the IFC Act, 1958. Circular No. 83/2/2019-GST, dated 1-1-2019 issued to clarify this issue observes that exemption will however be available only to the services provided by ADB and IFC and not to any entity appointed by or working on behalf of ADB or IFC. Reliance has been placed on provisions of the ADB Act and the IFC Act. The circular also cites decision relating to service tax by CESTAT Mumbai wherein it was held that there was no need for any separate exemption in such cases.

Exemption to IIMs clarified: CBIC has clarified that the services provided by the Indian Institutes of Managements (IIMs) to their students, by way of long duration programmes (one year or more), are exempt from GST. Circular No. 82/1/2019-GST, dated 1-1-2019 observes that from 31-1-2018, all IIMs are eligible for exemption under Sl. No. 66 of Notification No. 12/ 2017-CT(Rate). It notes that Sl. No. 67 of the notification has become redundant from 31-1-2018, i.e. after enforcement of Indian Institutes of Management Act, 2018, and hence has been deleted recently.

Liability on services by business facilitator or business correspondent to a banking company clarified: Observing that banking company is the service provider in the business facilitator (BF) or business correspondent (BC) model operated by a banking company, CBIC has clarified that the bank concerned is liable to pay GST on the entire value of service charge or fee charged to customers whether received *via* business facilitator or the business correspondent. Circular No. 86/05/2019-GST, dated 1-1-2019 also clarifies that RBI guidelines should be considered for classification of bank branch as located in the rural area and the services provided by BF/BC. It may also be noted that by Notification No. 29/2018-Central Tax (Rate), dated 31-12-2018, banks have been made liable to GST under reverse charge in respect of services provided by the BF to them.

Printing of pictures falls under Service Code 998386 and liable to GST @18%: Printing of pictures falls under Service Code 998386 and is liable to GST @ 18% under item (ii), against Serial Number 21 of the Table in Notification No. 11/2017-Central Tax (Rate). Service Code 998386 deals with photographic and videographic processing services. CBIC Circular No. 84/03/2019-GST, dated 1-1-2019 also observes that the service is not covered under Service Code 998912 relating to printing and reproduction services of recorded media, on a fee or contract basis.

No GST on supply of food and beverages by educational institution itself: CBIC has clarified

that supply of food and beverages by the educational institution itself to its students, faculty and staff is exempt under Sl. No. 66 of Notification No. 12/2017-Central Tax (Rate). Such supply by any other person based on contractual arrangement with the institution is, however, leviable to GST @ 5%. Circular No. 85/4/2019-GST, dated 1-1-2019 notes that a supply specifically covered by Notification No. 12/2017-Central Tax (Rate) is exempt from GST even if the rate is prescribed under Notification No. 11/2017-Central Tax (Rate). It further notes that these notifications have also been amended to remove doubts.

E-invoices issued as per Information Technology Act – Signature not required: Signature or digital signature of the supplier or his authorised representative is not required in respect of electronic invoice, electronic bill of supply, consolidated tax invoice (or any other document in lieu thereof), and ticket for passenger transportation, issued as per Information Technology Act. Rules 46, 49 and 54 of the CGST Rules, 2017 have been amended for this purpose by Notification No. 74/2018-Central Tax, dated 31-12-2018.

Late fee for delayed filing of GSTR-1, 3B and 4 for specified period waived: As recommended by the GST Council, CBIC has issued notifications for waiver of late fees in respect of GSTR-1, GSTR-3B and GSTR-4 if these returns for the months/quarters from July, 2017 to September, 2018 were not filed by due date but are submitted between the period from 22nd December, 2018 to 31st March, 2019. Late fees for delayed filing of GSTR-3B is otherwise Rs. 25 for every day of delay and Rs. 10 per day if the CGST payable is nil. Notifications Nos. 75 to 77/2018-Central Tax, all dated 31-12-2018 have been issued for this purpose.

Effective date for denial of Composition scheme clarified: Withdrawal from composition scheme is effective from a date of the application/intimation filed by the registered person, not prior to the start of the financial year in which application is filed. CBIC Circular No. 77/51/2018, dated 31-12-2018 clarifies that in the event where an officer finds the registered person ineligible for the scheme, the date of denial of the scheme cannot be prior to the date of contravention of the provisions. Registered person shall be liable to pay tax under Section 9 of the CGST Act from the date of issue of the order in Form GST CMP-07. ITC will also be available on inputs held in stock, inputs contained in semi-finished or finished goods held in stock and on capital goods on the date immediately preceding the date of issue of the order.

Time for completion of migration process extended: Persons who did not file complete Form GST REG-26 but received only a Provisional Identification Number (PID) till 31-12-2017 can now apply for GSTIN till 31-1-2019. Further, persons who obtain GSTIN accordingly can file GSTR-3B return for the period July 2017 to February 2019, by 31st of March 2019. Similarly, GSTR-1 return for this period can also be filed till 31st of March 2019 by these tax payers. Notification Nos. 67 to 72/2018-Central Tax, all dated 31-12-2018 issued for this purpose amend various notifications.

No GST on inter-State movement of goods on own account: CBIC has clarified that inter-State movement of machinery like tower cranes, rigs, batching plants, concrete pumps and mixers, which are not mounted on wheels but require regular means of conveyance, is not liable to GST if there is no transfer of title in such goods and movement is undertaken by service provider on own account for provision of service. Circular No. 80/54/2018-GST, dated 31-12-2018 further clarifies classification and GST rates of many other products including animal feed

supplements, LPG for domestic use, embroidered fabric sold in three pieces cloth for ladies suits, waste to energy plant, bagasse based laminated particle board, fish meal and other raw materials used for making cattle/poultry/aquatic feed, wood logs for pulping, turbo charger for railways, polypropylene woven and non-woven bags and PP woven and nonwoven bags laminated with BOPP, etc.

Export of service when part of service provided by another foreign supplier: CBIC has clarified that in case of export of services by the Indian supplier, where part of services is provided to recipient (A) outside India by another foreign supplier (X), portion of consideration received by X from A directly shall also be treated as receipt of consideration for export of services by Indian supplier, subject to conditions. As per Circular No. 78/52/2018-GST dated 31-12-2018, IGST should have been paid by Indian supplier on import of service from X and RBI should have allowed part of consideration to be retained outside India.

GST valuation – Inclusion of TCS collected under Income Tax: CBIC has clarified that the taxable value for the purposes of GST shall include the Tax Collected at Source (TCS) amount collected under Income Tax Act, since the value to be paid to the supplier by the buyer is inclusive of the said TCS. Circular No. 76/50/2018-GST, dated 31-12-2018 observes that Section 15(2) of the CGST Act specifies that the value of supply shall include any taxes, duties cesses, fees and charges levied under any law, except under the GST Acts.

No penalty under Section 73(11) for delayed filing of GSR-3B return: Observing that provisions of Section 73 of CGST Act are generally not invoked in case of delayed filing of GSTR-3B return as tax along with applicable interest has already been paid but after the due date, CBIC has clarified that penalty under Section 73(11) of the Central GST Act, 2017 is not payable in such cases. Circular No. 76/50/2018-GST, dated 31-12-2018, however, states that since tax has been paid late in contravention of the provisions, a general penalty under CGST Section 125 may be imposed after following due process of law.

Refund procedure simplified: All documents/statements to be submitted along with refund claim in Form GST RFD-01A can now be uploaded on the common portal (GST portal) at the time of filing of application. As per Circular No. 79/53/2018-GST, dated 31-12-2018, option to submit documents physically to the department is also available. This circular also explains the calculation of refund of accumulated ITC because of inverted duty structure. Further, it clarifies on certain issues relating to refund of accumulated ITC of Compensation Cess on account of zero-rated supplies made under bond / LUT.

Extension of time limit for availing ITC for supplies in FY 2017-18: CBIC has extended the due date for availing ITC on the invoices or debit notes relating to such invoices issued during the FY 2017-18. According to the Removal of Difficulty Order No. 2/2018-Central Tax, dated 31-12-2018, tax payers are entitled to take ITC in respect of any invoice or debit note for supply of goods or services or both, after the due date of furnishing of the return under Section 39 for the month of September following the end of FY 2017-18 to which such invoices or debit note pertains. The last date as per the amendments now is the due date of furnishing of GSTR-3B for the month of March 2019. A new proviso has also been inserted in Section 37(3) to allow rectification of error or omission in respect of details furnished, after furnishing of GSTR-3B for September 2018 till the due date for furnishing GSTR-1 for March 2019 or for the quarter January 2019 to March 2019.

Annual return – Due date for filing extended till 30-6-2019: Observing that the system for furnishing the annual returns electronically may take some more time to be ready, the due date of filing the said returns has been extended. GSTR-9 / GSTR-9A and reconciliation statement for the Financial Year 2017-18 can now be filed till 30-6-2019. Central Goods and Services Tax (Third Removal of Difficulties) Order, 2018 dated 31-12-2018 has been issued for this purpose.

GSTR-8 for specified months – Due date for filing extended: A new explanation has been added to Section 52(4) of the Central Goods and Services Tax Act, 2017 to declare that the due date for furnishing a statement in Form GSTR-8 for the months of October, November and December 2018 till 31st January 2019. The statement / return is in respect of tax collected at source (TCS) by e-commerce operators and also contains details of outward supplies of goods or services or both effected through such operators including supplies returned through them.

Ratio decidendi

Detention of goods not permissible over minor detectable errors: In a case involving detention of goods as value of goods was mistakenly mentioned as Rs. 388220 instead of Rs. 3882200 (a case of missing zero), Kerala High Court has held that if IGST has been correctly paid, detained goods can be released after taking a simple bond. The High Court, however, held that if IGST has not been paid correctly, goods need to be released only on furnishing of the bank guarantee. The Court was also of the view that if a human error which can be seen by naked eye is detected, the same cannot be capitalised for penalisation. [*Rai Prexim India Pvt. Ltd.* v. *State of Kerala* - 2018-VIL-553-KER]

Detention – Section 129 applicable to transporter also: Kerala High Court has held that CGST Section 129(1)(b) applies to all those interested in goods other than consignor and does not provide any exemption even to a transporter. In a case of detention of goods over non-filing of Part B of e-way bill, the High Court stated that the compliance with Section 129(1)(b) of the CGST Act does not affect defence of transporter before a State Tax Officer. However, for interim release of goods he must comply with statutory requirements under Section 129(1)(b). [*Daily Express* v. *State tax officer* - 2018-VIL-552-KER]

Sale to international passenger from shop at domestic airport attracts GST: Sale of goods to international passenger from a shop located at a domestic airport or domestic security hold area is liable to IGST. Bombay High Court has held that such supply is not a 'non-taxable supply' under Section 2(78) of the CGST Act, which is only applicable to shops past immigration counter and customs frontiers at international airports. The High Court dismissed the petition, observing that Customs would not have an effective check as to whether goods purchased at Nagpur airport are actually taken abroad by a passenger. It was the case of petitioner that a lot of international passengers take their fights from the Nagpur airport to travel outside India through a transit international airport. [*A-1 Cuisines (P) Ltd.* v. *Union of India* - 2018-VIL-575-BOM]

Supplies to duty-free shop at airport liable to GST, as not 'export': Observing that duty-free shop (DFS) situated at airport cannot be treated as a territory outside India as per provisions of IGST Act wherein Indian territory is defined to extend up to 200 nautical miles, Madhya Pradesh High Court has held that supply to such shop would be liable to GST. The High Court ruled that the supply to a DFS by an Indian supplier does not qualify to be an export and therefore is not

exempt from GST. It was also held that refund of unutilized ITC cannot be claimed in such case. The petitioner had asked for directing the Revenue department to treat the goods supplied by the petitioner to DFS as an export. [*Vasu Clothing (P) Ltd.* v. *UOI* - 2018-VIL-577-MP]

Seizure due to expiry of e-way bill, when wrong: In a case involving expiry of e-way bill, Allahabad High Court has allowed release of goods noting that instructions received from department did not match with the documents produced. It observed that averments regarding entry of vehicle well before the expiry time was not countered by the department. The High Court also noted that provisions do not provide any time period within which a seizure memo must be prepared, and this gives ample handle to officers not to enter actual time of interception and to prepare seizure memo at leisure. [*Timexo Fasteners* v. *State of UP* - 2018-VIL-532-ALH]

Purchase in different State, and subsequent transportation: Kerala High Court has quashed detention of a car purchased in Puducherry and carried to Kerala, on omission of e-way bill. It pointed that sale was of intra-State nature, since purchaser acquired temporary registration and insurance in Puducherry. Transport of the vehicle by the dealer on behalf of the purchaser was hence termed to be of used personal effects, thereby attracting exemption from the e-way bill. The High Court observed that taxing authorities should not be concerned with the movement of goods after the supply is terminated. [*Kun Motors Co. Pvt. Ltd.* v. *Asst. State Tax Officer* – Judgement dated 6-12-2018 in W.A. No. 1803 of 2018, Kerala High Court]

Anti-profiteering – Operational difficulty no ground for disobedience: Observing that assessee had no ground to increase base prices except to appropriate benefit of tax reduction, National Anti-profiteering Authority has held that assessee had contravened CGST Section 171. NAA imposed penalty for issuing incorrect invoices, profiteering, and wrongly collecting ITC (TRAN-2 benefit) from distributors. It also rejected plea of offset of additional benefit to other customers. On the question of abatement of cost of packing material written off, it held that operational difficulty in following a law cannot be a ground for disobedience. [*Anonymous* v. *Hindustan Unilever Ltd.* – Case No. 20/2018, decided on 24-12-2018, NAA]

Place of supply of imports made through different State: In a case where importer in Mumbai wished to import at Haldia and then supply therefrom after storing the goods in the warehouse at Haldia, Maharashtra AAR has held that place from where the supplier makes a taxable supply shall be the location of the supplier i.e. Mumbai Head Office, since the applicant do not have any godown in the state of West Bengal. The Authority in this regard observed that since the goods will be imported, the place of supply of the goods shall be determined in terms of Section 11 of the IGST Act, 2017 which states that the location of importer shall be considered as place of supply. It also held that separate registration was not required to be taken in the State of West Bengal. Additionally, it was held that the assessee could do further transaction mentioning the GSTIN of Maharashtra in the e-way bill for 'Bill from' address and the dispatch place shall be the customs warehouse, Kolkata. [In RE: *Sonkamal Enterprises Private Limited* - 2018-VIL-309-AAR]

Sale of business as going concern – Direction to seller to transfer business to affiliates is 'supply': Considering the prominent contribution of the applicant in the transfer of businesses to the affiliates, Maharashtra AAR has held that the applicant is doing the act of giving direction to the affiliates and is covered under the purview of 'supply' in terms of Paragraph 5(e) of Schedule II to the CGST Act read with Section 7 of the CGST

Act. Accordingly, it was held that the transaction shall attract GST. The applicant had given direction to the seller for transferring business A to affiliate X and business B to affiliate Y as a going concern. The Authority perused the terms of the business transfer agreement between the applicant and the seller and held that the sale could only be as per the directions of the applicant. Further, since the transaction is between related parties, it was held that the value for levy of GST shall be determined in terms of Rule 28 of the CGST Rules, 2017. [In RE: *Merck Life Science Private Limited* - 2018-VIL-311-AAR]

Construction service – Occupancy certificate is 'completion certificate': Considering Karnataka State local law, AAR Karnataka has held that chartered engineer's completion certificate for date of completion of property cannot be a substitute to the one issued by the competent authority which decides tax liability on immovable property. AAR, in this regard also observed that occupancy certificate is in the nature of completion certificate. It was also held that any consideration received before such date will be considered as towards supply and liable under Entry 5 of Schedule II of the CGST Act 2017. [In RE: *Bindu Ventures* - Advance Ruling No. KAR ADRG 32/2018, dated 3-12-2018, AAR Karnataka]

Service to other units by employees at corporate office constitutes 'supply': Services rendered by employees at corporate office in areas of accounting, administrative work and IT system maintenance, which benefits units in other parts of the country, is 'supply'. Upholding AAR ruling, Karnataka GST Appellate AAR observed that each unit of an entity is a distinct person, and that transaction among distinct persons even without consideration will constitute supply. AAAR also held that valuation must be done in terms of Rule 28 or 30 by factoring in the cost of work force at the head office of the appellant. [In RE: *Columbia Asia Hospitals Pvt Ltd.* - Order No. KAR/AAAR/05/2018-19, dated 12-12-2018, AAAR Karnataka]

Bill-to-ship-to mode not limited to only three parties: Holding that IGST Section 10(1)(b) does not limit transaction to only three parties, AAR Rajasthan has allowed the applicant to transact on bill-to-ship-to mode in a transaction involving 4 parties. The applicant (A), as per the facts of the ruling, is engaged in supplying goods to brand name owner (B), who would supply to associate company (C) of A, who in turn would supply to customers (D). A would transport directly to D while raising bill on B. As regards valuation, the AAR held that CGST Section 15 read with 2nd proviso to Rule 28 of the CGST Rules, 2017 would apply for transaction between A and B, and that Section 15 would apply for supply between C and D. [In RE: *Sanjog Steels Pvt. Ltd.* – Advance Ruling No. RAJ/AAR/2018-19/25, dated 2-11-2018, AAR Rajasthan]

Service not 'pure service' when goods used significantly: In a case involving street lighting infrastructure and upkeep services provided to a municipal corporation, Odisha AAR has held that, considering contractual nature of work which fits in Section 2(119) of CGST Act and significant use of goods/material involved, said services will not constitute 'pure services'. The applicant was denied exemption which is applicable to pure services provided to a government body with respect to function entrusted to a panchayat as mentioned in Notification No. 12/2017-CT. [In RE: *Super Wealth Financial Enterprises* – Order No. 4/ODISHA-AAR/2018-19, dated 31-10-2018, AAR Odisha]

Transport service accompanying supply of food to attract 18% GST: Telangana AAR has held that supply of food by also transporting it from place of production to the place of sale is a

composite supply under Section 8 of CGST Act and that transportation is ancillary with supply of food (outdoor catering) being the principal supply. It was held that the service will attract 18% GST on the gross transaction. The Authority referred to CBIC Circular No. 28/02/2018-GST and held that supply of food in a mess/canteen is taxable at 5% (excepting where supply is not event based), without ITC. [In RE: *Prism Hospitality Services* - TSAAR Order No. 12/2018, dated 26-9-2018, AAR Telangana]

ITC of IGST paid in Bill-to-ship-to model, available: AAR Rajasthan has held that ITC of IGST paid on 'Bill-to-ship-to' model, where the applicant purchases goods from a supplier in a different State but asks him to deliver them to another person in that very State, is available. Provisions of Sections 16 and 17 of CGST were relied. The Authority in this regard observed that IGST is applicable on both transactions where applicant receives supply (invoice) from supplier of Guwahati and then supplies to another recipient in Guwahati. The goods were directly dispatched from the first supplier to the final recipient in the same State. [In RE: *Umax Packaging* – Advance Ruling No. RAJ/AAR/2018-19/23, dated 2-11-2018, AAR Rajasthan]

Transfer of development rights to a developer constitutes 'supply': Karnataka AAR has held that a land owner who supplies development rights to a developer for a consideration received in the form of construction services shall pay GST at the time when the builder transfers possession of land owner's share of premises. The AAR in this regard interpreted Notification No. 4/2018-Central Tax (Rate) to hold that land owner entering in agreement with the developer for joint development and promotion is liable to be registered and discharge taxes for the supply of development rights. [In RE: *Patrick Bernardinz D'sa* – Advance Ruling No. KAR ADRG 29/2018, dated 28-11-2018, AAR Karnataka]

UK VAT - Whether apportionment of single supply be allowed for exemption – Matter referred to CJEU: Whether a single supply constituting management of special investment funds (SIFs) and non-SIFs can be apportioned to allow VAT exemption for SIF management? The question has been referred to the Court of Justice of the European Union (CJEU) by UK's Upper Tribunal Tax and Chancery Chamber. The Tribunal observed that apportionment of a single supply could be permitted considering such services are distinctive although it is equally arguable that apportionment cannot apply as single supply should be taxed based on predominant supply. [*Blackrock Investment Management (UK) Ltd.* v. *HMRC* - Appeal number: UT/2017/0163, decided on 20-12-2018, UK's Upper Tribunal Tax and Chancery Chamber]

EU VAT – CJEU clarifies chargeable event in case of payment in instalment: In a case involving placement of a player for certain seasons with a football club, remunerated by conditional payments in instalments, CJEU has held that chargeable event and tax chargeability do not occur when the player is placed, but on expiry of the periods to which payments made by the club relate. The Court, however, observed that it must be verified as to whether supply of such service gives rise to successive statements of account or successive payments within meaning of Article 64(1) of EU VAT Directive. [*Finanzamt Goslar v. Baumgarten Sports & More GmbH* – Judgement dated 29-11-2018 in Case C-548/17, CJEU]

Customs

Notifications, and Circulars

Documents for online IEC applications, clarified: DGFT has clarified that if IEC is required to be issued in the name of the firm, the application must be made in the name of the firm. Further, email address and phone number of the person submitting the application on behalf of the firm will be used for verification and subsequent login and cannot be changed at any point of time. Trade Notice No. 39/2015-20, dated 12-12-2018 issued for this purpose also explains the documents acceptable as proof of address while also clarifying about bank certificate and pre-printed cancelled cheque.

IGST refund on exports – Resolution of some EGM related errors: CBIC has instructed its officers to take all necessary steps to ensure that all EGMs of cargo related to past cases are filed before 31-1-2019. As per Circular No. 1/2019-Cus., as a measure of facilitation, penal provisions may not be invoked for such EGMs filed till 31-1-2019. Circular dated 2-1-2019 relates to IGST refund in case of exports and also covers issues like mismatch in local and Gateway EGM, and non-filing of stuffing report by preventive officers at gateway ports for the LCL cargo consolidated at the gateway ports / CFSs, in the system.

EPCG Scheme - List of products importable revised: EPCG scheme now allows import of furniture and fixtures, flooring materials and furnishing materials for hospitals. DGFT, through its latest amendments in Handbook of Procedures, has also allowed import of pre-fabricated polyurethane foam (PUF) panels/doors for chilled rooms and cold storages for storage of marine products meant for export under the scheme. Sl. Nos. 13 and 14 have been inserted in Appendix 5F of the Handbook of Procedures Vol.1 for this purpose by Public Notice No. 61/2015-20, dated 18-12-2018.

Advance authorisation available to other exporters based on ratified norms: All applicants of Advance Authorization are now eligible to apply and get their authorizations based on ratified norms which are available on DGFT website in the form of minutes. This benefit can also be claimed on repeat basis. Earlier, other exporters [exporter other than the applicant who has obtained *adhoc* norms] were not eligible for grant of authorization based on such adhoc norms. Para 4.12(vi) of FTP-HBP 2015-20 has been amended for this purpose by DGFT Public Notice No. 64/2015-20, dated 27-12-2018.

Re-export/return of imported SCOMET items – Procedure prescribed: DGFT has prescribed procedure for re-export/return of imported SCOMET items due to reasons of obsolescence of technology of imported items, cancellation of order by Indian buyer/end user, dead on arrival, etc. Public Notice No. 59/2015-20, dated 12-12-2018 inserts Para 2.79E in FTP Handbook of Procedures Vol. 1. While no end-use details are required, the application must accompany documents as proof of import of items, proof of obsolescence/cancellation of order, proof of obligation for re-export/return, and an elaborate undertaking from the applicant firm.

Customs duty reduced on specified imports from Malaysia, ASEAN, South Korea and Japan: Customs duties on import of specified goods from Malaysia, South Korea and from ASEAN countries have been reduced once

again. The goods must be imported in compliance with India-Malaysia Comprehensive Economic Cooperation Agreement, India-Korea Comprehensive Economic Partnership Agreement, and the India-ASEAN Free Trade Agreement, respectively. Further, basic customs duty has been reduced on gear box and parts thereof, of specified motor vehicles [Tariff Item 8708 40 00], when imported from Japan under the India-Japan Comprehensive Economic Partnership Agreement. This annual reduction, effective from 1-1-2019, is in line with India's commitments under the abovementioned bilateral agreements.

Import duty hike - Retaliatory measures against USA once again postponed: India has once again postponed implementation of retaliatory Tariff measures against USA which are aimed to counter USA's certain measures on import of steel and aluminium from India. Higher basic customs duty (BCD) in respect of imports of almonds, apples fresh and other diagnostic reagents, etc. will now be effective from 31-1-2019. It may be noted that the higher duty was initially scheduled for 4-8-2018 but has been postponed number of times, last being till 17-12-2018. Notification No. 80/2018-Cus., dated 15-12-2018 has been issued for this purpose.

Capital goods for distribution of power not importable under EPCG: Import of capital goods required for distribution of electrical energy (power) in not permitted under EPCG scheme. DGFT Circular No. 15/2015-20, dated 4-1-2019 observes that transmission of electricity and distribution of electricity are nothing but the same process of supplying of electricity from one point to another. It is clarified that Sl. No. 12 in Appendix 5F of FTP does not permit import of capital goods for generation, transmission and distribution of power. The clarification was sought since the word 'distribution' is missing in Sl. No. 12 in Appendix 5F and in Notification No. 35/2015-20, dated 29-1-2016.

Peas import restrictions extended till 31st of March 2019: Department of Commerce in the Indian Ministry of Commerce and Industry has extended the import restrictions till 31st of March 2019, in respect of import of peas (EXIM Code 07131000) including yellow peas, green peas, dun peas and kaspa peas. Import of these products is at present also under restricted category and the restriction was to expire on 31st of December 2018. Notification No. S.O. 6364(E), dated 28-12-2018 issued for this purpose is effective from 1-1-2019.

Ratio decidendi

Valuation – Assessing officer to give reasons for rejecting value: Supreme Court has held that it is incumbent upon assessing officer to give reasons for rejecting transaction value; to establish that price is not the sole consideration; and to give the reasons supported by material to arrive at own assessable value. It reiterated that normally, the AO is supposed to treat price actually paid as assessable value. The Apex Court rejected department's plea that the Tribunal should have remanded the case to enable AO to undertake exercise regarding price not being the sole consideration. [*Commissioner* v. *Sanjivani Non-Ferrous Trading* – Judgement dated 10-12-2018 in Civil Appeal Nos. 18300-18305 of 2017, Supreme Court]

Exemption – Use in any other project but for specified work, does not bar exemption: CESTAT Mumbai has allowed benefit of Notification No. 21/2002-Cus. (Sl. No. 230) to hydraulically operated self-propelled piling rig for construction of road in a case where it was alleged that the goods were involved in activities other than those specified. The assessee contested that the goods were utilised, even if not for the agencies specified in the conditions of exemption, only for road construction. The

Tribunal in this regard observed that the scheme of said exemption was not intended for exclusive use in contracts furnished as evidence of entitlement to the exemption and which got subsequently cancelled. It was held that deployment on any road construction project would suffice for continuing entitlement to the exemption, and that the object of utilisation in different projects must be examined. [*Gammon India Ltd.* v. *Commissioner* - Order No. A/88154-88156/2018, dated 19-12-2018, CESTAT Mumbai]

Central Excise and Service Tax

Ratio decidendi

Cenvat credit on inputs used in excess of what prescribed when available: Observing that actual consumption of material could vary from bill of material supplied along with designs and drawings by the principal, CESTAT Kolkata has set aside demand of Cenvat credit on alleged excess inputs. The Tribunal in this regard observed that assessee used thicker grade of material, there was processing loss, and that the CA had certified use of entire inputs which were also accounted in records. Absence of evidence of non-receipt of inputs or of clandestine removal, was also noted. [*Bhawani Metal & Body Building* v. *Commissioner* – Order No. FO/A/77081-77086/2018, dated 4-12-2018, CESTAT Kolkata]

Excise duty based on different MRPs affixed on different packages, correct: CESTAT Kolkata has dismissed plea of the department that since same type of cement was being sold at different MRPs, the highest of the MRPs was to be taken for purpose of payment of central excise duty. The Tribunal was of the view that there was no justification for charging duty at tariff rate as different MRPs were affixed only for clearances to different areas. Further, it held that it was not a case of two or more MRPs printed on a single package and mischief of Explanation III of Notification No. 4/2006-C.E. was not applicable. [*Nuvovo Vistas Corporation Ltd* v. *Commissioner* – Order No. FO/A/77087/2018, dated 4-12-2018, CESTAT Kolkata]

Distribution of Cenvat credit to other units optional till 2016: Bombay High Court has held that it was within the discretion of the assessee whether to utilize Cenvat credit at one of its unit or distribute it amongst other units providing output services. It noted that Cenvat Rule 7, during the period involved (2009-2014), provided such option as it used words 'may distribute' till 1-4-2016. The department's case was that assessee should have distributed the tax credit to various units situated across the country and should not have availed Cenvat credit only at one unit. The High Court however dismissed department's appeal observing that the entire exercise was revenue neutral as distribution of Cenvat credit to various units would result in lesser service tax being paid by them. [*Commissioner* v. *Oerlikon Balzers Coating India* – Judgement dated 19-12-2018 in Central Excise Appeal No. 117/2018, Bombay High Court]

Refund - Limitation - Time taken by Ministry to be excluded: Bombay High Court has held that time consumed by the concerned Ministry in granting certificates required for retrospective exemption and refund must be ignored. The Court, however, denied refund as even ignoring time taken by the Ministry, application was not

within prescribed limit. Referring to Supreme Court judgement in the case of *ALD Automotive (P) Ltd.* it held that prescribed limitation is mandatory. Constitutional validity of Section 103(3) of the Finance Act 1994, pertaining to retrospective exemption for construction of port and prescribing limitation for refund, was also upheld. [*JSW Dharamatar Port (P) Ltd.* v. *Union of India* - 2018-VIL-573-BOM-ST]

Exemption to sulphuric acid used for zinc sulphate – Matter referred to Larger Bench: CESTAT Chandigarh has referred the question as to whether Central Excise exemption under Notification No. 4/2006-C.E. was available to sulphuric acid used in the manufacture of Zinc Sulphate (agriculture grade) to Larger Bench. It observed that there were contrary decisions of Tribunal on the issue, relying on different judgments of the Supreme Court from time to time. [*Nav Jyoti Chemicals & Fertilizers* v. *Commissioner* - Order No. I/66-67/2018, dated 6-12-2018, CESTAT Chandigarh]

Exemption to services used by SEZ and authorised by UAC: Observing that footwear manufactured by assessee (an SEZ unit) are certainly not for self-consumption and since services utilized by them are in the list approved by the UAC of which the Central Excise Commissioner itself is also a member, CESTAT Chennai has set aside the order rejecting refund under Notification No. 9/2009-ST. Dispute before the Tribunal involved refund in respect of business support service, air travel agent service, banking & other financial services, maintenance and repair services, courier services, insurance auxiliary services, etc. CESTAT Mumbai's decision in the case of *Tata Consultancy Services Ltd.* was also relied on. [*Lotus Footwear Enterprises* v. *Commissioner* - Final Order No. 42936-42938/2018, dated 23-10-2018, CESTAT Chennai]

Refund when price reduced subsequent to clearance: In a case involving price reduction after clearance, where unit price was not altered in the work order due to oversight despite reduction of dimensions of product, CESTAT Mumbai has allowed refund of excess Central Excise duty paid. Supreme Court decisions in the case of *Purolator India* and *Addison & Co.* were distinguished by the Tribunal observing that there was no dispute on alterations. On the issue of unjust enrichment, it noted that debit note established that the amount was withheld and that there was only one level of transaction. [*Evergreen Engineering Co* v. *Commissioner* - Order No. A/87864/2018, dated 6-11-2018, CESTAT Mumbai]

Value Added Tax (VAT)

Ratio decidendi

Classification – Words 'in all its forms' cover goods made of basic material: Supreme Court has held that the term 'in all its forms' includes even a product made from the basic material. Gypsum board was hence classified as gypsum in all its forms, under Entry 56 of Schedule IV to Rajasthan VAT Act liable to tax at the rate of 4%. The Court in this regard observed that the entry was changed from mere gypsum to 'Gypsum in all its forms' signifying that something more than basic gypsum was sought to be included, and that there is no chemical change in gypsum while

converting into gypsum board. It also took note of the fact that legislature by a conscious decision in 2014 created a separate entry for gypsum board, which was not the case in respect of the assessment years in question and therefore, gypsum board was not includible in the residuary entry attracting tax at the rate of 12.5%. [*Additional Commissioner* v. *Lohiya Agencies* - Civil Appeal Nos. 180-186 of 2019, decided on 8-1-2019, Supreme Court]

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