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E-way bill system – Time to relax penal provisions

By **Nipun Arora**

It has been more than a year since India made the historic transition from the traditional indirect taxation regime comprising of central excise duty, service tax, VAT, etc., to an all-new integrated indirect taxation regime i.e. Goods and Services (GST). The government while implementing GST on the midnight of 30th June, 2017 declared the objective of implementing GST by calling it as Good and Simple Tax. Although the government might have had an intention to make tax payers life convenient and hassle free, the reactions of the industry representatives over last few months who have repeatedly expressed their grievances through representations seeking resolution to their endless problems convey a different message. Another area of concern is the time taken to design user friendly and glitch free system. In this article, we shall analyse certain implications arising out of the Madhya Pradesh High Court's order dated 5-7-2018 in the case of Gati Kintetsu Express Private Limited (Petitioner) relating to imposition of penalty for not updating Part B of Form EWB-01 (E-Way Bill) (W.P. No. 12399 of 2018).

E-Way Bill is required to be generated and carried along with the consignment of goods whenever goods are moved from one place to another irrespective of the fact whether the movement has been initiated for supply of goods or for any other purpose. Whereas Rule 138 of CGST Rules provides that registered person causing movement of goods shall generate E-Way Bill, first proviso to Rule 138 provides transporter can also generate an E-Way Bill subject to authorisation received from registered person. Therefore, it can be established that rules are made flexible to an extent that E-Way Bill can be generated by any of the three parties involved in movement of goods i.e. consignor (where consignor is initiating movement of goods), consignee (where consignee is initiating movement of goods) or transporter of goods (where authorised). E-Way Bill contains all the relevant details required for transportation of goods and it is divided in two parts, Part-A and Part-B. Whereas Part-A contains details of the goods moved, consignor and consignee, Part B contains relevant details of transporter and vehicle in which goods are to be moved. Both the parts required to be filled in E-Way Bill are mandatory as per second explanation to Rule 138(3).

The government is foreseeing E-Way Bill as game changing measure to curb evasion of taxes by evidencing movement of goods against an invoice by generation of E-Way Bill and tracking movement of goods. Since the E-Way Bill is in implementation phase, it was expected that government should have kept demand and penal provisions a bit less stringent and allowed the industry to adapt to this system. However, the same is not reflected by emerging case law. In the recent judgement delivered by Madhya Pradesh High Court, the petitioner had filed a writ petition against the order passed Commissioner, Commercial Tax of MP confirming demand and

imposing penalty of Rs.1,32,13,683/- due to failure in updating Part B of Form EWB-01 (E-Way Bill). In this case, the petitioner was moving goods from Maharashtra to Uttar Pradesh. The vehicle was intercepted in State of Madhya Pradesh for verification and the E-Way Bill was found incomplete as Part B of Form EWB-01 was not updated. It was also found that non-filing of appropriate details in Form GST EWB-01 resulted in violation of Rule 138(5) of CGST Rules.

As per provisions of Explanation 2 to Rule 138(3), E-Way Bill shall not be valid for movement of goods by road unless the information in Part-B of FORM GST EWB-01 has been furnished except in the case of movements covered under the third proviso to sub-rule (3) and the proviso to sub-rule (5). Therefore, it can also be said that in the present case, goods were moved under cover of an invalid E-Way Bill.

In this case, the petitioner took a plea that it could not upload details due to system glitches and therefore, the demand should be dropped, whereas the Court observed that had there been a system glitch, the same should have been brought to the knowledge of appropriate forum and evidence should have been presented before the Court.

At this juncture, a question arises whether a transporter who is engaged in transportation of goods for relatively lesser amount of freight and does not hold any interest in goods or tax alleged as evaded thereon can be made liable to make a payment of such a huge amount to the tune of around Rs. 1.32 Crores.

Section 122(1)(xiv) of CGST Act provides that if a taxable person transports taxable goods without the cover of specified documents, he shall be liable to penalty of Rs. 10,000 or amount equal to tax evaded, whichever is higher. Section 129 of CGST Act deals with detention, seizure and release of goods and conveyances in transit. Section 129(1)(b) casts liability on transporter not to transport goods while they are contravention of provisions of the CGST Act or rules made thereunder. Any transportation of goods by contravening provisions of CGST Act or rules shall be liable for seizure and shall be released on payment of the applicable tax and penalty equal to 50% of the value of the goods reduced by the tax amount paid thereon and, in case of exempted goods, on payment of an amount equal to 5% of the value of goods or Rs. 25,000, whichever is less, where the owner of the goods does not come forward for payment of such tax and penalty. Further, fourth proviso to Section 20 of IGST Act provides that in cases where the penalty is leviable under the CGST Act and the SGST Act or the UTGST Act, the penalty leviable under the IGST Act shall be the sum total of the said penalties.

Therefore, the demand was raised amounting to 100% of value of goods i.e. Rs.1,12,61,419 and tax payable thereon i.e. 19,52,264/- aggregating to Rs. 1,32,13,683/-.

In the present case, the petitioner placed reliance on the judgment in the case of VSL Alloys (India) Pvt. Ltd. vs. State of UP where the assessee was granted relief on the grounds that there was no contravention of provisions of law. However, the Court in the present case, while upholding the order of the tax authority, distinguished VSL Alloys on facts as in case of VSL Alloys, the goods were moving upto a distance of 50 Kms for delivery to transporter for further transportation which is in line with provisions of law whereas in the case of the petitioner, goods were moving for a distance of 1100-1200 Km.

The intention of the government may be bona fide as to eliminate revenue leakage but imposing such a huge penalty on the transporter does not appear to be appropriate in view of the fact that we are in the early days of implementation of GST in general and E-Way Bill system, in particular. It seems that the government needs to revisit and relax these provisions.

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Goods and Services Tax (GST)

Notifications and Circulars

CGST and IGST provisions set to be amended: Goods and Services Tax Council has, on 21-7-2018, in its 28th meeting approved draft amendments to CGST Act, IGST Act and GST (Compensation to States) Act. These amendments need to be passed by Parliament and State legislatures. Some of the amendments recommended by GST Council are:

High sea sales and sale of warehoused goods: Supply of warehoused goods to any person before clearance for home consumption, has been proposed to be covered under Schedule III of the CGST Act, providing for activities which are to be treated neither as supply of goods nor as supply of services. Further, supply of goods by consignee to any other person, by endorsement of documents of title, after the goods have been dispatched from a port outside India but before clearance for home consumption (high sea sales), would also be not liable to GST.

'Supply' provisions under GST: Omission of clause (d) of Section 7(1) and insertion of sub-section 7(1A) have also been proposed to clear the ambiguity of deeming as supply, certain activities listed in Schedule II even if they do not constitute supply as per other provisions of the said section. Further, supply of goods from a place in non-taxable territory to another place in non-taxable territory without the goods entering into taxable territory, would not be treated as 'supply'.

Import of service by non-taxable person: Sl. No. 4 of Schedule I to the CGST Act is also proposed to be amended to tax the import of services by entities which are not registered under GST but are otherwise engaged in business activities. These services received without payment of any consideration, from a related person or from any of their establishments outside India would be liable to GST if the proposals are accepted and the CGST law is amended by the Parliament.

Reverse Charge Mechanism set to be diluted: Section 9(4) of Central GST Act which mandates all registered persons to pay GST on reverse charge basis on purchases made from unregistered persons, has also been proposed to be omitted. It may be noted that said provisions are presently under suspension till 30-9-2018. Instead, the Central Government is proposed to be empowered to specify class of registered persons who shall on receipt of goods and/or

services from unregistered persons, pay GST as if they are liable.

Input Tax credit – Bill-to-ship-to provision for services: Section 16(2)(b) is proposed to be amended to provide for Bill-to-ship-to provisions for availing ITC. Accordingly, where the services are provided by the supplier to any person on the direction and account of a registered person, such registered person would be deemed to have received the services.

ITC provisions proposed to be relaxed: Provisions relating to input tax credit are being amended whereby ITC will be available on motor vehicles for transportation of persons having seating capacity of more than 13 persons, vessels and aircraft and motor vehicles used by bank or financial institution for transportation of money. Condition as to reversal of ITC with interest if supplier is not paid within 180 days is being amended to remove the interest liability in such cases.

Multiple registration for multiple business premises in same State: Section 25(2) is proposed to be amended to enable a taxpayer to obtain multiple registration for various business premises within the same State. However, such facility will be available subject to conditions that may be prescribed.

GST rates to be reduced on number of commodities: GST Council in its meeting held on 21-7-2018 has proposed reduction of GST rates on number of commodities. While paints and varnishes, refrigerators, washing machines, vacuum cleaners, domestic electrical appliances, storage water heaters, certain televisions, works trucks and toilet sprays will be liable to 18% and not 28% GST, Sanitary Napkins, Rakhi, Stone/Marble/Wood Deities, and certain other things would be exempted. GST rates have also been reduced on Chenille fabrics, Handloom dari, Bamboo flooring, Brass Kerosene Pressure Stove, Zip and Slide Fasteners, Solid bio fuel pellets, and footwear having a retail sale price up to Rs. 1000 per pair. [For complete list of items on which GST rates have been reduced, please visit www.gst.lakshmisri.com]

Exemptions to be provided to various services: GST Council in last meeting also provided multiple reliefs to service sector. Various exemptions have been provided in areas of agriculture, farming and food processing industry, education, training and skill development, pension, social security and old age support. Further, according to the Press Release, rate of tax on accommodation service shall be based on transaction value instead of declared tariff while GST on supply of e-books will be reduced from 18% to 5%. [For complete list of services and other details, please visit www.gst.lakshmisri.com]

GST liability for procurement from unregistered person – Exemption extended: CBIC has extended the exemption from payment of GST in case of procurements from an unregistered supplier. The exemption from liability under Reverse Charge Mechanism on the recipient of the supply will be effective till 30-9-2018 instead of 30-6-2018. It may be noted that exemption earlier was introduced only for intra-State supplies received below Rs. 5000 per day. The condition was, however, omitted in October 2017, and the exemption extended to inter-State supplies as well. Notification Nos. 12/2018-CT (Rate), 13/2018-IT (Rate) and 12/2018-UTT (Rate) have been issued on 29-6-2018 for this purpose. It may further be noted that this exemption is proposed to be extended till 30-9-2019 by the GST Council as decided in its last meeting held on 21st of July.

GST Return set to be simplified: GST Council in its 28th meeting held on 21-7-2018 in New Delhi, has approved the new return formats. According to the Press Release dated 21-7-2018, all taxpayers excluding small taxpayers and a few exceptions would have to file one simple monthly return containing two main tables, one for reporting outward supplies and one for availing input tax credit based on invoices uploaded by the supplier. Further, small taxpayers having turnover below Rs. 5 cr will be provided an option to file Return on quarterly basis. This facility will be available to two kinds of registered persons – small traders making only B2C supply or making B2B + B2C supply. It may be noted that the new return design provides facility for amendment of invoice and also other details filed in the return.

GST migration window to be opened again: GST Council has approved the proposal to open the migration window for taxpayers, who received provisional IDs but could not complete the migration process. Taxpayers are required to approach the jurisdictional Central Tax/State Tax nodal officers with the necessary details on or before 31-8-2018. As per Press Release dated 21-7-2018, late fee payable for delayed filing of return in such cases will be waived off. It may be noted that late fees has to be paid at first, but the amount would be reversed in the cash ledger.

Ratio decidendi

E-way Bill – Mention of second vehicle by hand when not an irregularity: Allahabad High Court has directed the department to release the seized goods and vehicle in a case where the assessee had, in his E-way Bills, mentioned details of the second vehicle by hand. The case involved stock transfer on payment of IGST, however, due to resistance by transport unions, vehicles were not allowed to ply beyond certain point and had to be changed. Since the portal did not accept two vehicle numbers for one transaction, the assessee mentioned the details of subsequent vehicle by hand. The Court in this regard observed that there was no irregularity at the hands of the petitioner or the transport company and in such peculiar circumstances the petitioner had no option but to mention the details of the subsequent vehicle by hand. It noted that tax was charged at the prescribed rate while issuing stock transfer invoices. [*Torque Pharmaceuticals Pvt. Ltd.* v. *State of UP* - 2018-TIOL-42-HC-ALL-GST]

Conversion of coal to electricity is supply of goods and not job work: Appellate AAR Maharashtra has held that processing undertaken by a person on goods belonging to another registered person qualifies as job work even if it amounts to manufacture, provided all requirements under CGST/SGST Act are fulfilled. The Appellate Authority, however, rejected appellant's contention that coal received for converting into electricity, for production of steel by supplier of coal, was in furtherance of job work agreement. It held that such supply is supply of goods (electricity) and not services as coal will be utilized in manufacture of new commodity. It was observed that conditions of definition of job work involving two persons and condition in Section 143(1)(a) of CGST Act, to bring back the inputs to the premises of principal, were not fulfilled. [*JSW Energy Limited* – Order No. MAH/AAAR/SS-RJ/01/2018-19, dated 2-7-2018, Appellate AAR Maharashtra]

Agricultural produce – Exemption for support services to agriculture when available: AAR Rajasthan has allowed benefit of Notification 11/2017-CT (Rate) for goods (cold storage) such as fennel, coriander, cumin and carom seeds, brown mustard seeds, etc. It observed that activity of storage and warehousing of agricultural produce, where the essential character remains same after processing and done only to the

extent of first marketability, is covered under support services to agriculture. The AAR in this regard observed that once the products attain its first marketability for the primary market, all other subsequent processes leading to value addition will get covered under secondary market and thus, the produce would not be covered under the category of 'agricultural produce' as defined in the notification. It was also noted that if any processing is done as is not usually done by the cultivator or producer at farm level, then the produce will fall outside the scope of 'agricultural produce' as defined. Exemption was hence denied for goods like dry fruits, turmeric, dried ginger, tamarind, dry mango, groundnuts, cinnamon, gum, coconut, etc., considering them as not 'agricultural produce'. [*Sardar Mal Cold Storage* – Advance Ruling No. Raj/AAR/2018-19/03, dated 11-6-2018, AAR Rajasthan]

No exemption for cleaning of agricultural produce away from farms: Activity of cleaning of various agriculture produce like saunf, dhaniya, or like goods, etc., which are brought to the applicant by farmers or traders is not covered under Sl. No. 24(i)(i) of Notification No. 11/2017-CT (Rate) or Sl. No. 54(c) of Notification No. 12/2017-CT (Rate). Authority for Advance Rulings Rajasthan observed that to avail exemption the activity should be carried out at agricultural farm and that in the instant case specific machines and equipments were installed at premises away from agricultural farm. Further, the activity of mechanised cleaning was also held as not an intermediate production process as job work in relation to cultivation of plants. [*Rara Udhyog* – Advance Ruling No. Raj/AAR/2018-19/06, dated 23-6-2018, AAR Rajasthan]

Reimbursement of salaries and expenses by HO is not consideration for services to LO: AAR Rajasthan has held that reimbursement of expenses and salary paid by Head Office in Netherlands to the applicant (liaison office, LO) in India is not liable to GST, and hence there is no requirement to get registered under GST. The Authority in this regard observed that the LO cannot enter into any business contracts in its own name without RBI's permission and its source of income is solely dependent on HO, hence, HO and LO cannot be treated as separate persons. It was also noted that there was no taxable supply of service inasmuch as one cannot provide service to self. [*Habufa Meubelen* – Advance Ruling No. Raj/AAR/2018-19/05, dated 16-6-2018, AAR Rajasthan]

Contract manufacturing for brand owner – GST liability: Considering that ownership of raw materials for manufacturing beer rested with Contract Brewing/Bottling Unit (CBUs) who undertook manufacturing on behalf of applicant, AAR Karnataka has ruled that CBUs are engaged in supply of goods (beer) and not services (job work), hence, not liable to GST on the amount retained by them as profit. It observed that to determine whether the activity undertaken by the CBUs falls under Heading 9988, it is required to determine whether the raw material is supplied by the applicant or not. Further, the AAR was of the view that surplus profit received from CBUs by brand owner (applicant in this case) was for supply of service to CBUs. The said service was held as classifiable under SAC 999799 and covered under Notification 11/2017-CT (Rate) attracting GST at 18%. [*United Breweries* - Advance Ruling No. KAR ADRG 9/2018, dated 29-6-2018, AAR Karnataka]

Compensation to tenant for alternate accommodation is liable to GST: Compensation paid to the tenant for alternate accommodation during repairs at the old premises and for delayed handover of possession of the new premises, is liable to GST. AAR, Maharashtra in this regard observed that the act of vacating premises for facilitating the

developer falls under Clause 5(e) of Schedule II to CGST Act, 2017 as act of tolerating redevelopment as well as tolerating an act of non-completion of redevelopment work within prescribed time. Contention of the applicant-tenant that transaction was not rental transaction was however found to be correct. [*Zaver Shankarlal Bhanushali* – Order No. GST-ARA-29/2017-18/B-37, dated 22-5-2018, AAR Maharashtra]

Rakhi is not a 'handicraft', 'puja samagri' or covered as 'kalava': GST Authority for Advance Ruling, West Bengal has held that 'Rakhi' which is an independently identifiable product made of numerous materials is to be classified in accordance with Rule 3(c) of Rules for Interpretation of Custom Tariff. Contentions of the applicant that 'rakhi' is a handicraft or puja samagri were rejected by the AAR. It noted that the product did not feature in the list provided in Notification No. 32/2017-CT and that was not an essential part of any puja or religious ceremony to pay obeisance to any deity. It was observed that mere inclusion of 'rakhi' in a puja thali does not make it an integral and essential part of puja samagri. It was also held that 'rakhi' that the applicant intended to make was not in the form of kalava and hence, cannot attract NIL rate of duty under Sl. No. 92(2) of the TRU Clarification. Similarly, the goods were held to be not covered as 'made up article' under Chapter 63. [*MD Mohta* – Order No. 08/WBAAR/2018-19, dated 5-7-2018, AAR West Bengal]

Lyophilizers are classifiable under Ch. 84 and attract GST @ 18%: AAR Telangana, after examining the process of Lyophilization (freeze drying), has held that the goods Lyophilizers (machinery used in drug & pharmaceutical industry for manufacture of vaccines/ injectables which are life-saving drugs) are classifiable under Heading 8419 of GST Tariff and attract tax @ 9% CGST + 9% SGST. Rules of Interpretation of Customs Tariff were relied upon. The Authority agreed with the applicant's contention that the goods will be covered under S. No. 320 to Schedule III of Notification 41/2017-CT (Rate) which amended Notification 1/2017-CT (Rate). [*Lyophilization Systems* - TSAAR Order No. 5/2018, dated 2-7-2018, AAR Telangana]

Bio-fertilizer in unit container with brand name attracts 5% GST: Observing that Bio Fertilizer are made of animals (micro-organisms), AAR Rajasthan has held that these are hence covered within standard description of HSN Code 3101. It also ruled that Bio-Fertilizer other than in unit container and bearing a brand name will attracts GST @ 0% (Schedule I) and those in unit container and bearing a brand name will be taxable @ 5% GST (Schedule II). The applicant had sought advance ruling as to whether Bio Fertilizer are covered under organic manure, and if not then what will be the applicable rate of GST. [*Rhizo Organic* – Advance Ruling No. Raj/AAR/2018-09/04, dated 16-6-2018, AAR Rajasthan]

Polypropylene Leno Bags when classifiable under Ch. 63: Polypropylene Leno Bags, if specifically made from woven polypropylene fabric using strips or the like of width not exceeding 5 mm and without any impregnation, coating, covering, or lamination with plastics, are to be classified under TI 6305 33 00. The applicant was clearing said goods under TI 3923 29 90 for exports and under TI 6305 33 00 in domestic market. AAR West Bengal in this regard relied upon various Notes to Ch. 39 and 63, and the BIS specifications as per IS 16187:2014. [*Mega Flex Plastics Ltd.* – Order No. 09/WBAAR/2018-19 dated 6-7-2018, AAR West Bengal]

EU VAT - Right to deduct VAT appearing on invoices depends on actual transaction: Court of Justice of the European Union (CJEU) has held that exercise of right to deduct VAT does not

extend to a tax which is due solely because it appears on an invoice. It was held that such right can be denied if it is established that transactions covered by the invoice were not carried out. The Court in this regard observed that on audit of company accounts, VAT appearing on invoices for purchase of equipment did not correspond to any actual delivery. Intention of taxable person was held not relevant. [*SGI and Valériane* v. *Minister for Public Action and Accounts* – Judgement dated 27-6-2018 in joined cases C-459/17 and C-460/17, CJEU]

UK VAT – Distinction between 'dredging' and 'excavating': UK's Upper Tribunal (Tax and Chancery Chamber) has held that the words 'dredging' and 'excavating' cannot be substituted, and that for dredging to occur, there must be some existing water feature, not fields that required to be excavated. The Tribunal upheld denial of exemption holding that activity by which aggregates were extracted was excavation of land and not dredging river bed. Contentions that all navigable parts of marina are channel, and that digging was done below water level, were rejected. Marina was also held as not a watercourse. [*PJ Thory* v. *Commissioner* - Decision dated 25-6-2018 in Appeal number: UT/2016/0226, United Kingdom's Upper Tribunal (Tax and Chancery Chamber)]

Customs

Notifications, and Circulars

Asia Pacific Trade Agreement – India cuts tariff from 1-7-2018: India has further reduced Customs duties on specified imports from Bangladesh, China, Korea RP, Lao PDR, and Sri Lanka, all signatories to the Asia Pacific Trade Agreement. As per MoC Press Release dated 2-7-2018, tariff concessions on 3142 tariff lines are available on imports from all member countries while special concessions on 48 tariff lines are there on goods from Bangladesh and Lao PDR. Notification No. 50/2018–Cus., effective from 1-7-2018, has been issued in supersession of Notification No. 72/2005-Cus. in this regard.

Advance Authorisation on net to net basis - Accountability of inputs: DGFT has laid down procedure for issuance of EODCs where Advance Authorisations are issued on net to net basis subject to accountability clause in terms of General Notes Sl. No-4 under Engineering Products and Sl. No-6 in All Export Products Groups under SION. According to a recent DGFT Policy Circular No. 10/2018-19, certificate in specified format from an independent Chartered Engineer having domain knowledge, certifying that inputs imported are required and used, is essential along with accountability statement. This will be required irrespective of FTP period.

'No incentive certificate under MEIS' – DGFT notifies procedure: DGFT has notified a procedure to obtain a 'No incentive certificate under MEIS' for shipments which are being re-imported. Public Notice No. 17/2015-20, dated 3-7-2018 in this regard inserts Para 3.24 in Handbook of Procedures Vol. I along with ANF 3E and 3F specifying formats for application and the certificate respectively. Accordingly, MEIS benefit if utilised has to be refunded along with interest in order to get the certificate. Scrips not utilised have to be surrendered. If scrips have not

been applied for or not yet issued, RA will issue certificate based on undertaking of the exporter.

'Processed items' defined in plant quarantine import regulation order: Ministry of Agriculture has inserted definition of processed items in Plant Quarantine (Regulation of Import into India) Order, to mean processed to the point where commodity does not remain capable of being infested with quarantine pests. The definition includes cooking, fermentation, malting, multi-method processing, pasteurization, preservation in liquid, pureeing, sterilization, sugar infusing and tenderizing. It may be noted that as per clause 3(7)(ii) of the Order, plant quarantine clearance is not required for import of commodities with least phytosanitary risk which have undergone such processing.

Pea imports – Quantity restrictions extended till 30-9-2018: Restriction on import of Peas classified under Exim Code 0713 10 00 (including Yellow peas, Green peas, Dun peas and Kaspa peas) has been extended for a further period of three months, i.e., till 30th of September 2018. The quantity restriction introduced by Notification dated 25-4-2018, was earlier applicable only till 30-6-2018. DGFT has on 2-7-2018 issued Notification No. 15/2015-20 for this purpose. However, it may be noted that DGFT has through its Trade Notice No. 21/2019-19, dated 6-7-2018 clarified that consignment of peas (other than Yellow Peas) imported during the period 25-4-2018 to 15-5-2018 and awaiting clearance at Customs or consignments of peas (other than Yellow Peas) with Bill of Lading prior to 16-5-2018, are permitted to be freely imported.

IPR enforcement – Reference to 'patent' removed from Customs Rules: Reference to 'Patent' and 'Patents Act' have been removed from the definitions of 'intellectual property' and 'intellectual property law', respectively, under Rules 2(b) and 2(c) of Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007. Further, clauses (c) and (d) have been inserted in Rule 5, now requiring rights holder to inform about any amendment, cancellation, suspension of IPR at the time of giving notice. Similar amendments have also been made in Notification No. 51/2010-Cus. (N.T.) prohibiting import of certain goods.

Export duty reduced on iron ore and concentrates for Japan and South Korea: Effective rate of Customs export duty on iron ore and concentrates, both agglomerated and non-agglomerated, when exported by MMTC Ltd. to Japan and South Korea under a long term agreement will be 10% till 30th of March 2021, subject to conditions. Notification No. 51/2018-Cus., dated 9-7-2018 in this regard amends Sl. No. 20B of Notification No. 27/2011-Cus. which prescribed reduced rate of duty till 31st of March 2018. It may be noted that words and figures 'the first day of April, 2018' have been substituted by words and figures 'the 31st day of March, 2021' for this purpose.

Ratio decidendi

TED refund denial detrimental to exporters and economy – Notification restricting refund is not retrospective: Observing that FTP 2009-14 conferred rights on DTA supplier to seek refund of Terminal Excise Duty when supplies made to 100% EOU were not against International Competitive Bidding, Delhi High Court has allowed TED refund for the last quarter of 2011. The assessee, in the dispute, had supplied goods to the EOU on payment of duty using Cenvat credit. The Court in this regard observed that Notification No. 4 of 2013, prohibiting such refunds when *ab initio* exemption was available, was not retrospective and that denial was detrimental to cause of the exporters and the Indian economy. It also noted that decision of Policy Relaxation Committee denying refund was not consistent. [*Motherson Sumi*

Electric Wires v. *UOI* – Judgement dated 12-7-2018 in W.P. (C) No. 6151/2016, Delhi High Court]

TED refund not deniable in absence of *ab initio* exemption: Observing that supply of trains under the contracts funded by Japan International Cooperation Agency, to the Chennai Metro under International Competitive Bidding (ICB) were not *ab initio* exempt, Delhi High Court has quashed the order denying refund of Terminal Excise Duty (TED). Considering that unconditional exemption from Customs duty (which itself was condition for Excise exemption) was available only for supplies to Delhi Metro and not to Chennai Metro, it was held the denial of refund of TED on account of already being exempt was not sustainable. The assessee had supplied 6 train sets between 26-2-2014 & 30-8-2014. [*Alstom Transport* v. *UOI* – Judgement dated 9-7-2018 in W.P.(C) Nos. 10544/2017 and 10558/2017, Delhi High Court]

CVD on imports for sale to hospital to be on transaction value and not MRP: CESTAT Mumbai has held that valuation of Top loader refrigerator, for purpose of CVD, must be done under Section 4 and not under Section 4A of Central Excise Act, 1944, as the said goods were imported for selling to hospitals which qualify as institutional customer. The Tribunal in this regard observed that the importer was at par with the manufacturer for the purpose of levy of CVD, and are exempted from affixing MRP under Rule 2A of Standards of Weight & Measures (Packaged Commodity) Rules, 1977 in specified cases. [*Remi Sales & Engg.* v. *Commissioner* - Order No. A/86476/2018, dated 23-5-2018, CESTAT Mumbai]

Central Excise and Service Tax

Ratio decidendi

Cenvat credit on inputs - Explanation in Rule 2(k) is not for service provider: CESTAT Ahmedabad has held that Explanation 2 to Cenvat Rule 2(k), providing for non-availability of credit on cement and certain steel items for construction of factory shed, etc., wis exclusively in respect of manufacturer only. The Tribunal allowed Cenvat credit when the said inputs were used for provision of service namely, Erection, Commissioning and Installation. It was of the view that by use of words 'factory shed' it is clear that the explanation was meant for manufacturer only and not for service provider. [*Ultra Tech Transmission* v. *Commissioner* - Final Order No. A/11363 /2018, dated 9-7-2018, CESTAT Ahmedabad]

Cenvat credit on basis of photocopy of Bill of Entry when permissible: In a case where the assessee in order to save additional expenditure had despatched the consignment to their various units from the port itself, CESTAT Delhi has allowed Cenvat credit on basis of invoice and photocopy of B/E. Tribunal in this regard held that as long as inputs are received and used for manufacture of excisable goods, there is no bar in taking Cenvat credit. It was observed that substantial benefit is not to be denied on procedural ground. Absence of any loss to the Revenue was also noted by the Tribunal. [*Century Metal Recycling Pvt. Ltd.* v. *Commissioner* - Final Order No. 52282/2018, dated 22-6-2018, CESTAT Delhi]

Removal of MRP sticker, without affixing new one is not 'manufacture': CESTAT Delhi has upheld Commissioner (A)'s Order holding that removal of MRP sticker, without affixing a new MRP did not amount to 'manufacture' under provisions of Section 2(f)(iii) of Central Excise Act, 1944. The Tribunal hence rejected department's appeal observing that there was absence of allegation of fixation or alteration of MRP. It noted that provisions of said section provided for "deemed manufacture" only when goods are labelled or relabelled or MRP was altered, which itself establishes the fact of fixation of MRP. [*Commissioner* v. *Anmol Vachan Impex* - Final Order No. 52180-52181/2018, dated 11-6-2018, CESTAT Delhi]

Cenvat credit on input service for pan masala cleared under Pan masala Packing Capacity Rules: Observing that advertisement and sales promotion services were used in relation to the manufacturing business and not directly in the manufacture of pan masala, CESTAT Allahabad has allowed benefit of Cenvat credit on such services. It noted that restrictive Rule 15 of Pan masala Packing Machine (Capacity Determination and Collection of Duty) Rules denies credit on input services used in manufacture only. The Tribunal was of the view that prohibition in said Rule 15 was not in respect of 'input service' as defined in Cenvat Rule 2(l) but input service which is used for manufacture of notified goods. [*Dharampal Satyapal Ltd.* v. *Commissioner* - Final Order No. 71336/2018, dated 4-7-2018, CESTAT Allahabad]

C & F Agent expected to undertake all activities as agent of principal: CESTAT Delhi has set aside the demand of service tax under Clearing and Forwarding Agent service, in a case where assessee was entrusted with the responsibility of receiving goods at railway siding, storing the same in the godown as also loading onto the truck. The Tribunal after perusing the agreements, was of the view that assessee had not acted as agent of the principal, and therefore, not as C & F Agent of the principal. It noted that the godown was rented by the appellant-assessee to the other company. [*B.P.T. Polymers Pvt. Ltd.* v. *Commissioner* - Final Order No. 52223/2018, dated 12-6-2018, CESTAT Delhi]

Refund of Cenvat credit – Place of Provision of Services Rules not applicable: Observing that office situated in USA was different establishment from firm's project office in India and that services were availed by US establishment, CESTAT Mumbai has held that Consulting Engineer Services provided by the assessee to its parent company would fall under exports as per Service Tax Rule 6A. The assessee was held eligible for refund of Cenvat credit under Rule 5 of the Cenvat Credit Rules, 2004. The Tribunal observed that different establishments located in non-taxable territory and taxable territory are establishments of different persons. It was also of the view that provisions of Place of Provision of Services Rules cannot be relied for refund under Cenvat Rule 5 and to interpret export of service. [*Holtec Asia* v. *Commissioner* - Order No. A/ 86466-86469/2018, dated 20-4-2018, CESTAT Mumbai]

Business Auxiliary Service does not cover establishment of WAN: In a case where part of contract was sub-contracted, CESTAT Delhi has rejected department's plea of coverage under Business Auxiliary Services for the period from 2004 to 2009. The sub-contract was for establishment of WAN and it was held that activity is covered under Information Technology Service under Explanation to Section 65(19) of Finance Act, 1994, and thus excluded from BAS. The Tribunal also observed that maintenance service was a part of operation of computer systems, falling under BSS and not under Management, Maintenance or Repair Service. [*Tata Consultancy Services* v. *CST* - Final Order No. 52251/2018, dated 18-6-2018, CESTAT Delhi]

Lending/Borrowing by industrial unit not attracts Cenvat Rule 6(3B): CESTAT New Delhi has held that Rule 6(3B) of Cenvat Credit Rules, requiring reversal of 50% of the credit availed, will not be applicable to assessee, a steel manufacturer, as their activity being industrial falls under exclusion category of financial institution. Noting that provisions of taxing statute must be interpreted literally, assessee was held as not covered under banking company, NBFC or financial institution even if it was undertaking activities falling therein. Tribunal in this regard observed that Cenvat Credit availed will not be restricted to 50% as assessee's principal business is not of banking nature. The assessee had availed loans from various banks as well as other 'Banking and other Financial Services' from overseas service provider, and paid service tax under reverse charge mechanism during period 2011-12 till August 2015. [*Jindal Steel & Power* v. *Commissioner* - Final Order No. 52257/2018, dated 20-6-2018, CESTAT Delhi]

Micronutrients are fertilisers and not plant growth regulators: CESTAT Mumbai while holding that micronutrients are fertilisers and not plant growth regulators, has rejected department's contention of classification under TI 3808 20/3808 30 40 of Central Excise Tariff. Circular No. 1022/10/2016-CX, dated 6-4-2016 was though partly doubted. Tribunal was of the view that micronutrients manufactured in factories are fertilizers, both by use as reflected in Fertilizer (Control) Order, 1985 and the deficiency that is sought to be remedied by their addition to soil or by foliage application. The issue involved classification of 'Agromin', 'Chelafer' and 'Chelamin'. [*Commissioner* v. *Aries Agro-Vet Industries* - Order No. A/86615/2018, dated 31-5-2018, CESTAT Mumbai]

Cenvat credit on railway tracks used for bringing in inputs, available: CESTAT Kolkata has allowed Cenvat credit on railway tracks for railway line from a railway siding to the unloading point inside the factory for inward transportation of raw materials and also outward transportation of finished goods. It rejected department's view that goods were not inputs as were not used in the manufacture of finished goods, and not even capital goods as were used to build a railway track which ran from a point outside the factory to a point inside the factory. The Tribunal was of the view that goods had nexus with the manufacture of final goods and were covered under the definition of inputs as per the Cenvat Credit Rules. [*Adhunik Alloys & Power Ltd.* v. *Commissioner* - 2018 (7) TMI 517 - CESTAT Kolkata]

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