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Better late than never – A sigh of relief for real estate developers

By **Narendra Kumar Singhvi**

The real estate industry has witnessed high litigation rate, considering the number of indirect taxes payable by the sector prior to GST. Prior to GST, a real estate developer was required to pay various taxes including Service Tax, VAT, Central Excise, Entry Tax, LBT, Octroi, etc. and the credits of such taxes were not freely available. With the introduction of GST, the real estate developers have been allowed to avail Input Tax Credit (ITC), aimed at reducing the cascading effect of taxes.

This article highlights the impact of recent decision of Gujarat High Court in Principal *Commissioner* v. *Alembic Limited*, 2019-TIOL-1495-HC-AHM-ST, which has affirmed the decision of CESTAT in *Alembic Limited* v. *Commissioner*, 2019-TIOL-358-CESTAT-AHM.

In the Service Tax regime, a developer paying Service Tax under Construction of Complex Services, while availing abatement under Notification No. 26/2012-ST, dated 20-6-2012, was allowed to avail Cenvat credit of Service Tax and Cesses paid on input services. The liability under Construction of Complex Services arose, only when a unit was agreed to be sold against receipt of some payment prior to receipt of the completion certificate. In other words, units sold after receipt of the completion certificate were treated as amounting to sale of immovable property and not charged to Service Tax.

The sale of units by any developer, however, depends on a number of factors and is largely market-driven. There arise situations, where number of units are unsold even at the time of receipt of completion certificate. In such a case, no Service Tax was paid on sale of such units taking place after receipt of completion certificate. This is irrespective of receipt of input services by the developer, which are largely received at the time of pre-development and development phases of the projects. The credit of tax paid on such services, thus, is also availed at the time of receipt of such services.

In such cases, disputes were raised by the department alleging that Cenvat credit was not admissible on portion of the input services used in development of the project, to the extent of unsold units till receipt of the completion certificate, in as much as there was no liability to pay Service Tax on sale of such units after completion certificate.

This dispute received attention of all real estate developers and their jurisdictional departmental authorities. Divergent practices were being followed regarding availment of Cenvat credit by developers, with a view to avoid disputes with the department. Some developers were not availing any Cenvat credit on input services received after issuance of completion certificate, though Service Tax was being paid on installments received thereafter as pertaining to units sold earlier.

In this background, the dispute was considered by Tribunal in *Alembic Limited* (supra). Relying on decision of Supreme Court in *Collector v. Dai Ichi Karkaria Limited*, 1999 (112) ELT 353 (SC), it was held that the entitlement to

Cenvat credit is to be determined at the time of receipt of input services and merely because the output services became exempt later on, the credit on input services received earlier is not deniable, in the absence of specific provision. The Tribunal also considered Rule 11 of the Cenvat Credit Rules, 2004, which specifically provides for reversal of credit on inputs in case of finished goods/ output services becoming exempt later. For illustration, Rule 11(4) provides for reversal of credit in respect of inputs received for providing output services, when the service provider opts for exemption from payment of Service Tax on such output services. Highlighting the absence of such specific provisions in the context of Cenvat credit on input services, it held that eligibility/entitlement to credit has to be examined only at the time of receipt of input service and once it is found to be availed at a time when output service is wholly taxable, and the said credit is availed legitimately, the same cannot be denied and/or recovered unless specific machinery provisions are made in this regard.

Aggrieved by the said decision of the Tribunal, the Department preferred an appeal before Gujarat High Court, which was dismissed in *Alembic Limited* (supra). The observations of the Tribunal discussed hereinabove have received approval of High Court.

The judgement has come as a sigh of relief for the real estate developers, although, with the introduction of GST, the window to avail Cenvat credit under earlier regime has been closed. However, this decision sets to rest disputes raised by department, where developers had already availed Cenvat credit prior to receipt of completion certificate and some units were unsold till then. Under the GST regime, though specific provisions have been enacted for calculation of ITC required to be reversed (particularly at time of rationalization of rates for real estate sector in March, 2019), the doubts over interpretation of statutory provisions therein still loom large.

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Coverage of redemption fine under Sabka Vishwas (Legacy Dispute Resolution) Scheme

By **Atul Gupta**

After introducing the National Tax Litigation Policy to reduce the litigation from the Central Government side by prescribing monetary limits upto which the Government restricted filing of appeals before each appellate authority from the stage of Commissioner (A) to the Supreme Court, the Central Government has now proposed a scheme termed as Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 in the Finance (No. 2) Bill 2019 to reduce/wipe out the litigation pending at various stages. The language used in the proposed scheme suggests that it encompasses only the matters in which demand of duty, interest and penalty are involved and the monetary relief is also restricted to such issues under clause 128(1)(a). The attention of the Government may be invited by the field formation of the department as well as the Industry that in many of the matters pending, a minor issue of fine in lieu of confiscation of

goods, may also be involved simultaneously along with involvement of demand of duty, interest and penalty.

It is to be noted that in cases where goods are not absolutely confiscated, an option to get the goods redeemed after payment of a fine in lieu of confiscation is given to the owner of the goods or the person from whose possession goods were seized.

At present, amount of fine in lieu of confiscation of goods has not been included either in tax dues and amount in arrears or the amount in respect of which grant of relief has been proposed under the scheme. Therefore, in absence of such specific inclusion of the redemption fine, the department may adopt an interpretation that such matters, in which even though an insignificant amount in respect of redemption fine is involved, will be outside the scope of the proposed scheme. Due to such minor issue, a large number of matters pending may not be settled and will continue to be pending for litigation.

In view of the above, it is expected that the Central Government may certainly take care of such issue and will make appropriate changes in clause 128(1)(a) to include the amount of redemption fine also in the relief granted, so that the scheme may achieve its intended purpose.

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Goods and Services Tax (GST)

Budget 2019 – Amendments proposed in CGST Act

Penalty for profiteering under GST proposed: Finance (No.2) Bill 2019 has proposed amendment in Section 171 of the Central GST Act to provide for imposition of mandatory penalty equal to 10% of the profiteered amount. However, according to the proviso to new sub-section (3A) to Section 171, no penalty will be leviable if the profiteered amount is deposited within thirty days of order of the National Anti-profiteering Authority. Further, an explanation is being inserted to provide for the meaning of the expression 'profiteered'.

Interest on delayed payment to be paid only on tax paid by debiting cash ledger: A proviso is being inserted in Section 50 of the CGST Act by the Finance (No.2) Bill 2019 to provide for payment of interest only on the tax paid through cash in case of delayed payment of tax (except where tax paid subsequent to proceedings under Section 73 or 74 of the CGST Act). If sufficient balance is available in the ITC ledger, then interest on portion of tax paid utilizing ITC will not be payable. It may be noted that this amendment was recommended by the GST Council in its 31st meeting held on 22-12-2018.

New 3-member National Appellate Authority for Advance Rulings proposed: Finance (No.2) Bill 2019 has proposed amendments in the Central GST Act to provide for constitution of three-member National Appellate Authority for Advance Ruling (NAAAR) to hear appeals when conflicting views are expressed by two or more

State Appellate Authorities. As per the provisions, any officer authorised by the Commissioner or an applicant, being distinct person referred to in Section 25 of the CGST Act, aggrieved by such advance ruling, may prefer an appeal to the National Appellate Authority. Sections 101A, 101B and 101C are being proposed to be inserted in CGST Act for this purpose.

Refund of SGST by Central Government: Central Government is being empowered for disbursement of refund of State GST as well. Finance (No. 2) Bill, 2019, for this purpose, proposes to insert sub-section (8A) in Section 54 of the CGST Act. It may be noted that the scheme of single authority for disbursement of refund was recommended by GST Council in its 31st meeting, and similar amendments will also be made in the State GST provisions by the respective States.

Registration under GST – Authentication using Aadhaar number being made mandatory: New sub-section (6A) is being inserted in Section 25 of the CGST Act 2017, relating to registration. As per this provision, for registration, authentication using Aadhaar number will be mandatory. According to the new provisions proposed, in case of failure to undergo authentication or furnish proof of possession of Aadhaar number or furnish alternate and viable means of identification, registration allotted to such person shall be deemed to be invalid.

Transfer an amount from one head to another in the electronic cash ledger: Amendment has been proposed in Section 49 of the Central GST Act to provide for facility to the taxpayer to transfer an amount from one head to another in the electronic cash ledger. As per new sub-section (10) being inserted in Section 49, a registered person will be able to transfer any amount from one of the major heads like IGST, CGST, SGST, UTGST or Compensation Cess to another major head. Similarly, amount paid towards minor heads like tax, interest, penalty, fee or any other amount can also be inter-changed with such other minor head. Such transfer will be deemed to be a refund from the electronic cash ledger under the CGST Act.

Notifications and Circulars

GST returns and declaration – Due dates notified: Registered persons having aggregate turnover more than Rs.1.5 crore have to furnish Form GSTR-1, for months of July 2019 to September 2019, till eleventh of the succeeding month. For persons having turnover less than or equal to Rs.1.5 crore, the due date for furnishing quarterly GSTR-1 for the said period will be 31-10-2019. GSTR-3B will continue to be filed by 20th of next month. As per notifications issued on 28-6-2019, time limit for furnishing Form GSTR-7 for October 2018 to July 2019, and Form GST ITC-04 for July 2017 to June 2019, will be 31-8-2019.

Supply of Information Technology enabled Services clarified Even where a supplier supplies Information Technology Enabled Services to customers of his clients on clients' behalf, but actually supplies these services on his own account, the supplier will not be an intermediary, but will be eligible for export benefits. Definition of ITeS services under Income Tax Rules was noted by Circular No. 107/26/2019-GST, dated 18-7-2019 for this purpose. It has also been clarified that supplier of backend services located in India who arranges or facilitates supply of goods/services by the client located abroad to customers of client, will however be covered under intermediary. According to the circular, in case of supplier supplying two sets of services, namely ITeS services and various support services to his client or to the customer of the client, coverage under 'intermediary' will depend on the facts and circumstances of the case.

GST on taking goods out of India for exhibition, clarified: CBIC has clarified that activity of sending goods out of India for exhibition or for export promotion, except when the activity satisfies tests of Schedule I of CGST Act, is not 'supply' and hence not a zero-rated supply. As per Circular No. 108/27/2019-GST, dated 18-7-2019, such activity is in the nature of sale on approval basis. Execution of bond/LUT is not required, however, records as prescribed in the Circular itself, are to be maintained. Supply is deemed to take place after 6 months from the date of such removal, if such goods are neither sold abroad nor brought back within such period. Refund of unutilized ITC can be claimed though bond / LUT was not executed when the goods were sent out of India.

Treatment of additional or post-sales discounts clarified: : In a case where additional discount is given by supplier of goods to the dealer to offer a special reduced price to the customer, this additional discount is liable to be added to the consideration payable by the customer, for arriving at value of the supply, in the hands of the dealer. Circular No. 105/24/2019-GST, dated 28-6-2019 also clarifies that dealer will be eligible to take ITC of the original amount of tax paid by the supplier of goods even if the latter has issued financial/commercial credit notes for post-sales discount, if the discounted value and said original tax amount are paid.

It has been further clarified that if additional discount given by the supplier of goods to a dealer is a post-sale incentive requiring the dealer to do some act like special sales drive, advertisement campaign, exhibition, etc., then such transaction would be a separate transaction. The additional discount will be the consideration for undertaking such activity, in relation to supply of service by the dealer to the supplier of goods. According to the circular, dealer will charge GST and ITC will be available to supplier of goods.

Refund processing by authorities to whom taxpayer not assigned: In a case where refund application has been wrongly transferred by the common portal to the tax authority to whom the tax payer has not been assigned, CBIC has clarified that if reassignment of applications is not possible, refund claim should be processed by the authority to whom the application has been transferred mistakenly. CBIC Circular No. 104/23/2019-GST, dated 28-6-2019 observes that processing of refund claim should not be held up due to incorrect mapping in division of taxpayer base between the Centre and States.

Place of supply of services at port and on goods temporarily imported: The place of supply for services, like cutting and polishing, on unpolished diamonds temporarily imported into India and not put to use in India but exported, is to be decided as per Section 13(2) of IGST Act, i.e. generally location of recipient. As per Circular No. 103/22/2019-GST, dated 28-6-2019, the place of supply for haulage of wagons inside port area, siding of wagons, unloading, movement of unloaded cargo to plot and staking, movement of cargo to berth, shipment/loading on vessel etc., provided by port, is to be decided as per Section 12(2) or 13(2) of the IGST Act

GST on additional/penal interest for delay in payment of EMI clarified: CBIC has clarified that transaction of additional/penal interest for delayed payment of consideration does not fall within the ambit of Entry 5(e) of Schedule II to CGST Act i.e. 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act'. As per Circular No. 102/21/2019-GST, dated 28-6-2019, additional/penal interest satisfies definition of 'interest' as in Notification No.12/2017-Central

Tax (Rate). The circular also illustrates situations when penal interest would be included or not included in the value of supply.

IGST refund to exporters – ITC verification only of few risky exporters: CBIC has instructed its formations to verify correctness of Input Tax Credit (ITC) by few exporters who are perceived as 'risky' based on certain pre-defined risk parameters. Since there were fears that even genuine exporters would face trouble in IGST refunds, Ministry of Finance has on 20-6-2019 clarified that all genuine exporters would continue to get their IGST refunds in a timely manner in a fully automated environment. As per the Press Release, only 5,106 risky exporters have been identified as against about 1.42 lakh total exporters.

Australia introduces penalty on Director for company's GST liabilities: Australia has recently introduced Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 in its Parliament. The Bill allows Commissioner to collect estimates of anticipated GST liabilities and make company directors personally liable for their company's GST liabilities. As per the Explanatory Memorandum, Directors will be subject to a penalty, equal to the amount of company's unpaid obligations, if their obligation is unfulfilled by the due date. It may however be noted that number of defences against penalty will exist based on reasonableness of conduct of the director.

Ratio decidendi

Return in Form GSTR-3B is temporary and not in lieu of return in Form GSTR-3: Press Release dated 18-10-2018 clarifying that the last date for ITC on invoices issued during July, 2017 to March, 2018 is the last date for the filing of GSTR-3B for the month of September, 2018, has been held as illegal by the Gujarat High Court. According to the Court, the clarification is contrary to Section 16(4) read with Section 39(1) of the Central GST Act and Rule 61 of the CGST Rules. The High Court noted that reference in Notification No. 10/2017-CT that Form GSTR-3B is in lieu of Form GSTR-3, was retrospectively omitted and that notifications are being issued from time to time extending the due date of filing Form GSTR-3. [*AAP & Co.* v. *UoI* - 2019-VIL-314-GUJ]

IGST refund can be withheld only as per CGST Rule 96: The Gujarat High Court has held that IGST refund for exports can be withheld only in two circumstances enshrined in Rule 96(4) of the CGST Rules, 2017. The High Court in this regard, rejected department's submission that despite differential drawback being returned by the applicant, there is no option to consider the refund claim. The Court held that the CBIC Circular No. 37/2018-Cus., dated 9-10-2018, relied by department for refusing refund, on availment of higher drawback, cannot run contrary to Rule 96 and cannot be said to have any legal force. It noted that the Circular explained provisions of drawback, had nothing to do with IGST refund and was issued after the concerned exports. [*Amit Cotton Industries v. Principal Commissioner* – Judgement dated 27-6-2019 in R/Special Civil Application No. 20126 of 2018, Gujarat High Court]

Property to be attached only after notice and assessment: The Gujarat High Court has held that only after the notice is served under Section 46 of the CGST Act and the assessment is done by the proper officer under Section 62, can the goods and the bank accounts of the taxable person be attached under Section 83. The High Court observed that Section 46 indicates that if registered person fails to furnish return under Section 39 or 44 or 45, a notice is to be issued requiring him to furnish return and if he fails to furnish it, proper officer may assess tax liability. Only in such pendency if the Commissioner

intends to protect interest of revenue, can property be attached. [*Cengres Tiles Ltd. v. State of Gujarat* - 2019-VIL-294-GUJ]

Dream 11's fantasy sports is not gambling – GST liability clarified: Observing that success in Dream 11's fantasy sports is not dependent on winning or losing of any team in real world, the Bombay High Court has reiterated that in such case no betting or gambling is involved. Meaning of betting and gambling as provided in the Finance Act 1994 was also relied. The High Court in this regard also held that since amount pooled in the escrow account for distribution to the winners is an actionable claim and not gambling, it will fall under Entry 6 of Schedule III of CGST Act and be not liable to GST. Payment of GST under Entry 998439 for online gaming, was found correct. [*Gurdeep Singh Sachar v. UoI* – Judgement dated 30-4-2019 in Criminal Public Interest Litigation Stamp No. 22 of 2019, Bombay High Court]

Transition of credit of Education Cesses – Gujarat High Court issues notice to UoI: The Gujarat High Court has issued notice to Union of India to explain reasons for bringing the amendment in Section 140 of the Central GST Act, seeking to retrospectively disallow transition and carry forward of Education Cess and Secondary and Higher Secondary Education Cess in the GST regime. The assessee in this case pointed out that the EC and SHEC qualified as Cenvat credit and that since Section 140(1) referred to Cenvat credit, they were eligible to transition of such credit. It was also argued that the amendment seeks to deny vested and accrued rights and benefit. [*Grasim Industries Ltd. v. UoI* – Order dated 10-7-2019 in R/Special Civil Application No. 11061 of 2019, Gujarat High Court]

Anti-profiteering – No profiteering when ITC reversal more than excess realization: Observing that the difference in commensurate price and the actual selling price amounts to profiteering, National Anti-profiteering Authority has held that the assessee failed to pass benefit of rate reduction on sanitary napkins, from 12% to nil. The NAA however confirmed the DGAP's findings and held that there was no profiteering as benefit of ITC was not available, ITC reversal on closing stock was extra cost to the respondent. It observed that reversal of ITC was more than the excess realization on closing stock. [*Commissioner* v. *Unicharm India* - 2019-VIL-37-NAA]

Anti-profiteering – Profit or loss has no relevance in proceeding under Section 171: Observing that the assessee could not prove that the amount charged after GST was on account of reduction in the discount, National Anti-profiteering Authority has held that it can be inferred that base price was increased after the tax rate reduction. It also noted that profit or loss has no relevance in any proceeding under Section 171 of the CGST Act and that relevant value for calculating profiteering must be the transaction value and not MRP. The NAA upheld DGAP's computation of profiteered amount. [*Mohammad Azid Ramzani* v. *Adarsh Marbles* - 2019-VIL-36-NAA]

Subvention received to reduce interest rate for customers chargeable to GST: AAR Tamil Nadu has held that interest subvention income received by a non-banking financial institution, to reduce effective interest rate to final customers of the entity providing subvention, is chargeable to GST @ 18% under SAC 999792. The Authority observed that the amount paid was to ensure assured standards of services, better luxury experience, quick loan approvals, etc., to customers of subvention providing entity. It also noted that since the applicant, a financial services provider and the entity providing subvention, were related parties, value of supply maybe different from the transaction value. The applicant had pleaded that interest subvention

received was in effect 'interest' and is exempted under Notification No. 12/2017-CT (R). [In RE: *Daimler Financial Services* – Order No. 16/AAR/2019, dated 15-4-2019, AAR Tamil Nadu]

ITC available on vehicles used for demo by car distributors: Goa AAR has held that ITC on motor vehicle purchased for demonstration purpose is available as ITC on capital goods and be used for setting off output tax. The AAR noted that the applicant capitalized purchase of such demo vehicles in the books of accounts and sold them after 2 years. It held that CGST Section 17(5) was not applicable as provision does not prescribe time within which further supply is to be affected. The Authority was of the view that demo vehicle is an indispensable tool for promotion of sale by providing trial run to the customer. [In RE: *Chowgule Industries Pvt. Ltd.* - 2019-VIL-213-AAR]

Gaming zone in a mall is not an 'amusement park': Maharashtra AAR has denied lower GST rates to an entertainment company observing that gaming equipment stationed in a mall would not qualify as 'amusement park' but would fall within the ambit of 'amusement facilities'. The AAR held that to be called an 'amusement park', there must be a large land area, whereas, a 'facility' can sufficiently be placed within a place or a building. Supreme Court judgement in *Dilip Kumar & Co*. on interpretation of notification, and definition of 'amusement park' in Bombay Entertainment Act, 1923 were relied upon. [In RE: *Bandai Namco India (P) Ltd.* - 2019-TIOL-200-AAR-GST]

ITC is not available on goods supplied free under promotion scheme: Maharashtra AAR has held that Input Tax Credit (ITC) is not available of the GST paid on the expenses towards promotional schemes of *Shubh Labh Loyalty Programme* and on the goods given as brand reminders. The Authority in this regard observed that such supply was without consideration and without payment of output tax. Pondering over the meaning of 'gift', the AAR concluded that the transaction is nothing but gift covered under Section 17(5) restricting ITC. [In RE: *Sanofi India Ltd.* - 2019-VIL-176-AAR]

Taxability of extra goods supplied without additional consideration: In a case where the applicant intended to introduce a sales promotion scheme to offer extra packs of cigarettes along with the specified quantity to their distributors without any additional consideration, AAR Maharashtra has held that the taxability of supply of goods provided free along with another goods would depend upon as to whether the supply was a composite supply or a mixed supply and the rate of tax would be determined as per the provisions of Section 8 of the CGST Act, 2017. Further, the authority was of the view that credit would be available to the supplier for the inputs, input services and capital goods used in relation to supply of goods or services or both as part of such offers. It was held that the extra packs of cigarettes would not be considered as exempt supplies or free samples and hence, provisions of Section 17(2) and (5) of CGST Act will not apply. CBIC Circular No. 92/11/2019-GST, dated 7-3-2019 was relied upon. [In RE: *Golden Tobacco Limited* - 2019-VIL-185-AAR]

Valuation when goods moved between distinct entities: Maharashtra AAR has held that the applicant should adopt Rule 28 of the CGST Rules, 2017 in a situation where it moved goods from one distinct entity (factory/depot) to another distinct entity (factory/depot) on payment of GST. All the factories and depots were duly registered under GST law and were eligible to avail full input tax credit. The applicant had sought a ruling as to whether the value can be determined on the basis of cost of production. Referring to Rule 28 and Rule 30 of the CGST Rules, the AAR held that Rule 30 would come into operation in a

situation where the value of supply of goods or services or both could not be determined by any of the rules preceding to Rule 30. It observed that Rule 28 of CGST Rules is the specified rule to determine the value of supply in a transaction where supplier and recipient are related. [In RE: *Kansai Nerolac Paints Limited* - 2019-VIL-167-AAR]

Compulsory registration if GTA services received though goods supplied exempt: The applicant was engaged in manufacture of exempted goods but, received Goods Transport Agency services on which tax is payable under reverse charge basis. Advance ruling was sought on the question as to whether the applicant was liable to take registration under Section 24 of CGST Act. The Authority held that since the applicant is required to pay GST under reverse charge basis on GTA services received for its business, the applicant is compulsorily required to obtain registration under GST law. The argument, that since Section 23 was an independent section and was not overruled by Section 24 and hence there is no requirement to take registration, was rejected. The authority was of the view that contention of the applicant would render Section 24 redundant. [In RE: *Jalaram Feeds* - 2019-VIL-166-AAR]

Importer without godown can import goods in Odisha with Maharashtra GSTIN: Maharashtra AAR has held that applicant importing goods at Paradip port in Odisha with the head office in Mumbai having Maharashtra GSTIN, need not take a separate registration in Odisha since applicant do not have any godown in Odisha. The AAR was of the view that importation would be completed on payment of Customs Duties and IGST in the name of Mumbai office. It also ruled that applicant can sell goods directly from Paradip port warehouse (ex-bond) to customers in Odisha and charge IGST raising bills from Mumbai office. [In RE: *Aarel Import Export Pvt. Ltd.* - 2019-VIL-162-AAR]

UK VAT – Test for single or two different services: UK's Upper Tribunal (Tax and Chancery Chamber) has held that partial demolition and refurbishment of one building and construction of a new building is a single service since construction contract was contemplated as single development of site. The Tribunal observed that separate programming and attribution of construction costs are of minimal importance when seen against background of the whole project. It also observed that there was a single contract and payment was made as per invoices issued for the whole project. [*Glasgow School of Art* v. *Commissioner HMRC* – Decision dated 9-5-2019 in Appeal number UT/2018/0134, UK's Upper Tribunal (Tax and Chancery Chamber)]

UK VAT on deals offering free items – Apportionment of payment received: : In a dispute involving promotional offer of free bottle of wine with 3 food items, UK Upper Tribunal (Tax and Chancery Chamber) has upheld First-tier Tribunal's decision that the amount paid should be apportioned between food and wine. The food was nil rated while wine was standard VAT rated. The Tribunal rejected the plea that wine was supplied free and that description as free was not simply a label used in marketing sense. It observed that in economic and commercial reality, assessee was offering a package of 4 items. [*Marks and Spencer Plc* v. *Commissioner HMRC* – Decision dated 27-6-2019 in UT/2018/0067, UK Upper Tribunal (Tax and Chancery Chamber)]

Customs

Budget 2019 – Amendments proposed in Customs law

Penalty for obtaining and utilizing FTP instruments by fraud: Finance (No.2) Bill, 2019 introduced in the Indian Parliament on 5th of July has proposed to insert new Section 114AB in the Customs Act, 1962 to provide for penalty for obtaining instrument (scrip, authorization, licence, or certificate, etc.) by fraud, collusion, willful misstatement or suppression of facts, and where such instrument has been utilized for discharge of duty. Meaning of the expression 'instrument' has to be taken from Section 28AAA of the Customs Act. Maximum penalty imposable as per the new provision would be the face value of the instrument. Further, Section 135 of the Customs Act is also being amended to provide for imprisonment and/or fine in case a person obtains an 'instrument' by fraud, collusion, willful misstatement or suppression of facts and such instrument is utilized. It may also be noted that Section 104 relating to 'Power to arrest' is also being amended to provide for such offence of obtaining the instrument by fraud, etc., and then utilizing it for payment of duty, as a cognizable and non-bailable offence if the duty involved exceeds Rs. 50 lakhs.

Provisional attachment of bank account: : Budget 2019 has proposed amendment in Section 110 of the Customs Act, 1962 to empower the Customs proper officer to provisionally attach any bank account, during any proceeding under the Customs Act. As per the new proposed sub-section (5) of Section 110, the purpose should be for protecting interest of revenue or for preventing smuggling. Further, Section 110A is also being amended for provisional release of such provisionally attached bank account on submission of bond with required security and conditions.

Arrest of Customs offenders outside India: Budget 2019 has proposed to empower the Customs proper officers to arrest a person who has committed an offence, punishable under Section 132, 133, 135, 135A or 136 of the Customs Act, outside India or Indian Customs waters. Section 104 of the Customs Act is being proposed to be amended in this regard by clause 72 of Finance (No.2) Bill 2019 by omitting the words 'in India or within the Indian customs waters'. Certain other changes have also been proposed in Section 104 to make certain offences cognizable and non-bailable.

Countervailing duty to be imposed in cases of circumvention of Countervailing duty: Section 9 of the Customs Tariff Act, 1975 is being amended by the Finance (No.2) Bill, 2019 to provide for imposition of countervailing duty in cases of circumvention of said duty. According to the new sub-section (1A), circumvention occurs in cases of altering the description or name or composition of the article on which such duty has been imposed or by import of such article in an unassembled or disassembled form or by changing the country of its origin or export or in any other manner. It may be noted that similar provision is already available since 2012 in respect of anti-dumping duty.

Notifications and Circulars

Jurisdictional authority for filing SEIS application clarified: DGFT has clarified on the jurisdictional authority for filing SEIS applications in case where the IEC holder has both DTA and

SEZ unit and one of them is having a zero export turnover. According to Policy Circular No. 25/2015-20, dated 1-7-2019, the correct jurisdictional authority for filing SEIS application would be the one under whose jurisdiction the unit with non-zero export turnover is situated. Provisions of Para 3.06(c) of the FTP-Handbook of Procedure Vol.1 have been further elaborated in this regard.

Customs duty on reimport of jewellery exported under bond for exhibition: CBIC has clarified that Additional Customs duty is not payable in cases of re-import of jewellery earlier exported under bond/LUT for exhibition abroad or on consignment basis. Circular No. 17/2019-Cus., dated 19-6-2019 observes that as there was no sale involved, there was no liability to pay Central Excise duty as the same arises, as per Articles of Jewellery (Collection of Duty) Rules, 2016, only at the time of first sale. The Circular however states that if the jewellery was exported under rebate, repayment of rebate is required at time of re-import.

Redemption of authorisations - DGFT stresses issuing of one consolidated deficiency letter: : DGFT has issued a Trade Notice reiterating that in processing of redemption request of Advance Authorization/EPCG cases, Regional Authorities are not to issue multiple deficiency letters in piecemeal manner. DGFT has stressed issuing of one consolidated deficiency letter to the importer mentioning all deficiencies in it. Second deficiency letter under unavoidable circumstances may be issued only after the approval of head of the RA. Trade Notice No.20/2019-20, dated 26-6-2019 has been issued for this purpose.

Procedure relaxed for Transport and Marketing Assistance for specified agriculture products: Requirement of Export Promotion copy of shipping bill and landing certificate for availing the benefit of Transport and Marketing Assistance (TMA) for specified agriculture products has been dispensed with, from the date of effect of Public Notice 82/2015-20 dated 20-3-2019. Additionally, exports from/of SEZ/EOU/FTWZ have also been made eligible for the benefit of TMA. DGFT Public Notice No. 12/2015-20, dated 25-6-2019 for this purpose amends Chapter 7(A) of Handbook of Procedures Vol. 1 and the Aayaat Niryaat Forms.

Ratio decidendi

Goods cleared for home consumption do not retain identity of imported goods: Gujarat High Court has held that imported mis-declared goods, which were subsequently cleared for home consumption after payment of duty and furnishing of bond and guarantee, no longer retain identity of imported goods and can be exported. The High Court in this regard noted that there is no question of re-export. It observed that unless there is a statutory bar or statutory requirement for export are not satisfied, authorities cannot deny permission to export. According to the department, it had denied exports to deter the importer from committing same irregularities again.. [*Naitik Enterprise v. UoI* - 2019-VIL-287-GUJ-CU]

Valuation – No indication for how market survey conducted, is wrong: CESTAT Delhi has set aside order of rejection of declared value by the adjudicating authority observing that adjudication order did not indicate as to how market survey was conducted and how transaction value was rejected. The Tribunal held that if any

transaction value is rejected by the assessing authority, it must be done under Section 14 of the Customs Act read with Customs Valuation Rules, 2007. It observed that appellant-importer accepted enhanced value and paid duty only to avoid heavy demurrage and detention charges. [*Tushar Trading Company v. Pr. Commissioner* - 2019-VIL-351-CESTAT-DEL-CU]

Mere enhancement of value not carries stigma of mis-declaration for penalty: CESTAT Mumbai has ruled that penalties under Section 112 of the Customs Act as consequence of overvaluation without any evidence is unsustainable. It held that it is essential for the adjudicating authority to establish the difference between assessed and declared value to prove any attempt to conceal real transaction. The Tribunal was of the view that mere application of rules for enhancement of value does not carry stigma of mis-declaration. It also noted that the relationship between importer and exporter must be tested against Customs Valuation Rule 2(2). [*S Muthusamy* v. *ADG (Adjudication)* - Final Order No. A/86083-86086/2019, dated 6-6-2019, CESTAT Mumbai]

Penalty on CHA under Customs Section 114 is incorrect: CESTAT Mumbai has held that as separate provisions of Customs House Agents Licencing Regulation, 2004 exist which is a comprehensive self-contained scheme for licensing, operations, etc., imposition of penalty under Section 114 of the Customs Act on a CHA is patently incorrect. The Tribunal observed that every agent who has a licence is connected with import/export and if an agent can be proceeded against under Section 114 merely because of being an agent, then every agent must be made a noticee in proceedings under Sections 111 and 113 which is not intended. [*Kailash Bahiru Jadhav* v. *Commissioner* - Final Order No. A/86092 / 2019, dated 13-6-2019, CESTAT Mumbai]

Submission of EO Discharge Certificate is only a procedural condition: CESTAT Bangalore has held that submission of Export Obligation Discharge Certificate (EODC) is only a procedural condition. It held that in the absence of one, if the assessee can prove the factum of export and foreign exchange realization by way of other corroborative evidences, then benefit of Notification No. 43/2002-Cus. was not deniable. The Tribunal hence waived the demand of interest and penalty observing that the importer had already closed down business and had paid entire duty despite fulfilling export obligation. [*Hungi Granites v. Commissioner* – 2019 (366) ELT 736 (Tri. – Bang.)]

Computer with integrated CPU, VDU and virtual keyboard is portable PC: Computer having integrated CPU, VDU, but without physical keyboard (having virtual keyboard), and weighing less than 10 kg is classifiable as portable PC under TI 84713010 and not under TI 84715000 of the Customs Tariff Act, 1975. The Tribunal found no literature to support the contention that since product does not have in-built keyboard or mouse, it cannot be classified as portable computer. It ruled that the term portable computer is not merely limited to laptops and notebooks but covers computers that can be relocated easily. [*Lenovo India v. Commissioner* - 2019-VIL-389-CESTAT-MUM-CU]

Safeguard duty on solar cells – High Court vacates interim relief against levy: Gujarat High Court has vacated the ad-interim relief granted to petitioner (importers) against imposition of safeguard duty on solar cells imported into India. The High Court observed that final findings of DGTR showed that domestic industry has suffered injury, and if ad-interim relief is continued, domestic industry may collapse. It noted that the petitioner had already

availed four months of interim relief out of the limited duration of levy of such duty. It also noted that volume of imports grew 671% while domestic industry grew only by 126%. [*Jupiter Solar Power* v. *UoI* - 2019-VIL-297-GUJ-CU]

Part of machine – Conditions for classification as 'part': Court of Justice of the European Union has reiterated that in order to classify an article as 'parts', it is not sufficient to show that without that article the machine or apparatus is not able to carry out its intended functions. It must also be established that the mechanical or electrical functioning of the machine or apparatus in question is dependent on that article. Consequently, it must be examined if part qualifies as part of general use. CJEU held that welded steel part at issue is classifiable as *Tube or Pipe fitting* of general use within Note 2 to Section XV of CN, and not as part of radiator. It observed that internal diameter of collar was of conventional diameter.. [*Korado v. Genralni Reditelstvi Cel* – Judgement dated 15-5-2019 in Case C-306/18, Court of Justice of the European Union]

Central Excise and Service Tax

Budget 2019 – Legacy dispute resolution scheme

Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019: Finance Ministry has, as part of Budget 2019, proposed a dispute resolution cum amnesty scheme named the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019. The scheme is being introduced for resolution of disputes relating to central excise, service tax and cesses, all earlier subsumed in Goods and Services Tax (GST) in 2017. While providing relief from a percentage of tax dues (ranging from 40% to 70%), this scheme also provides for waiver of penalty and interest. Additionally, the declarant would not be liable to be prosecuted for the matter. If the tax dues are payable on account of voluntary disclosure by the declarant, then, no relief shall be available with respect to tax dues. Meaning of 'tax dues' has also been elaborated in Finance (No.2) Bill, 2019 which also states that all persons shall be eligible to make a declaration under this scheme except as enumerated in clause 124 of the Bill. Further, according to clause 129 of the Bill, any amount paid under this scheme cannot be paid through the input tax credit account and will not be refundable under any circumstances. The provisions also provide that such amount paid shall not be available as input tax credit.

Ratio decidendi

Refund of credit of Swachh Bharat Cess on export of services, available: CESTAT Mumbai has held that appellant is entitled to refund of Swachh Bharat Cess paid on input services used for providing export services. It was observed that Swachh Bharat Cess may be considered separate from Service Tax but, will follow the same legal framework. The Tribunal was of the view that as per Section 119(5) of the Finance Act, 2015, rules notified under Finance Act, 1994 which also includes Cenvat Credit Rules 2004, shall be applicable to Swachh Bharat Cess as

they apply to service tax. [*State Street Syntel Services (P) Ltd. v. Commissioner* - 2019-VIL-348-CESTAT-MUM-ST]

Discount from car dealer to bank disbursing loan is not for any service: CESTAT Chennai has held that discount received by a bank from a car dealer while disbursing loan for the car sold by the dealer was not for any service and that the activity was not covered under Business Auxiliary Service. The Tribunal observed that every flow of money does not constitute consideration and that for rendering a service, there should be a relationship of service provider and recipient. It observed that the bank was never a commission agent of the dealer and would not disburse loan unless satisfied on conditions. [*IndusInd Bank Ltd. v. Commissioner* - 2019 (25) GSTL 220 (Tri. – Chennai)]

Cenvat credit of tax paid on demurrage charges is available: CESTAT Mumbai has held that demurrage was part of handling of import and export shipments of the assessee and therefore Cenvat credit of tax paid on such demurrage charges would be available. The demurrage charges were paid by the C&F service provider on behalf of the assessee and billed to him as out of pocket expenses. The Tribunal also observed that Customs Clearance Service also qualified to be input service covered by Cenvat Rule 2(l). [*Federal Express Corp.* v. *Commissioner* - Final Order No. A/86087/2019, CESTAT Mumbai]

Cenvat credit of service tax paid for insuring deposits – Issue referred to Larger Bench: CESTAT Chandigarh has referred the question to Larger Bench as to whether a banking company would be entitled to avail Cenvat credit on service tax paid to Deposit Insurance and Credit Guarantee Corporation for insuring deposits. The Tribunal in this regard noted that contrary orders were passed by the CESTAT in the cases of *State Bank of Bikaner & Jaipur v CCE-ST* and *ICICI Bank* v. *Commissioner.* [*State of Patiala v. Commissioner* - 2019-VIL-426-CESTAT-CHD-ST]

Export of service - Channel carriage fees to be considered as 'intermediary': CESTAT Mumbai has held that channel carriage fees which is towards channel carriage by channel distribution partners in India cannot be added to export turnover for determination of refund of accumulated Cenvat credit. The Tribunal was of the view that services of mediation of provision of service by channel distribution partner are 'intermediary' as per Rule 2(f) of the Place of Provision of Services Rules, 2012. It was held that since the place of location of these services is in India, said services cannot be considered as export of services. [*Commissioner v. Lamhas Satellite Services* - Final Order No. A/86064-86067/2019, dated 4-6-2019, CESTAT Mumbai]

Refund - Benefit of Supreme Court decision cannot be taken after levy attains finality: Rejecting refund application filed beyond period of limitation, the Kerala High Court has rejected the plea that the amount paid by the assessee was not due from it as service tax because the value of materials supplied free of cost by the service recipients was not includible. The High Court observed that assessee cannot take advantage of Supreme Court decision in the case of *Bhayana Builders* since levy of service tax from the assessee had attained finality by the time the Supreme Court rendered said decision. Supreme Court's 9 Judge Bench decision in the case of *Mafatlal Industries* was relied upon. [*S.I. Property Kerala (P) Ltd v. Commissioner* – Judgement dated 20-6-2019 in C.E. Appeal No. 1 of 2019, Kerala High Court]

No refund of Cenvat credit on closure of factory – Larger Bench of Bombay High Court: Full Bench of the Bombay High Court has held that Cenvat credit cannot be refunded merely because inputs were lying unutilised or were capable of being utilised, but manufacturing activities came to halt because of closure of factory. The High Court was of the view that cash refund is not permissible in terms of clause (c) to proviso to Section 11B(2) of the Central Excise Act, 1944 where an assessee is unable to utilize credit on inputs. The Court also held that the decision of the Supreme Court in the case of *Slovak India* cannot be read as a declaration of law under Article 141 of Constitution of India. [*Gauri Plasticulture P. Ltd.* v. *UoI* – Judgement dated 14-6-2019 in Central Excise Appeal No. 13 of 2007 and Ors., Bombay High Court]

Cereal bar not containing sugar or jaggery can be classified as sweet meat: CESTAT Hyderabad has held that a product need not contain sugar or jaggery to be held as *Chikki,* classifiable under TI 2106 90 99 as sweet meat. The Tribunal for this purpose observed that even if a product is made of cashew nuts, cereals or other ingredients such as puffed rice or soya crispies, the goods would not lose identity as sweet meat cereal bar. Presence of meagre amount of cocoa was held as not relevant. Benefit of Notification No. 3/2006-CE was also allowed, observing that words '*similar edible preparation*' is of wide compass. [*Shaik Iqbal Mohammed* v. *Commissioner* - 2019 (25) GSTL 545 (Tri. – Hyd.)]

Valuation – Related person – Mutuality of interest important: CESTAT Ahmedabad has held that the findings of the appellate authority that assessee and its customers were related because some of the directors were common to both of them, was without any basis. It was held that there was no evidence of mutuality of interest. The Tribunal observed that even clause (i) of Section 4(3)(b) of the Central Excise Act, 1944 was never invoked in the show cause notice and therefore the impugned order was incorrect. It also noted that customers were not selling entire goods of assessee but only 4 to 5% of only one product. [*Nilkamal Ltd.* v. *Commissioner* - Final Order No. A/10970-10971/2019, dated 3-6-2019, CESTAT Ahmedabad]

Value Added Tax (VAT)

Ratio decidendi

Sales Tax exemption or deferment – Availability to units after re-organization of States: Larger Bench of the Supreme Court has accepted the contention of the States of Madhya Pradesh and Chhattisgarh that from the date when new State of Chhattisgarh came into existence, trade between territories of MP and Chhattisgarh would be in the nature of inter-State sales and not intra-State sales. It held that Sales Tax Act in force in unified State of Madhya Pradesh would continue to apply to MP and Chhattisgarh as two separate enactments applicable to two different States but within territorial limits. The Apex Court thus upheld the stand taken by the States that the units situated within MP and Chhattisgarh would continue to enjoy benefit of exemption in respect of intra-

State trade within the particular State and not in respect of inter-State trade between these two States. The Court noted that as per Article 286, States are not competent to enact legislation relating to taxation of inter-State sales and the provisions of relevant statute on reorganization of the said two States did not provide for considering trade between them as intra-State. The contention of the assessees that even inter-State transaction were entitled to some exemption under the relevant clauses were left open to be raised before authorities as they were not raised before. [*State of MP* v. *Lafarge Dealers Association* – Judgement dated 9-7-2019 in Civil Appeal No. 5302 of 2019 and Ors., Supreme Court Larger Bench]

No provision of deregistration in CST, dealer can also register in GST: Gujarat High Court has held that no provision for automatic deregistration under CST Act, after the introduction of GST, has been made in the Taxation Laws (Amendment) Act 2017, unlike the Gujarat VAT Act which provides for automatic deregistration if specific goods are not dealt with. The High Court, observing that the dealers dealing in commodities other than those under Section 2(d) of the CST Act are required to be registered under the GST Acts, rejected the plea that dealers registered under GST Act cannot be registered under CST Act. [*Gaurav Contracts Company v. State of Gujarat - 2019-VIL-281-GUJ*]

Input Tax Credit (ITC) not a matter of right but concession: Gujarat Bombay High Court has held that where evidence as to whether taxes had been paid by the vendors of appellant were not forthcoming, attitude of assessee making no efforts to bring its vendors to produce their records in the face of findings of authorities, is not reasonable. The Court held that appellate authority was justified in disallowing input tax credit of Maharashtra VAT. It also observed that the Bombay High Court in the case of *Mahalaxmi Cotton & Ginning Pressing & Oil Industries* had observed that ITC is not a matter of right but a concession. [*Valia Associates* v. *State of Maharashtra* - 2019-VIL-269-BOM]

Property tax payable for use of municipal land for laying cables: Chhattisgarh High Court has held that since Municipal Corporation has passed a resolution to impose property tax for use of land for laying underground cable against all cellular companies, property tax is payable. It observed that levy is not for laying cables but for use of land for laying the telecommunication cables. The Court observed that the definition of land in Chhattisgarh Municipal Corporation Act was pari materia with that in the Gujarat Provincial Municipal Corporations Act, 1949 hence Supreme Court judgement in *Ahmedabad Municipal Corporation v. GTL Infrastructure* was applicable. [*Bharti Airtel* v. *State of Chhattisgarh* - 2019-VIL-293-CHG]

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