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GST 3.0 – The way forward!

By **Brijesh Kothary**

As we enter the third year of GST implementation, the focus of GST Council appears to be shifting from rate rationalization and compliance simplification to revenue growth. There have been various representations from the trade and industry, particularly renewable energy, automobile and real estate sectors for restructuring of tax rates to boost growth. There is no doubt that the Government is receptive to such demand, however, the priority for now is clearly on securing the revenue.

As per the interim budget data, the Government expects growth of over 19% in GST collections in the year 2019-20. It is estimated that there has been a shortfall of about Rs. 1,00,000 crore in GST revenue earned in 2018-19, compared to what was forecasted. The shortfall was expected given that the GST rates for several goods and services have been reduced from time to time. What has really taken the authorities by surprise is the decline in the number of entities filing returns and upsurge in the cases of tax evasion.

Given the above, the GST Council, in its 35th meeting, has laid stress on simplicity and flexibility in furnishing of returns and development of a robust system of raising red flag for real time identification of fraudulent activities. Modus operandi adopted to evade payment of indirect taxes can be broadly categorized as below:

a. Invoices out of system
b. Undervaluation
c. Non-payment of taxes - Missing taxpayer
d. Inflated tax credits

In this era of self-assessment, the enforcement authorities are not only expected to interpret the tax laws, but also understand the way the economy functions. They must equip themselves with emerging laws that have a bearing on efficient tax administration. The Directorate General of Audit has recently issued audit plan for the year 2019-20 by dividing the assessee based on their turnover and certain local risk parameters. Additionally, some of the tools that may help the authorities in increasing fiscal space and make taxation simpler and more predictable for the taxpayers, are discussed in the below paragraphs.

Electronic invoicing system

An electronic invoice is issued, transmitted and received in a structured data format which allows for its automatic and electronic processing. Electronic invoicing system is prevalent and widely adopted in Latin American countries. It helps to reduce operating expenses by eliminating paper and data entry and automating workflow. It also enables real-time/online view and traceability of invoice-related documents and eliminates the possibility of falsification.

Rule 138(2) of the CGST Rules provides for generation of Invoice Reference Number (*IRN*) from the common portal by uploading the details of tax invoices in FORM GST INV-1 in lieu of tax invoice, which would be valid for thirty days from the date of uploading. Once IRN is integrated with the ERP system, the assessee would be freed from the inconvenience on account of

multiple data entry for furnishing of returns and generation of e-way bills. This would also substantially reduce the issues relating to verification of input tax credits.

In the 35th meeting, the GST Council decided to introduce electronic invoicing system for B2B transactions. It is proposed to be rolled out in a phased manner from January 2020. It is expected to help tax authorities in combating tax evasion. The emphasis would be to lay down electronic trail at every stage of supply so that the fraudulent seller is identified real time or at the earliest. The government has also proposed for inclusion of Quick Response (QR) Code in the tax invoices and bills of supply, to boost digitization.

Denial of facility to generate e-way bills for non-furnishing of returns

Rule 138E of the CGST Rules lays down restriction on furnishing of information in PART A of FORM GST EWB-01 if a person, whether as a supplier or a recipient, fails to furnish the returns for two consecutive tax periods. This restriction has been introduced in order to secure the revenue of the government and also to ensure strict adherence to payment of taxes and filing of return by assessees.

If the rule relating to generation of e-way bill is not complied with, GST laws provide for confiscation of the goods or imposition of a penalty (that is equal to the tax payable on the goods being transported) on the owner of goods as well as the transporter. There has been plethora of judgments from various High Courts on issues relating to non-generation of e-way bills, detention of goods, imposition of penalty, etc. E-way bill system has played a vital role in curbing the practice of invoices generated out of the system.

As per Notification No. 22/2019-C.T., dated 23-4-2019, the above rule should have come into effect from 21-6-2019. The GST Council in its 35th meeting however recommended extension of applicability of Rule 138E of the CGST Rules by 2 months and Notification No. 25/2019-C.T., dated 21-6-2019 has been issued to this effect.

Validation of e-way bills through RFID tags

The Radio Frequency Identification Devices (RFID) use radio waves to identify certain objects. In RFID, a microchip is attached to an antenna, for transmission of information to a reader. The reader converts the radio waves into digital information that can then be passed on to the computers for validation.

Uttar Pradesh became the first State to implement RFID tags from November 2018, for verification of e-way bills generated for transportation of goods in the State. In this system, the user uploads the details of e-way bills into this device. When the vehicle passes through RFID tag reader, the reader detects the details fed into the device and transmits the same to the government portal. This data can be used by the revenue authorities to validate the supplies made by the assessees.

With the help of a central server, the person manning computer may get to know if the e-way bill has been generated for the vehicle. This system may not completely eliminate the process of manual verification of goods by revenue authorities but can restrict the manual verification to those cases which involve transport of sensitive goods, where there is a suspicion that the movement of goods is being done in a fraudulent manner.

Though no decision has been taken by the GST Council on this aspect as yet, the government intends to install RFID tag readers to record the details of goods transported by the vehicle with RFID, thereby reducing the manual intervention for verification of goods. This may prove to be an effective tool to identify and track goods and resolve the issue of circular trading.

Geo-tagging of premises

Geo-tagging is the process of adding geographic information about digital content, within metadata tags, including latitude and longitude coordinates, place names and/or other positional data. The Ministry of Corporate Affairs has made it compulsory for companies incorporated on or before 31-12-2017 to furnish e-form INC-22A ACTIVE (Active Company Tagging Identities and Verification). The form *inter alia* mandates furnishing of latitude and longitude coordinates of the registered office of the company.

The GST authorities presently undertake post registration field visit to satisfy themselves regarding genuineness of documents furnished during registration. If the tax officer is not satisfied, he can re-initiate the field visit or even initiate cancellation of registration. The application form seeking details of a person for the purpose of registration under GST law (FORM GST REG-01) provides fields for entering latitude and longitude coordinates of the place of business for which registration is sought; however, these fields are not made mandatory as yet.

The government is leveraging technology and geo-tagging facility is used to tag various assets created under different welfare schemes of the government. The present move of geo-tagging of premises is expected to curb shell companies and going forward the government intends to halt proliferation of companies used for money laundering. This facility can be utilized by the authorities to zero in on companies with a common address, contact numbers, etc. and sudden and unexpected changes in revenue that may warrant a closer look into their affairs.

New returns with ITC matching functionality

The GST Council, as per Press Release dated 21-6-2019 has laid down the schedule to migrate to the new GST return functionality. As per the transition plan, the assessees may familiarise themselves with the new functionality by using trial offline tools to upload the details of invoices and view/download the details of inward supplies on the common portal, for the period July to September 2019.

The GST Council has recommended for introduction of new return in a phased manner. Large assessees (with aggregate annual turnover in the previous financial year more than Rs. 5 Crore) would be required to upload the details of outward supplies in FORM GST ANX-1 from October 2019 onwards and furnish monthly return in FORM GST RET-01 from December 2019 (to be filed in January, 2020). To phase out the existing return filing process, the large assessees would be required to file their last FORM GSTR-1 and GSTR-3B for the months September and November 2019, respectively.

The small assessees may choose to plan their transition to the new return functionality as per the above schedule or opt for furnishing of quarterly return, wherein the taxes would be paid on monthly basis in FORM GST PMT-08. The small assessees may upload the details of outward supplies in FORM GST ANX-1 for the period October-December 2019 on continuous basis, by 10th January 2020 and furnish quarterly return in FORM GST RET-01 for the period

October-December 2019 by 20th January 2020. Accordingly, the existing system of return filing is scheduled to be completely phased out by January 2020.

The new returns functionality is intended to track credit at invoice level supplies with a clear mechanism for counter-parties to reconcile accounts and mismatches and eliminate subjective assessment by tax officials. The recipient would need to accept and lock invoices else they may not be able to take input tax credit. The new functionality is programmed considering parameters like ease of compliance, alignment to business process without additional burden, and alignment to tax administration regulations. With the new simplified version of returns, the issues relating to credit mismatch are expected to be eliminated.

Data analytics

Data analytics are used to find patterns indicative of tax evasion. The patterns discovered using big data can be used either in detection or prevention of a fraudulent activities. The skills required for performing these tasks go beyond the typical accounting and taxation skillset to include statistical and computer analysis.

The revenue authorities analyse the data collected from various sources such as GST Network, National Informatics Centre (e-way bills data), Customs authorities (ICEGATE data), Income Tax authorities, etc. to get insights, including fraud analytics, sectoral patterns and hot-spot mapping for revenue collection. This information also helps in framing of government policy and forecast the effects of such policy on GST revenue collections.

Data analytics as a tool has proved to be effective for detection and analysis of circular trade and identification of dubious exporters claiming refund of taxes. It is however important to note that analytics cannot work independently in a scenario where compliance level is slipping, as data *per se* is not actionable. The emphasis must therefore be upon increasing the level of compliance by simplification of procedures and increase taxpayers base to formalise the economy.

Parting remarks

The Council has so far done a commendable job of steering GST in the right path by keeping economic goals above the divergent political ideologies. This is evident from the fact that not once has the Council used voting to take any of the 950+ decisions taken so far. Going forward, the GST Council has a tough challenge of striking the right balance between meeting industry's demand for rationalisation of taxes and government's agenda to boost growth and revenue. Effective implementation and use of the above tools would go a long way to meet the common goals in the interest of the nation.

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Recourse available against order passed by Appellate AAR under GST

By **Nagesh Jadhav**

The provisions of GST law allow a person to apply for advance ruling to get specific points clarified from the Authority for Advance Ruling ("AAR"). The AAR is required to issue ruling

stating the position of law on the question raised in the application. However, if the applicant is not satisfied with the ruling pronounced by the AAR, the GST law enables him to file an appeal before the Appellate Authority for Advance Ruling ("AAAR").The AAAR may, after giving the parties to the appeal or reference an opportunity of being heard, pass such order as it thinks fit, confirming or modifying the ruling appealed against.

The CGST Act provides that unless the law, facts or circumstances supporting the original advance ruling have changed, the advance ruling pronounced by the AAR or the AAAR shall be binding only on:

a. The applicant who had sought it in respect of any matter referred for advance ruling;
b. The concerned officer or the jurisdictional officer in respect of the applicant.

There is no further mechanism provided in the GST law in case the applicant or the jurisdictional officer is aggrieved by the ruling pronounced by the AAAR. Therefore, many taxpayersare filing writ petition in the High Court challenging the ruling pronounced by AAAR. In this regard, attention is drawn to a recent judgement of the Bombay High Court in the case of *JSW Energy Limited* [2019-VIL-276-BOM].

The Bombay High Court refused to interfere with the AAAR's order and specifically noted that merely because the statute has not provided any further remedy of appeal, it does not become a fit case for further appeal before the High Court and any such attempt, would amount to converting the proceedings under Article 226/227 of the Constitution of India, which are essentially proceedings seeking judicial review, into appellate proceedings. The High Court further noted that even though they will not look into the merits/de-merits of the impugned order, they are empowered to judicially review the order on the basis of the principles of natural justice to check whether the order has been passed in conformity with the same. Therefore, the validity or otherwise of the impugned orders will have to be examined by applying the principles of judicial review and not the principles which apply in case of an appeal.

In delivering this judgement, the Bombay High Court relied on the judgement of the Supreme Court in the case of *Appropriate Authority and Another* v. *Smt. Sudha Patil and Anr.* [(1999) 235 ITR 118 (SC)]. In the said case, the Supreme Court had held that merely because no appeal mechanism was provided for against the order of an appropriate authority directing compulsory acquisition by the government, the supervisory power of the High Court would not get enlarged nor can the High Court exercise an appellate power.

The Bombay High Court further held that the principles of judicial review, normally do not concern themselves with the decision itself, but are mostly confined to the decision-making process and such proceedings are not an appeal against the decision in question, but a review of the manner in which such decision may have been made. In judicial review, the court determines the correctness of the decision-making process and not the correctness of the decision itself. In exercise of powers of judicial review, the court is mainly concerned with issues like whether the decision-making authority exceeded its jurisdictional limits, committed errors of law, acted in breach of principles of natural justice or arrived at a decision which is *ex-facie* unreasonable or perverse.

Although this judgement would be binding on the assessees located in the State of

Maharashtra, there is high possibility of other High Courts following this judgement.From this judgment, it can be concluded that the order passed by the AAAR, cannot be challenged in the High Court through writ petition. It can only be challenged in the High Court in the following scenarios:

a. AAAR exceeding its jurisdictional limits;
b. Committing errors of law;
c. Acted in breach of principles of natural justice; or
d. Arrived at a decision which is *ex-facie* unreasonable or vitiated by perversity

As per Section 103 of CGST Act, advance ruling pronounced by AAR or AAAR shall be binding on the applicant and the jurisdictional officer. Considering the fact that there is no statutory appellate remedy against such rulings, implications should be carefully examined before taking a decision on filing of applications for advance rulings.

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Goods and Services Tax (GST)

Notifications and Circulars

35th Meeting of GST Council – Decisions on rate changes and time extension for various forms: The 35th meeting of GST Council was held on 21-6-2019. Some of the important recommendations relating to time extension are,

- Due date for furnishing of Form GSTR-9, Form GSTR-9A and reconciliation statement in Form GSTR-9C to be extended till 31-8-2019.
- Due date for furnishing Form GST ITC-04, relating to job work, for the period July, 2017 to June, 2019 to be extended till 31-8-2019.
- Last date for filing of intimation, in Form GST CMP-02 for availing the option of payment of tax under Notification No. 2/2019-Central Tax (Rate) will also be extended till 31-7-2019.

The GST Council also extended the tenure of National Anti-Profiteering Authority by two years. Further, it took the following decisions on rate changes of few specified goods and services:

- It referred to the Fitment Committee the issues relating to GST concession on electric vehicle, charger and hiring of electric vehicle.
- Similarly, the issue related to valuation of goods and services in a solar power generating system and wind turbine, has also been referred to the Fitment Committee.
- The Council also observed that certain issues relating to taxation (rates and destination principle) relating to lottery would require legal opinion of Attorney General.

Blocking of e-way bills on non-filing of returns – Implementation of Rule 138E postponed till 21st August: Date for implementation of Rule 138E of CGST Rules relating to restriction on furnishing of information in Part A of Form GST EWB-01 has been postponed to 21-8-2019. The above said rule was was to come into force from 21-6-2019. As per Rule 138E, no person (including a consignor, consignee, transporter) will be allowed to furnish

information in Part A of Form GST EWB-01 and generate e-way bill if he has not furnished the returns for two consecutive tax periods. Notification No. 25/2019-Central Tax, dated 21-6-2019 has been issued for this purpose.

Annual Return – Clarifications on filing: Ministry of Finance has clarified that in case of a mismatch between auto-populated data in annual return (GSTR-9) and actual entry in books of accounts/returns, taxpayers shall report data as per their books of account/returns filed. The Press Release dated 4-6-2019 also advises the taxpayers to fill in their entire credit availed on import of goods from July 2017 to March 2019 in Table 6(E) of Form GSTR-9 itself, as Table 8 has no row to fill in the credit of IGST paid on imports but availed in the return of April 2018 to March 2019. It also states that any additional outward supply which was not declared by the registered person in Form GSTR-1 and Form GSTR-3B shall be declared in Pt. II of the Form GSTR-9.

GST Returns – Ministry of Finance unveils transition plan: Ministry of Finance has on 11-6-2019 shared transition plan to new GST Returns. While from July, 2019, users will be able to upload invoices using GST ANX-1 offline tool on trial basis for familiarisation, between July and September, the new return system (ANX-1 & ANX-2 only) would be available for trial. From October, 2019, GST ANX-1 will be compulsory and GSTR-1 would be replaced. Further, small taxpayers will be required to file GST PMT-08 instead of GSTR-3B, from October, 2019 while large taxpayers will have to file GST RET-01 instead of GSTR-3B from January 2020 (return for the month of December, 2019). Small taxpayers will also be required to file GST RET-01 for the quarter October – December 2019 in January, 2020.

Kerala Flood Cess will be imposed from 1st of August 2019: Kerala Flood Cess on intra-State supplies of certain goods and services in the State of Kerala will be imposed from 1st of August 2019 for two years. This Cess was earlier proposed in the Kerala Finance Bill 2019 and is for the purposes of providing for reconstruction, rehabilitation and compensation needs due to floods in Kerala in the month of August, 2018. Cess of 1% will be imposed on goods and services on which SGST is payable @ 6%, 9%, and 14%. It may however be noted that supplies made by a registered taxable person to another registered taxable person and supplies by registered person who has opted for composition levy, are exempt from such Cess. Exempted goods and services are also not liable to such Cess. As per news available in Kerala State GST portal, earlier implementation date of 1st of July has been postponed to 1st of August, 2019.

Ratio decidendi

IGST not payable on supplies from Duty Free Shops at International Airport: Allahabad High Court has, in a PIL, held that supply of imported goods to Duty Free Shops (DFS) and from DFS at international airport do not attract any customs duty or IGST. It noted that the effective taxable event for levy is when the Bill of Entry is filled, whereas in the case of DFS goods do not cross the customs frontier. The High Court observed that goods cleared to departing international passengers are taken along by such passengers therefore levy of Customs duty and IGST do not arise. It was also noted that supplies by DFS to international arriving passengers is before clearance from home consumption. It was observed that the definition of 'export' and 'export of goods' under both the laws, i.e. under Customs and GST laws, is the same. [*Atin Krishna* v. *UoI* - 2019-VIL-231-ALH]

ITC available of inputs and services used in construction of mall rented out: Observing that rationale of GST is to prevent cascading, Orissa High Court has allowed credit of input tax paid on

purchases of inputs and services used in construction of a shopping mall which was rented out. The petitioner had contended that Section 17(5)(d) of the CGST Act restricts credit in a situation where inputs are consumed in the construction of the immovable property which is sold, and which is not the case here. Noting that the petitioner-assessee was not using property for own purpose but letting out same, the High Court was of the view that denial of ITC, where tax chain is not broken, is not correct. While considering the provisions of Section 17(5)(d), it was held that the narrow construction of interpretation put forward by the Department is frustrating the very objective of the Act, inasmuch as the petitioner in that case has to pay a huge amount without any basis. [*Safari Retreats* v. *Commissioner* - 2019-VIL-223-ORI]

Principal Bench of GST Tribunal at Lucknow and not in Prayagraj: Allahabad High Court has quashed the proposal of creation of Principal Bench of the GST Tribunal at Prayagraj and directed its setting up in Lucknow instead. The Court in this regard observed that the proposal to establish the Principal Bench (State Bench) at Prayagraj as there is permanent seat of High Court at Allahabad, was devoid of merits. It observed that there are two seats of the High Court and none of which are permanent and can be changed as per the provisions of the Amalgamation Order, 1948. Supreme Court Judgement in the case of *Nasiruddin v. State Transport Appellate Tribunal* was relied on. [*Oudh Bar Association, High Court Lucknow Bench* v. *UoI* - P.I.L. Civil No. 6800 of 2019, decided on 31-5-2019, Allahabad High Court]

Registration – Deemed registration within 3 days when not applicable: In a case involving call for deemed GST registration as no communication was received from the department within 3 days, Kerala High Court has held that if the proper officer has taken steps within such time, advantage of deeming provision is not available even though communication is not received within such time. The High Court noted that there was attempt by the department to intimate defects in the application, but that could not be done due to a technical snag. It was held that the deeming provision is to be interpreted strictly as it creates a legal fiction. [*West Bengal Lottery Stockists Syndicate Pvt. Ltd.* v. *UoI* - 2019-VIL-235-KER]

GST Form TRAN-1 – High Court directs department to provide certain facilities: In a case involving difficulty in filling up correct credit amount in Form TRAN-1, Delhi High Court has directed the department to either open the portal to again to file the form or to accept a manually filed form. The High Court also directed the department to consider providing a facility of saving onto the dealer's system the filled-up form and reviewing it before submission. It stated that department should permit print-out of filled-up form and a message acknowledging that the form with the credit claimed has been correctly uploaded, should pop out. [*Bhargava Motors* v. *Union of India* – Order dated 13-5-2019 in W.P.(C) 1280/2018, Delhi High Court]

GST fraud - Provisions of UP GST Act do not override Indian Penal Code: Allahabad High Court has held that there is no bar in the UP GST Act on lodging FIR under the Criminal Procedure Code for offences punishable under the Indian Penal Code (IPC) even though, for the same act/ conduct, prosecution can be launched under the UP GST Act. It observed that there is no provision of UP GST Act which overrides the provisions of IPC. The High Court also rejected the plea that except for offences specified in sub-section (5) of Section 132, all offences under the UP GST Act are non-cognizable as per sub-section (4) of Section 132 and therefore no FIR

can be lodged. The Court was of the view that rather, Section 131 of the UP GST Act impliedly saves the provisions of the Penal Code. [*Govind Enterprise* v. *Sate of U.P.* - 2019-VIL-254-ALH]

No profiteering if sales in pre-GST era absent: Observing that the real estate project was not in existence before the implementation of GST, National Anti-profiteering Authority (NAA) has held that there is no case of profiteering. DGAP had noted that there was no price history of units sold in pre-GST era which could be compared with post-GST base price to determine whether there was any profiteering. NAA also held that as there was no comparative pre-GST ITC that was accumulated or utilized by the assessee the question of profiteering does not arise. [*Hermeet Kaur* v. *Conscient Infrastructure* – Order dated 24-5-2019 in Case No. 33/2019, National Anti-profiteering Authority]

No profiteering when tax rate increased post-GST, cost of non-creditable tax not passed on and comparable price absent: National Anti-profiteering Authority has accepted the findings of DGAP on absence of profiteering by a DTH service provider. The applicant had pleaded that entertainment tax, which was levied in addition to service tax in the pre-GST period, was removed post-GST and hence prices should have come down. The Authority however observed that post-GST, tax rate increased from 15% service tax to 18% GST. The DGAP had noted that assessee had absorbed the burden of non-creditable entertainment tax and had not passed it to its distributors. Evidence of incremental value offered to customers, post-GST, by way of additional content at no extra cost, was also noted. [*Navneet Gupta* v. *Bharti Telemedia Pvt. Ltd.* - 2019-VIL-31-NAA]

Exemption to construction of Inland Waterways Terminal for IWAI: In a case of contract with Inland Waterways Authority of India for construction of multi-modal IW terminal on EPC basis, West Bengal AAAR has held that benefit of Sl. No. 3(vi) of Notification No. 11/2017-CT (R) as amended by Notification Nos. 24/2017-CT(R) and 31/2017-CT(R), is available. AAAR in appeal observed that though the terminal will facilitate commerce, its creation is not for propagating commercial interest of IWAI and that remittances by IWAI to Shipping Ministry are part of the government revenue and not business proceeds. [*ITD Cementation India* – Order dated 15-5-2019 in Appeal Case No. 03/WBAAAR/Appeal/2019, West Bengal Appellate Authority for Advance Ruling]

ITC of tax paid on lease rent during preoperative period when not available: West Bengal Appellate AAR has held that input tax credit is not available on input tax paid on lease rent during the pre-operative period for leasehold land for construction of resort for furtherance of business, in a case where the same is treated as capital expenditure. Dismissing the appeal, the AAAR observed that assessee was not providing any construction service or operating resort on behalf of any lessor. Noting that such rent has nexus with construction, it held that appellant is building on own account for furtherance of business, and hence ITC is barred. [*GGL Hotel and Resort* – 2019-VIL-43-AAAR]

Diagnostic service provider not liable to take registration under GST: AAR Kerala has held that the applicant, a clinical establishment engaged purely in diagnostic services, is not liable to take registration under GST since the applicant was supplying services that were wholly exempt from GST. Reliance in this regard was placed on provisions of Section 23 of the CGST Act and Serial No. 74 of Notification No. 12/2017-Central Tax (Rate). It was held that services

by way of diagnosis come under the category of health care services covered under SAC 9993 in connection with health care services provided by a clinical establishment and are, therefore,

exempted. It was however held that if the applicant receives any goods or services liable to tax under reverse charge then compulsory registration would be required to be obtained in accordance with the provisions of Section 24. [In Re: *Medivision Scan and Diagnostic Research Centre Pvt. Ltd.* - 2019-VIL-140-AAR]

Delayed payment charges in respect of electricity charges, not liable to GST: Observing that the supply of electricity power was exempted by virtue of Serial No. 104 of Notification No. 2/2017-Central Tax (Rate), Appellate AAR Rajasthan has held that since the supply of electricity stands exempted, the incremental value, as per Section 15(2) of the CGST Act, 2017, of such supply due to recovery of delayed payment charges, would also remain exempted. With respect to taxability of cheque dishonor charges, it was however held that such charges are recovered in respect of supply of services in accordance with clause 5(e) of Schedule-II to the CGST Act, 2017. Thus, the same are liable to GST. The applicant was engaged in operating and maintaining the electricity distribution network and was also recovering some non-tariff charges in respect of application/ connection fees, charges for meters/ transformers, charges for extension of supply lines, cheque dishonor charges and delayed payment charges. [In RE: *TP Ajmer Distribution Limited* - 2019-VIL-27-AAAR]

No ITC on motor vehicles used for providing renting of motor vehicle service: West Bengal AAR has held credit of input tax (ITC) paid on purchase of motor vehicle is not available when the same is used for payment of tax for supplying cabs on a rental basis. The Authority referred to the provisions of Section 17(5)(a) of the CGST Act, 2017 as amended in 2019 and observed that credit in respect of purchase of motor vehicle is available in case where such motor vehicle is used for further taxable supply of transportation of passengers. It observed that the services of renting of motor vehicles is covered under SAC 9966 and the services of transportation of passengers is covered under SAC 9964. Drawing differences between the service of transportation of passengers and renting of motor vehicle, it was held that since the applicant provides cab rental services for a certain amount irrespective of the distance for which the cab is used for travel, such services would fall under SAC 9966 as renting of motor vehicle and ITC would not be available. [In RE: *Reesham Associates* - 2019-VIL-150-AAR]

TDS not deductible in respect of specified supplies to Municipal Corporation: The applicant was providing conservancy or solid waste management service to the Conservancy Department of the Municipal Corporation. The issue involved was whether TDS must be deducted from payments made by municipal corporation. AAR West Bengal noted that in view of Sl. No. 3 and 3A of Notification No. 12/2017-Central Tax (Rate), services provided to the Government, a local authority or a governmental authority by way of water supply, public health, sanitation, conservancy, solid waste management or slum improvement and up-gradation are exempt from GST. It was held that since the recipient was a municipal corporation, which was a local authority as defined under Section 2(69) of the CGST Act, 2017, the services provided by the applicant would be exempt from GST. Further, it was held that since the applicant is making exempt supply to the municipal corporation, the notifications regarding TDS would not be applicable. [In Re: *Maruti Enterprise* - 2019-VIL-151-AAR]

EU VAT – Time of supply – Acceptance of supply also important: Court of Justice of the European Union has held that although VAT is chargeable on date of issue of invoice, date of chargeability can be the time when service supplied is accepted by the other party, provided 'acceptance' is stipulated in the contract binding them. The Court held that it is not possible to ascertain the consideration due before the customer has accepted the construction or installation work, as obligated in contract. It observed that formalities like formal breakdown of expenses are not relevant in determining time of supply. [*Budimex S.A.* v. *Minister Finansów* – Judgement dated 2-5-2019 in Case C-224/18, Court of Justice of the European Union]

Customs

Notifications and Circulars

India implements tariff retaliatory measures against USA: India has increased import duties on certain goods imported from USA with effect from 16-6-2019. The retaliatory tariff measures, which are aimed to counter USA's measures on import of steel and aluminium from India, were first proposed in June 2018 but were repeatedly postponed 8 times. Customs Duties have been increased on lentils, chickpeas, almonds, walnuts, apples, phosphoric acid, boric acid, diagnostic reagents, certain flat rolled products of iron, steel and stainless steel, electric steel and certain articles of iron and steel imported from USA. Notification No. 17/2019-Cus., dated 15-6-2019 amends Notification No. 50/2017-Cus. for this purpose.

Customs (Supplementary Notice) Regulations, 2019 notified: CBIC has notified the Customs (Supplementary Notice) Regulations, 2019 for issuance of supplementary notice under Section 28 or 124 of the Customs Act, 1962. The provisions relating to such supplementary notices were introduced in the Customs Act in Budget 2018. The supplementary notice, as per the new Regulations, may be issued in cases of difference in the demand of quantum of duty including cases necessitating change of adjudicating authority, for invoking additional penal actions, for invoking additional sections of the Act and in case there is any additional evidence having a significant bearing on the outcome of the case. Notification No. 42/2019-Cus. (N.T.), dated 18-6-2019 has been issued for this purpose.

Manufacture and Other Operations in Warehouse Regulations, 2019 notified: Ministry of Finance has notified new Manufacture and Other Operations in Warehouse Regulations, 2019 on 19-6-2019 in supersession to the said Regulations of 1966. Accordingly, a person who has been granted a licence for a warehouse and a person who applies for a such licence along with permission for manufacturing or other operations therein, are eligible to apply for operating under the said Regulations. As per the new Regulations, the person filing an application for such permission for working under these provisions has to furnish his accounts of receipt and removal of goods, to the bond officer (Officer of Customs in-charge of a warehouse) on monthly basis. Among other changes, the new Regulations also explicitly provide for penalty as per Customs Act, in case of any contravention.

IGST refund on exports – CBIC prescribes mechanism to verify ITC: CBIC has issued a circular to put in place a mechanism for verification of IGST payments, in certain cases, for goods exported out of India. As per Circular No. 16/2019-Cus., dated 17-6-2019, DG (Systems) will work out the suitable criteria to identify risky exporters and inform the respective Chief Commissioner of Central Tax about the past IGST refunds granted to such exporters. While 100% examination of exports of such risky exporters would be mandatory, it may be noted that even if the consignment is cleared after such examination, such Shipping Bills shall be suspended for IGST refund. The circular also states that Chief Commissioner of Central Tax shall get the verification of the IGST refund claims and other related aspects done and the Customs officer at port of export will process the refund if the ITC availed by the exporter is found to be in accordance with the GST law. It may be noted that 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.

Smuggling of foreign currency – Guidelines for launch of prosecution revised: CBIC has revised the guidelines for launch of prosecution in the cases of smuggling of foreign currency. Observing that foreign nationals once released on bail are not available to face trial, it has now been directed that prosecution in cases involving foreign nationals may be launched at the earliest, even before issuance of show cause notice. Circular No. 12/2019-Cus., dated 24-5-2019 in this regard amends para 6 of Circular No. 27/2015, dated 23-10-2015. Further, 'foreign currency' has also been added in the said para to allow for launch of prosecution immediately.

Export benefits – RCMC required only from one Export Promotion Council: DGFT has clarified that an entity requires only one RCMC from its relevant EPC as per Appendix-2T to the FTP-Handbook of Procedures Vol.1 and that the entity can keep on adding any number of businesses afterwards and RCMCs from other EPCs will be optional only. According to Trade Notice No. 17/2019-20, dated 22-5-2019, if an entity having RCMC for goods from a particular EPC/FIEO exports services subsequently, there is no need to obtain second RCMC from SEPC as membership with SEPC in such a case is merely optional.

FTP – No requirement of destruction certificate from excise/customs authorities: DGFT has waived off the requirement of destruction certificate from excise/customs authorities for unutilized duty free imported material in cases of regularisation of bona fide defaults. Now, Authorisation holder will have to submit a self-declaration along with Chartered Accountant's certificate. Para 4.49(g)(i) of Handbook of Procedures Vol.1 relating to regularization of bona fide default in cases where authorisation is issued for import of drugs from unregistered sources with pre-import condition, has been amended by DGFT Public Notice No. 11/2015-2020, dated 14-6-2019 for this purpose.

Flash sale price acceptable for Customs valuation purposes – WCO adopts Advisory Opinion 23.1: The Technical Committee on Customs Valuation at WCO has at its 48th Session recently adopted an instrument (Advisory Opinion 23.1) on valuation of goods purchased in a flash sale. Reiterating that transaction value is the primary basis under the Agreement on Implementation of Article VII of GATT 1994, Committee concluded that highly discounted price is acceptable for Customs valuation purposes. It also held that transaction value in a flash sale could be used to determine

transaction value of identical or similar goods for which there is no transaction value.

Import policy for Bio-fuels relaxed: Policy condition for import of biofuel, classifiable under EXIM codes 2207 20 00, 2710 20 00 and 3826 00 00, has been removed with effect from 24-5-2019. This Policy condition allowed imports only for non-fuel purposes subject to actual user condition. It may however be noted that Import Policy of bio-fuels remains 'restricted' and its import will require import licence from DGFT. Schedule-I (Import Policy) of ITC (HS) has been amended in this regard by Notification No. 6/2015-20, dated 24-5-2019.

Ratio decidendi

Valuation – Doubt to justify enquiry to be based on certain reasons: Supreme Court has held that a doubt to justify detailed enquiry under proviso to Section 14 of the Customs Act, 1962 read with Rule 12 of the Customs Valuation Rules should not be based on initial apprehension, be imaginary or a mere perception not founded on reasonable and certain material. The Apex Court in this regard held that doubt should be based and predicated on the material in the form of 'certain reasons' and not mere *ipse dixit*. Adjudication order, not giving cogent and good reason for rejection of transaction value, was held flawed and contrary to law. [*Century Metal Recycling Pvt. Ltd.* v. *Union of India* – Judgement dated 17-5-2019 in Civil Appeal No. 5011 of 2019, Supreme Court]

Customs duty can be demanded only from importer if owner not redeeming goods: Bombay High Court has held that demand of Customs duty can only be made upon the importer of the goods and not upon the person from whose ownership the goods are confiscated in case the owner of goods does not seek to redeem the goods under Section 125 of the Customs Act, 1962. The High Court, for this purpose, relied upon Supreme Court decision in case of *Fortis Hospital Ltd.* and Bombay HC decision in case of *VXL (India) Ltd.* Penalty, alleging that assessee financed the import, was also set aside considering the facts of the case. [*Gagandeep Singh Anand* v. *Commissioner* – 2019 SCC online Bom 277]

Cosmetic imports – No exemption under Rule 132 of Drugs and Cosmetic Rules: Bombay High Court has reversed the CESTAT Order which had set aside the confiscation of cosmetics not imported through ports specified as per the Drugs and Cosmetics Rules, 1945. The Court in this regard rejected the plea that the goods were covered as 'substances not intended for medicinal use' under Schedule D and hence exempted by Rule 132 of the Drugs and Cosmetic Rules from the provisions of Chapter III of the Drugs and Cosmetics Act, 1940. It held that any article qualifying as 'cosmetic', within the definition contained in Section 3(aaa), cannot be called 'substance' within the definition of 'drug'. [*Commissioner* v. *Max Overseas* - 2019-VIL-275-BOM-CU]

No ADD on saccharin salts – Notification to be strictly interpreted: CESTAT Mumbai has held that anti-dumping duty under Notification No. 41/2007-Cus. is imposable only on saccharin and not on its salts. Department's plea that the word 'saccharin' is generic and wider meaning needs to be given to include even sodium saccharin, was rejected. The Tribunal observed that saccharin and its salts are not same and that the notification did not intend to levy anti-dumping duty on saccharin salts. It was held that interpretation of notification should be strictly in accordance with the wording of the notification. [*Sanjay Chemicals* v. *Commissioner* - Final Order No. A/85967/2019, dated 3-5-2019, CESTAT Mumbai]

Classification of hearing aid connectors – CJEU interprets Chapter Note 2(a) of Chapter 90: Court of Justice of the European Union has held that Note 2(a) to Chapter 90 of EU's CN, read in conjunction with the General Rules Nos. 1 and 6 for interpretation, must mean that expression '*Parts and accessories which are goods included in any of the headings of this chapter or of Chapter 84, 85 or 91*' refers only to the four-digit headings of those chapters, and not to six & eight digit codes. The CJEU however referred the case back to the referring Court on the issue of classification of hearing aid connectors, whether under Heading 8544 or under Heading 9021. [*Skatteministeriet* v. *Estron A/S* – Judgement dated 16-5-2019 in Case C-138/18, Court of Justice of the European Union]

Classification of vehicles – Intended use when to be considered: US Court of Appeals for Federal Circuit has reversed the US Court of International Trade judgment which had held a certain vehicle to be classifiable under sub-heading 8703.23.00. Classification under sub-heading 8704.31.00 was upheld. The Court in this regard held that the CIT erred by refusing to consider intended use as part of its analysis. Considering structural and auxiliary design features, and inherent use considerations, it was held that subject merchandise is not principally designed for transport of persons. The rear seats were removed in post-import processing. [*Ford Motor Company* v. *United States* – Decision dated 7-6-2019 in 2018-1018, US Court of Appeals for Federal Circuit]

Central Excise and Service Tax

Circulars

Declared service concept not applicable on service covered in Negative List: CBIC has clarified that service of access to road or bridge from 8-11-2016 to 1-12-2016, when NHAI had instructed toll operators to allow free access, was not liable to service tax. Circular No. 212/2/2019-ST, dated 21-5-2019 has not accepted the stand that service during the said period, when consideration was received from NHAI, was liable under 'agreeing to obligation to refrain from an act, or to tolerate an act…'. It is clarified that one cannot apply the concept of declared service to remove a service from the Negative List and make it a taxable service.

Ratio decidendi

Demand of Service tax - Pre-notice consultation mandatory: In a case where pre-notice consultation with assessee was absent, Delhi High Court has held that mere possibility that at the end of adjudication process, assessee may have to face consequences for committing 'offence' under Finance Act, 1994 need not *per se* render the show cause notice itself as 'offence related' SCN. The Court rejected the dispensation of para 5 of the Master Circular dated 10-3-2017 providing for consultation with the noticee before issue of show cause notice. It also observed that there was absence of any

noting in the file about any decision taken by the department not to undertake such consultation. The Master Circular was held as mandatory. [*Amadeus India Pvt. Ltd.* v. *Pr. Commissioner* – Order dated 8-5-2019 in W.P.(C) 914/2019, Delhi High Court]

Service tax not liable on transfer of copyright in perpetuity: Madras High Court has held that transfer of IP rights of parts of cinematograph films for 99 years, in excess of 60 years as prescribed under the provisions of Copyright Act, by its purchasers/producers to television channels was not liable to service tax under Section 65(105)(zzzzt) of the Finance Act, 1994. The Court has held that as the document specifically used the word 'perpetual', the transaction was outside the purview of service tax. It observed that though Department contended that use of such word was only to disguise temporary transfer, nothing was brought on record to prove it. [*Vendhar Movies* v. *Joint Director* - 2019-VIL-258-MAD-ST]

No period of limitation for filing stay applications: In a case involving non-filing of stay application at the time of filing appeal, Bombay High Court has held that so long as the appeal is not disposed of, it is open to the party to file application for waiver of pre-deposit. It observed that there was no period of limitation provided under the provisions for filing of application for dispensing with pre-deposit. The Tribunal observed that the requirement to pre-deposit is to be fulfilled *pending the appeal* and not *pending filing of appeal*. The Court in this regard observed that Section 35F of the Central Excise Act, 1944 at relevant time did not bar a party from filing appeal unless the amount confirmed was deposited. [*Siddhesh Tours and Travels* v. *Commissioner* – 2019 SCC online Bom 721]

Cenvat credit – Limitation – Amendment to Rule 4(1) not retrospective: Delhi High Court has held that amendment to Rule 4(1) of the Cenvat Credit Rules 2004, prescribing time limit of six months for availing Cenvat credit, was not applicable where import and deemed manufacture by change of MRP, both, took place prior to the amendment. The High Court hence set aside the Settlement Commission's order observing that the amendment cannot be given retrospective effect. It also observed that the right to adjustment of tax on final products accrues on the date when the tax is paid on the raw materials and that right would continue until the facility available thereto gets worked out. [*Global Ceramics* v. *Pr. Commissioner* – Judgement dated 24-5-2019 in W.P. (C) 6706/2016, Delhi High Court]

Hospitals not liable to pay service tax under business support services: CESTAT Mumbai has held that hospitals were not liable to pay service tax under Business Support Services. The Tribunal was of the view that it was immaterial that hospitals pay a portion of remuneration received to the doctors for services by them to the hospitals. CESTAT in this regard observed that it cannot be concluded that a portion of doctor's fee paid by the patients was retained by hospitals and such retention be treated as consideration paid to hospitals. Ratio of the earlier order in the case of *Sir Ganga Ram Hospital v. CCE* was held to be applicable. [*National Health and Education Society* v. *Commissioner* - Final Order No. A/85982-85998/2019, dated 29-5-2019, CESTAT Mumbai]

No liability on goods destroyed before clearance – Not material if remission sought or not: CESTAT Hyderabad has held that demand of Central Excise duty on goods that were not removed but destroyed or lost in a cyclone before their clearance, treating them as

final products, was not sustainable irrespective of the fact whether the assessee had sought remission of duty or not. It also noted that Circular No. 907/27/2009-CX did not indicate under which rule duty was payable when the goods were not removed. The Tribunal was hence of the view that to that extent there was a gap in the Central Excise Rules, 2002. [*Granules India Ltd*. v. *Commissioner* - Final Order No. A/30543/2019, dated 3-6-2019, CESTAT Hyderabad]

No liability under Section 73A of Finance Act on service tax paid under RCM and collected from agent: CESTAT Mumbai has held that service tax initially paid by the assessee under reverse charge and later collected from the insurance agents by way of adjusting the commission, was not to be deposited under Section 73A(2) of the Finance Act, 1994. The Tribunal was of the view that the amount was not in excess of service tax chargeable and collected. It also held that expenses incurred in pre-recruitment training and post licence training of agents cannot form part of gross taxable value of commission paid to insurance agents in determining the service tax liability. [*Bajaj Allianz Life Insurance Co. Ltd. v. Commissioner* - Final Order No. A/86013-86023/2019, dated 31-5-2019, CESTAT Mumbai]

Reversal of Cenvat credit merely because value of goods diminished, not required: CESTAT Delhi has set aside demand for reversal of credit observing that merely because value of goods diminished in the books of accounts, it did not permit the dept. to insist on reversal of credit particularly when such goods were available in the factory in usable condition. The Tribunal observed that there was no provision under which Cenvat credit under Central Excise Rules, 1944 could be directed to be reversed simply because inputs were not utilised for a certain period of time. [*Ester Industries Ltd.* v. *Commissioner* - 2019-TIOL-1533-CESTAT-DEL]

No bar on interest on delayed interest even in absence of provisions: CESTAT, Delhi has held that only because there is no provision for interest on delayed payment of interest that does not mean that there is any bar or prohibition for granting the same. The Tribunal observed that the department had withheld legitimate interest and that there was inordinate delay on its part in granting refund of interest which was to be paid in 2012 but was paid in 2015. Order in the case of *Kerala Chemicals & Properties Ltd.* was relied on. [*BSL Ltd.* v. *Commissioner* - Final Order No. 50699/2019, dated 17-5-2019, CESTAT Delhi]

Cenvat credit of tax paid, though not payable, not deniable: CESTAT Mumbai has allowed Cenvat credit of service tax on rent paid for residence of employee. The Tribunal observed that when service tax was collected by the service provider even on providing residential accommodation which was not subject to tax, Cenvat credit was not deniable. The case involved secondment of employee and collection of all expenses from the assessee by the service provider. [*Aditya Birla Science & Technology Co. Pvt. Ltd.* v. *Commissioner* - 2019-VIL-305-CESTAT-MUM-ST]

No service tax on TDR if land acquired without transfer of ownership: CESTAT, Chandigarh has held that the assessee who was involved only in acquisition of land for another, without any transfer of development rights from land owning company, was not liable to service tax in terms of Section 65B(44) of the Finance Act, 1994. The Tribunal observed that under development agreement, developer was permitted to carry out development activities and transfer of development rights was only in future.

It held that since assessee did not have ownership, transfer of development right and consequent service tax would not arise. [*DLF Commercial Projects Corporations* v. *CST* - Final Order No. 60554/2019, dated 22-5-2019, CESTAT Chandigarh]

Sub-contractor liable to pay service tax: Larger Bench of the CESTAT has held that sub-contractors were liable to pay service tax even if main contractor had paid tax on gross amount. It noted that according to the provisions, every person (including a sub-contractor) providing taxable service to any person (including a main contractor) must pay service tax at the rate specified. The Tribunal also observed that the mechanism under Cenvat Credit Rules ensured that there was no scope for double taxation. Master Circular dated 23-8-2007 was relied on. [*Commissioner* v. *Melange Developers Pvt. Ltd.* - Misc. Order No. 50388/2019, dated 23-5-2019, CESTAT Larger Bench]

Multi-storey parking – No service tax on construction thereof: CESTAT Allahabad has held that construction of multi-storey parking by the Lucknow Development Authority, established under the Uttar Pradesh Urban Planning and Development Act, was not liable to service tax as provision of such parking was not a commercial activity. The Tribunal in this regard observed that LDA was entrusted with responsibility of providing facilities for public amenity and mere collection of a small fee from users would not make said activity as commercial. It held that providing of public amenity cannot be for generating profit. [*Commissioner* v. *Shalimar Corp. Ltd.* – 2019 (24) GSTL 254 (Tri. – All.)]

Value Added Tax (VAT)

Ratio decidendi

Tamil Nadu General Sales Act – First sale of imported item: In a case where the aircraft was imported into India through another State and after two domestic sales outside Tamil Nadu, was brought into Tamil Nadu on payment of CST, Madras High Court has held that at the point of entry into and sale in Tamil Nadu, the aircraft was not an imported item. The sale was held liable to be taxed at 12% as per Section 3(2) read with Entry 2 of Part D of Schedule-I to TN General Sales Tax Act, and not at the rate of 20%. The High Court however held that sale of the aircraft in Tamil Nadu was the first sale for the purposes of the TNGST Act. [*Spencers Travel Services* v. *CTO* - 2019-VIL-259-MAD]

Skimmed milk powder is not same as milk food: Madras High Court has upheld sales tax at the rate of 10% on skimmed milk powder. It held that skimmed milk powder is not same as milk food and hence would not be entitled to reduced rate of 4% under exemption Notification GOP No. 253 for period prior to 26-9-1991. The Court held that the plea that milk powder was mentioned in Entry 103(viii) and therefore it was milk food, was not tenable. The High Court observed that skimmed milk powder is processed before being marketed therefore not the same as milk food. [*Salem District Co-operative Milk Producers Ltd.* v. *State of Tamil Nadu* - 2019-VIL-226-MAD]

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