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An e-newsletter from
Lakshmikumaran & Sridharan, India

May 2018 / Issue – 83

Contents

May
2018

Article

Advance Rulings under GST – Certain questions of law

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GST made its entry in July, 2017. To facilitate trade on issues relating to liability or credit or classification or valuation, mechanism of advance rulings has been provided in CGST Act and SGST Act. While the statute provided a remedy on questions relating to proposed activities, the ambitious procedural machinery of filing everything online including applications for advance rulings, rendered the term 'advance' irrelevant. Taxpayers were compelled to stretch their resources by invoking writ remedy and High Courts had to intervene to allow for manual filing of applications. After such long hiccups, it appears, the system is stabilising as evidenced by rulings issued by Authority for Advance Rulings in various States. As advance rulings mark the commencement of judicial (or quasi-judicial) interpretation of GST law, let us look at some of the rulings vis-à-vis application of law.

Advance ruling not available on product not in existence?

One of the first rulings to be available in public domain is by AAR, West Bengal in respect of classification of certain products as medicaments [*M/s Akansha Hair & Skin Care* - Ruling dated 9-4-2018]. The applicant sought ruling in its favour that the 33 products listed in the application are medicaments or rather covered by entry relating to medicaments attracting GST at the rate of 12%. As the issue related to classification, the ruling profusely quotes from Supreme Court's judgment in the case of *Puma Ayurvedic Herbal Care* [2006 (196) E.L.T. 3 (S.C.)]. This judgment laid the basis for the famous test of 'cure' or 'care' for classification of a product as medicament or cosmetic. Leaving such classification issues or precedents aside, an important point of law that attracts our attention pertains to the AAR's non-consideration of classification of three products which according to it, have not come into existence and therefore excluded from the ambit of examination for the purpose of advance ruling.

Section 95(a) of CGST Act defines 'advance ruling' as decision provided by AAR on specified matters or on specified questions in relation to supply being undertaken or proposed to be undertaken by the applicant. One of the specified matters is classification of any goods. An application for advance ruling is moved to obtain clarity in advance on a statutory basis in respect of a proposed activity vis-à-vis tax implications. In the earlier laws, advance ruling mechanism itself was confined to proposed activities and GST law has been more benign in covering both proposed and running activities. Normally, for a manufacturer, getting to know the judicial mind in respect of classification of a product which he is already manufacturing (which means he is already clearing and paying tax) arises only when the same is disputed by the department by way of notice. When a manufacturer knocks the doors of AAR, his requirement is certainty in so far as tax implications of his proposed business is concerned. By holding that examination of classification of products not yet manufactured by the applicant is excluded from the ambit of advance ruling, it appears that this ruling has not appreciated the relevant provisions in proper context. May be, if the applicant moves the

Appellate Authority for Advance Rulings this may get clarified.

AAR whether can re-phrase general questions and issue ruling?

Compared to the application filed before AAR, West Bengal, the application filed or rather the questions taken up before Maharashtra AAR was not couched in legal language and had to be content with negative ruling [*M/s Acrymold*, Ruling dated 23-3-2018]. The applicant sought ruling on classification of trophies imported by them and which were either made of one or more of materials like base metal, glass and plastic. One of the questions raised was with respect to classification of trophies made out of combination of materials and in particular, if a particular material constitutes 75% (in value terms). This question was termed as general and in the absence of information as to constituent materials of trophies, this was not answered by AAR. As per para 2 of the ruling, the applicant has provided a table containing various types of trophies imported by them, description as per HSN, HSN code and GST rate with the only question at the end of the table mentioning trophies made with combination of materials stated in the previous entries in the table. The applicant could have been queried during hearing as to percentage of constituent materials in respect of trophies made out of combination of materials or given an opportunity to file additional submissions in support of the same. Despite quoting interpretative rules for classification, test of essential character, etc., the question was ultimately not answered in the ruling.

Section 98(4) of CGST Act provides that where an application has been admitted, the authority shall, after examining such further material as may be placed before it by the applicant or obtained by the authority and after providing an opportunity of being heard pronounce its advance ruling. Therefore, AAR is empowered to obtain 'further material' as may be required to answer the question raised and the question raised is not cast on stone as it can always be re-phrased for better clarity and for the purpose of answering the same. Section 105 provides sufficient powers to both AAR and Appellate AAR for issuing commissions and compelling production of records. Even if the applicant does not provide a particular document or information which the authority may consider material to examine the issue, it is empowered to issue commissions to compel production of such required document / information. If another opportunity of hearing is required to answer the question raised, then the same could have been provided as there is no mention in the GST law as to number of adjournments or hearings that can be offered. While the letter of law provides sufficient backing in terms of powers, the spirit of law of advance ruling demands that the applicant coming before the authority may not be trained in law and the question raised may have to be modified so as to provide relief by way of express ruling.

Ruling not available in back-to-back contracts?

It is quite common that in the EPC industry or in major infrastructure projects, back-to-back contracts are entered into whereby there are sub-contractors providing portion of service to main contractor(s). When the main contractor requires clarity in respect of tax implications on his business activities, the same may cover within its ambit the services provided by sub-contractors to him. In fact, it is based on the tax cost incurred vis-à-vis various sub-contractors and the extent of credit admissibility, the main contractor can and will arrive at his costing and participate in any bid or accept any work order. If such main contractor or the EPC agency is before AAR and seeks answers to various questions including that of sub-contractors, can the authority refuse to

answer on the ground that the supplier in respect of that particular question being sub-contractor, the same will not be answered when raised in the application filed by main contractor? The answer is yes according to Maharashtra AAR's ruling dated 3-3-2018 [*M/s Fermi Solar Farms*].

As per CGST Act, 'applicant' means any person registered or desirous of obtaining registration under the CGST Act. The questions or matters which can be raised before AAR are specified in Section 97 and the same includes both existing and proposed activities. There is no condition in the provisions to the effect that the applicant should be a supplier of particular goods or service on which ruling is sought. If this is the case, then the definition of 'advance ruling' in Section 95(a) as including proposed activities will be rendered meaningless. The ruling is given in respect of the matters raised in the application and the same is not contingent on the status of the applicant as to whether he executes a particular work or proposed to execute the same in the capacity of a main supplier or sub-contractor. The applicant may be executing the work as main contractor and in respect of certain other work, he may act in the capacity of sub-contractor. The ruling in the above said case has also referred to absence of documents as a reason for refusal to answer which also appears to be not statutorily fool-proof in view of the discussions elsewhere in this article on powers of the authority.

Evolving law, processes and institutions

Substantial number of advance rulings have been issued and many of them involve important issues including the ones like recovery from employee for canteen services, outdoor catering service provided to factory owner, supply of goods with brand name or otherwise, supplies being composite or mixed, etc. Given the nascent stage of GST law itself, the questions brought before AAR and the rulings, for the first time, provide some insight into divergent practices, perspective of the department and the judicial (or quasi-judicial) interpretation of various provisions of the youngest tax law. The institution of AAR itself is a federal experiment at the bureaucratic level with both Central and State GST officials sharing the responsibility. Therefore, we shall wait for the law, institutions and processes to evolve and mature, reserving our right to deliberate on issues affecting the trade and industry.

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Goods and Services Tax (GST)

Notifications, Circulars and Press Releases

Late fee waived for not furnishing GSTR-3B in specified situation: Ministry of Finance has waived late fee payable under Section 47 of the Central GST Act, 2017 for failure to furnish monthly return in FORM GSTR-3B by due date for the months of October, 2017 to April, 2018. The waiver is for those taxpayers who had submitted FORM GST TRAN-1 but could not file the same on or before 27-12-2017 on the GST portal, but has now been filed before 10-5-2018. According to Notification No. 22/2018–CT, dated 14-5-2018, waiver of late fees is available only if such registered person files FORM GSTR-3B for each of such months on or before 31-5-2018.

GST leviable on transfer of tenancy rights: Transfer of tenancy right against consideration in form of tenancy premium is supply of service liable to GST. CBIC through its Circular No. 44/18/2018-GST, dated 2-5-2018 has clarified that merely because a supply involves execution of documents which may require registration and payment of registration fee and stamp duty, it would not preclude such supply from GST. According to the circular, surrendering of such rights by outgoing tenant against consideration is also liable to GST. It however records that grant of tenancy rights in a residential dwelling for use as residence against tenancy premium or periodic rent or both is exempt.

Inspection, confiscation and release of goods – Procedure: CBIC has prescribed detailed procedure for interception of conveyances and for inspection of goods in movement. Procedure has also been laid down for detention, seizure and release and confiscation of such goods and conveyances. As per Circular No. 41/15/2018-GST, an e-way bill number may be available with person in charge of conveyance in the form of a printout, SMS or written on the invoice and all these forms of having an e-way bill are valid. It is also clarified that confiscation order will be uploaded on common portal and demand accruing from said order will be added in electronic liability register. It also states that no order for confiscation of goods or conveyance, or for imposition of penalty, shall be issued without giving the person an opportunity of being heard. Various forms have also been prescribed for the purpose.

Recovery of arrears of Excise, Service Tax and Cenvat credit – Procedure: Arrears of central excise duty, service tax or wrongly availed Cenvat credit, unless recovered under then prevalent law, are to be paid as central tax (CGST), utilizing amounts available in electronic credit/cash ledger under GST. Credit wrongly carried forward as transitional credit can also be paid similarly. According to Circular No. 42/16/2018-GST, dated 13-4-2018, arrears of interest, penalty and late fee however have to be paid through electronic cash ledger. Arrears from assessees under the laws as prevalent before 1-7-2017 who are not registered under present GST regime, will also be recovered in cash.

E-way Bill in Bill-to Ship-to transactions clarified: Ministry of Finance has clarified that in a Bill-to-Ship-to model of supply which involves two transactions, only one e-way bill is to be generated – either by the person ordering goods to be sent to another (A) or by the person actually sending the goods (B). According to Press Release dated 23-4-2018, if B (person sending the goods) generates e-way bill, he needs to mention his details in the field for “Bill from”, and mention details of A (person ordering sending of goods) in the field for “Bill To” while mentioning details of the recipient in the field for “Ship To”. In case the e-way bill is generated by A, he needs to mention details of the person receiving the goods, in both “Bill To” and “Ship To” fields, while mentioning his own detail in the field for “Bill from”.

GST refund to UIN agencies clarified: Government has granted a one-time waiver, in case of non-recording of UIN by supplier in invoices for supplies to UIN agencies, from July 2017 to March 2018. The UIN agencies’ authorised representative however has to submit attested copy of such invoice to the jurisdictional officer, for quarterly GST refund. Circular No. 43/17/2018-GST, dated 13-4-2018 also requests such agencies to manually furnish (for the time

being) statement containing invoice details along with refund application. Further, officers have been advised not to request for original or hard copy of invoices unless necessary.

GST Council grants in-principle approval to new return design: GST Council in its meeting held on 4-5-2018 granted in-principle approval for the new design for filing of returns. All taxpayers, except a few, will be required to file single monthly return with a simple design and easy IT interface. B2B dealers will have to fill invoice-wise details of outward supply. There will be no automatic reversal of ITC on non-payment of tax by seller, and recovery of tax or reversal of ITC will be through online process of issuing notice and order. According to the press release, the new system will be implemented in 6 months and till then filing of GSTR-3B and GSTR-1 will continue.

Rate concession in digital payments, and sugar cess – GST Council refers issues to Group of Ministers: GST Council in its meeting held on 4-5-2018 discussed a concession of 2% in GST rate (where GST rate is 3% or more, 1% each from applicable CGST and SGST rates) on B2C supplies for which payment is made through cheque or digital mode. According to the press release issued after the Council's meeting, there would be a ceiling of Rs. 100 per transaction. The Council also discussed issues relating to imposition of sugar cess over and above 5% GST, and reduction in GST rate on ethanol. Both the proposals will be looked into by the Group of Ministers who will make their recommendations.

Ratio decidendi

Seizure on inter-state movement where Part-B not filled, when unjust: Allahabad High Court has held that goods in transit from a consignor in UP to a transporter in the same State for further despatch to a consignee in other State cannot be seized when details of the vehicle are not found in Part-B of e-way bill. It noted that government itself had clarified that 'Part B' has to be filled by the transporter/dealer when goods are reloaded in a vehicle meant for delivery to the consignee. The High Court, for this purpose, relied on the Press Release dated 31-3-2018 issued by the Ministry of Finance clarifying various situations under the new E-way Bill System. It observed that unless the goods reach the place of the transport company from where they were required to be transported to its ultimate destination, it was not possible to fill up the details of the vehicle. [*Rivigo Services Pvt. Ltd.* v. *State of UP* - 2018-VIL-204-ALH]

GST payable on one-time lease premium when specific exemption absent: Division Bench of Bombay High Court has held that GST is leviable on one-time lease premium paid by the allottee to acquire plots for business purposes on long term lease. The Court noted that 'supply' includes supply of goods and services for consideration by a person in the course of business. It was held that once the law treats the activity particularly in relation to land and building and includes a lease, as supply of goods or supply of services, then the consideration therefor as a premium/one-time premium is a measure on which the tax should be levied.

The allottee also sought exemption under Section 7(2) of the Central GST Act as activities performed were the in nature of statutory obligations, tenders being floated by sovereign authorities. The Court however rejected the plea noting absence of notification and further held that merely going by the status of the CIDCO, it cannot be held that lease premium would not attract liability to pay GST. [*Builders Association Navi Mumbai* v. *Union of India* – Judgement dated 28-3-2018 in Writ Petition No. 12194 of 2017, Bombay High Court]

State government whether can issue notification for inter-State e-way bill? – Allahabad High Court refers issue to Larger Bench: Whether the State Government is empowered under Rule 138 of U.P. GST Rules to issue a notification prescribing carrying of any forms or documents along with a consignment during inter-State movement? Allahabad High Court has referred the question to its Larger Bench taking note of two diametrically opposite judgements of the coordinate benches, one affirming such notification by the State government and other nullifying it. It noted that while one judgment did not consider the relevant statutory provisions, the other judgment overlooked the earlier judgment which was a binding precedent. The dispute involved transportation of goods without e-way bill from Delhi to U.P. in November 2017. [*Om Disposals* v. *State of U.P* - 2018-VIL-200-ALH]

CGST Act does not authorise issuance of second SCN for same demand and period: Gujarat High Court has held that the Revenue department cannot issue second show cause notice pertaining to same period and for same demand of unpaid taxes. The Court while interpreting Section 74 of the CGST Act stated that powers under Section 74(3) cannot be exercised for expanding or enlarging the liability arising out of show cause notice issued under Section 74(1). It also observed that practice of collecting post-dated cheques either voluntarily or by coercion during raid is not permissible when no tax demand has been confirmed or crystallised. Provisional attachment of the petitioner's two bank accounts was also lifted, subject to certain conditions. [*Remark Flour Mills* v. *State of Gujarat* – Judgement dated 19-4-2018 in R/Special Civil Application No. 4835 of 2018, Gujarat High Court]

Liquidated damages liable to GST @ 18% - Manner of payment immaterial: Liquidated damages are liable to GST @ 18%. Maharashtra Authority for Advance Ruling has held that fact that damages were deducted from contract price, was immaterial. The AAR also held that said service is covered under clause (e) of para 5 of Schedule II of CGST Act, classifiable under Heading 9997. It was also held that time of supply in respect of such service would be defined once delay in completion of the project is established. The Authority in this regard observed that levy is not when the delay is occurring but when liability for payment is established on part of the contractor. [*Maharashtra State Power Generation Company Ltd.* – Order dated 8-5-2018, AAR Maharashtra]

Supply to international outbound passengers, when not exports: Supply of goods to international outbound passengers, by a retail outlet situated in security hold area of international airport, is not covered under export or zero-rated supply. Authority for Advance Ruling, Delhi while holding so, observed that the outlet is within the territory of India as defined under Section 2(56) of the Central GST Act and Section 2(27) of the Customs Act, and hence applicant is not taking goods out of India. Contention that the shop was beyond customs frontiers of India, and hence supply is exports, was thus rejected. Reliance in this regard was also placed on definition of 'export' under Section 2(18) of Customs Act and under Section 2(5) of the Integrated GST Act. Applicant was held liable to GST on such sales. [*Rod Retail Pvt. Ltd.* – Order dated 27-3-2018, AAR Delhi]

Road reinstatement charges paid to municipality liable to GST: Authority for Advance Ruling, Maharashtra has ruled that charges for restoring roads from the patches dug up by business entities cannot be equated to performing a sovereign function by the municipality under Article 243W of the Constitution of India. The Authority observed that

there are many such entities such as telephone, gas, etc., which dig up the road and restoration is required to be done. It was held that restoration work is different from construction and maintenance of roads covered under the sovereign function of the municipality. Reinstatement and access charges paid to municipal authorities were thus held to be exigible to GST. [*Reliance Infrastructure Ltd.* – Order dated 21-3-2018, AAR Maharashtra]

Package containing name of company to be considered as bearing brand name: Package of goods having a declaration mentioning name and registered address of the assessee as manufacturer or under 'Marketed by', as per statutory requirements, cannot be considered as not bearing a 'brand name'. Maharashtra Authority for Advance Ruling while holding so, also held that exemption under relevant entries of Notification No. 2/2017-Central Tax (Rate), and similar notifications under IGST and SGST, will not be available. AAR in this regard noted that the goods were supplied through specific stores which also had registered brand name as on 15-5-2017. [*Aditya Birla Retail Ltd.* – Order dated 23-3-2018, AAR Maharashtra]

Sale of used vehicle as scrap liable to GST: Supply of old motor vehicle as scrap after its usage is 'supply' in the course or furtherance of business and is liable to GST. Maharashtra Authority for Advance Ruling has held that buying new assets and discarding the old and unusable ones is an activity in the course of business. The AAR rejected the plea of coverage under Schedule I (disposal of business assets) and Schedule II (transfer of business assets) of the Central GST Act. It observed that while Schedule I covers exceptional case where consideration is absent, Schedule II classifies supplies into goods or services.

Question as to whether input tax credit on purchase of such vehicles which are used for cash management business and supplied post usage as scrap, was however referred to the Appellate Authority for Advance Ruling, as there was difference of opinion among the Members of the AAR. [*CMS Info Systems Ltd.* – Order dated 19-3-2018, AAR Maharashtra]

Coaching service provided by private institution is liable to GST: Service of coaching for entrance examinations comes under ambit of GST. Authority for Advance Ruling, Maharashtra has held that exemption under Sl. No. 66 of Notification No. 12/2017-Central Tax (Rate) is not available as said service is not covered under 'service provided by an educational institution'. It noted that private institute does not have any specific curriculum, examination and it does not award any qualification recognised by law. The AAR held that the service would be taxable at the rate of 9% CGST and 9% Maharashtra GST. [*Simple Rajendra Shukla* – Order dated 9-3-2018, AAR Maharashtra]

Cenvat credit of Krishi Kalyan Cess carried from earlier regime is not admissible input tax credit: Accumulated Cenvat credit of Krishi Kalyan Cess (KKC) carried forward from earlier Service Tax regime into new GST regime on 1-7-2017 is not an admissible input tax credit. Maharashtra Authority for Advance Ruling while holding so observed that credit of KKC was to be utilised for payment of KKC only and hence it cannot be treated as excise duty or service tax. It held that Cenvat credit referred in Section 140(1) does not include credit of KKC. The AAR further noted that CBEC had in its FAQ clarified that Cenvat credit of Swach Bharat Cess (SBC) and KKC cannot be carried forward to GST credit ledger. [*Kansai Nerolac Paints Ltd.* – Order dated 5-4-2018, AAR Maharashtra]

Construction of complex – Valuation and rate of GST: Authority for Advance Ruling, Delhi, in an issue involving value and rate of GST on service of construction of a complex, building,

etc., intended for sale to a buyer, has ruled that GST would be payable on two-third of total amount consisting of amount charged for transfer of land. It was also held that whole of consideration would be added for payment of GST even if agreement was entered after part of the construction had already been completed. Applicable rate of GST was held to be 9% CGST and 9% SGST. Notification No. 11/2017-Central Tax (Rate) was relied by the AAR for this purpose. [*Sanjeev Sharma* – Order dated 28-3-2018, AAR Delhi]

Dried tobacco leaves undergoing curing liable to GST @ 28%: AAR, Delhi has held that 'dried tobacco leaves' which have undergone process of curing after harvesting are 'unmanufactured tobacco' covered under HSN Code 2401. The goods were held to be covered under Sl. No. 13 of Schedule-IV of Notification No. 1/2017-Central Tax (Rate) attracting 14% (CGST) + 14% (SGST) or 28% (IGST). It was observed by AAR that the goods proposed to be supplied had undergone curing by sun-dry/ air-dry processes, hence the same cannot be covered under Sl. No. 109 of Schedule-I as 'Tobacco Leaves'. [*Shalesh Kumar Singh* – Order dated 6-4-2018, AAR Delhi]

Books primarily used for writing classified as 'Exercise Books': AAR, Delhi, in an application involving classification of books Sulekh Sarita Part-A, Part-B and Part 1-5, has held that they should be classified as Exercise Books (HSN 4820 of GST Tariff). CGST rate of 6% was held as applicable in terms of Entry No. 123 of Schedule II of Notification No. 1/2017-Central Tax (Rate). The AAR was of the view that primary use of the goods supplied was writing and that printing was merely incidental. Further, contention that persons who are not liable to tax shall not be required to take registration was rejected by the AAR observing that registration is compulsory if a person has GST liability under reverse charge mechanism. [*Sonka Publications (India) Pvt. Ltd.* – Order dated 6-4-2018, AAR Delhi]

Maintenance of railway track taxable @ 18%: Maintenance work of railway tracks, involving cleaning, surface preparation and painting of the rails, welding of joints, fabrication and fixing of guard rails, and other related work, is taxable @ 18% under Sl. No. 3(ii) of Notification No. 11/2017-Central Tax (Rate). West Bengal Authority of Advance Ruling while holding so declined the benefit of amendment dated 13-10-2017 in respect of works contracts involving predominantly earth work. The AAR also held that appropriate tariff code for the said works contract service would be sub-group 995429. [*Sreepati Ranjan Gope & Sons* – Order dated 3-5-2018, AAR West Bengal]

Floor mats impregnated and coated with PVC classifiable under Chapter 39: Authority for Advance Ruling, Maharashtra has ruled that PVC floor mats are classifiable under Customs Tariff Heading 3918 and not under Heading 5705. It was also held that the product falls under Sl. No. 104A of Schedule III to Notification No. 1/2017-Central Tax (Rate), thereby attracting GST @ 18%. The applicant's claim of classification under Heading 5705 was rejected observing that product was composed of PVC monofilament yarn and liquid PVC which fall under Chapter 39. The AAR noted that Note 2 to Chapter 39 excluded goods of Section XI and that latter excluded nonwovens covered with plastic. [*National Plastic Industries* – Order dated 2-4-2018, AAR Maharashtra]

UK VAT – Input tax credit and link with economic activities: England and Wales Court of Appeal (Civil Division) has referred the issue involving input tax credit of VAT paid by a university on the service received for managing its fund, to the Court of Justice of the European Union. Income out of the fund was used to support general activities of the university – both

taxable and exempt. The university had contended that purpose of the fund was to generate income for university activities and that the fund would not operate but for those activities. The department however pleaded that input tax was linked directly to activities of the fund which were outside the scope of VAT. [*Commissioners for HMRC* v. *Chancellor, Master and Scholars of the University of Cambridge* – Judgement dated 27-3-2018 in Case No. A3/2015/2650, England and Wales Court of Appeal (Civil Division)]

EU VAT - Refund due to correction in returns after tax inspection: CJEU has allowed VAT reimbursement, earlier rejected by the authorities on ground that correction of VAT returns related to period already subjected to tax inspection. The Romanian law, following principle of single tax inspection and legal certainty, provided that in such event, period for VAT deduction gets shorter, and it is not possible to correct returns. The Court of Justice however held that EU provisions prohibit national legislation from stating so. It noted principle of effectiveness, neutrality and proportionality for safeguarding rights of *bona fide* tax payer. [*Zabrus Siret SRL* v. *Direcția Generală Regională a Finanțelor Publice Iași* – Judgement dated 26-4-2018 in Case C-81/17, CJEU]

EU VAT - Limitation to deduct VAT to be liberal when assessee acting in good faith: CJEU has held that limitation period to deduct VAT must not be construed in stricter sense as refusal of the right of deduction is only an exception. Relying on provisions of VAT directive and principle of fiscal neutrality the Court observed that legislation of Member-State denying such right must be precluded. The Court of Justice observed that buyer in the dispute had neither shown lack of diligence before receipt of debit notes nor was there any fraudulent collusion with seller, and therefore, the right to deduct VAT should not be denied as it was impossible for buyer to exercise its right before adjustment of due tax was made. [*Biosafe* v. *Flexipiso* – Judgement dated 12-4-2018 in Case C-8/17, CJEU]

Customs

Notifications, Public Notices and Circulars

Automotive mining and oil rigging equipments – Import policy condition: Ministry of Commerce has introduced a new policy condition for import of old/used and new automotive mining equipment, oil rigging equipment for operation in captive mines or oil rigging areas and other vehicles for research and development purposes. According to amendment by Notification No. 7/2015-20, dated 8-5-2018, Policy Condition No. 1 and 2 (except for import through particular port in India), under Chapter 87 of the ITC (HS) would not be applicable to these items if these are re-exported or scrapped after the purpose is served.

India expands import restrictions on pulses, while issue raised at WTO: Urad and moong in split and other forms, classifiable under HS 0713 90 10 and 0713 90 90, have been put in restricted import category with total annual import quota of 3 lakh MT. Notification No. 6/2015-20 in this regard amends import policy and condition for these items from 4-5-2018. It may be noted that DGFT had in August 2017 restricted import

of urad and moong covered under HS 0713 31 00. The annual (fiscal year) quota will now be applicable for all 3 HS codes. Meanwhile, Australia, EU, Canada, USA, Ukraine and Japan have, in WTO Committee on Import Licensing, raised concerns against these quantitative restrictions.

No import restriction prior to 20-5-2015 on remnant fuel in ship brought for breaking: CBIC has clarified that remnant fuel contained in vessel brought in India for breaking is not subject to any import policy restriction under Chapter 27, prior to 20-5-2015. Circular No. 9/2018-Cus., dated 19-4-2018 relied upon a Supreme Court decision which had upheld CESTAT order, in turn holding that HSD is an integral part of such vessel/ships classifiable under Chapter 89 of the Customs Tariff and is free from restrictions. DGFT had in 2015 revised its stand, classifying remnant fuel under Chapter 27 and made such imports free from restrictions.

Advance authorisation provisions in Chapter 4 of FTP HoP Vol.1 revised: Ministry of Commerce and Industry has amended certain paras of Chapter 4 of Handbook of Procedures. The changes include provision for issuance of Advance Authorization for Annual Requirement where *ad hoc* norms exist for a resultant product. Provision has also been made to submit manual Bank Realization Certificates (BRC) and self-attested copy of exporter's copy of shipping bill. According to Public Notice No. 9, dated 14-5-2018, these changes have brought clarity and have harmonised documentation requirements for Export Obligation Discharge Certificate (EODC).

Drug exports – Implementation of Track and Trace System extended till 16-11-2018: DGFT has extended the implementation of Track and Trace System for export of drug formulations. The system for maintaining the parent-child relationship in packaging levels and its uploading on the Central Portal will now be implemented from 16-11-2018. Resultantly, all drugs manufactured by SSI as well as non-SSI units and having manufacturing date after 15-11-2018 can only be exported if both tertiary and secondary packaging carry barcoding as applicable, and the relevant data is uploaded on the Central Portal. Public Notice No. 5/2015-20, dated 9-5-2018 has been issued for this purpose.

Ratio decidendi

Projectors for computer, digital camera and other devices – Classification: CESTAT Bangalore has held that projectors capable of use with computers as well as other devices like DVD players and digital cameras will be covered under 'Projectors of a kind solely or principally used in an automatic data processing system', classifiable under TI 8528 61 00 of the Customs Tariff. The Tribunal also allowed benefit of Notification No. 24/2005-Cus. to such projectors. Further, observing that imported projectors were for warranty replacement, or for educational institutions, it was held that CVD would be chargeable on the basis of transaction value and not MRP. [*Dell India Pvt. Ltd.* v. *Commissioner* – Final Order Nos. 20562-20565/2018, dated 16-2-2018, CESTAT Bangalore]

SAD refund – No condition that subsequent sale has to be in same form: Supreme Court has held that mere conversion of imported logs in to sawn timber without loss of identity of original product, before subsequent sale, would not deprive importer of the benefit of notification granting refund of SAD. Upholding the view taken by the Tribunal and the High Court, the Apex Court rejected the plea that subsequent sale must be in the same form in which goods were imported. It observed that the plea was not supported by plain reading of notification dated

14-9-2007 even if construed in the strictest terms. [*Commissioner* v. *Variety Lumbers* – Civil Appeal Nos. 10258-10296/2011 and Ors., decided on 24-4-2018, Supreme Court]

End-use of imported goods when valid for classification: In the dispute pertaining to classification of calcium nitrate and mono potassium phosphate, CESTAT Mumbai has held that the goods are classifiable under Chapter 31 and not Chapter 28 of Customs Tariff Act, 1975. The Tribunal observed that when grouping of products and their description connotes end-use, disassociation with classification is not correct. It was noted that the goods composed of two out of three fertilizing elements, and that the government had issued licence for these. [*Commissioner* v. *Solufeed Plant Product* - Order No. A/85989-85997/2018, dated 5-4-2018, CESTAT Mumbai]

Valuation of films imported for distribution – Inclusion of licence fee: CESTAT Mumbai has held that valuation of imported digital beta tapes should not only be restricted to media but also include value for contents (seasons of popular serials) in media. The contention that the contents in media becomes distributable only after replication and other activities in India, was rejected. The Tribunal in this regard was of the view that value of the goods must include value for the contents. It was held that entire royalty/licence fee, related to number of episodes, is includible in the value as it is a consideration on account of transfer of distribution rights in India. [*Genx Entertainment* v. *Commissioner* - Order No. A/85987-85988/2018, dated 5-4-2018, CESTAT Mumbai]

Bona fide purchaser can opt to pay redemption fine and duty: In a case involving confiscation due to mis-declaration, Kerala High Court has held that *bona fide* purchaser of imported goods can opt for payment of redemption fine along with short levied duty to get the goods released. It was held that such payment is not a levy rather an option provided under Section 125 of the Customs Act, 1962. The High Court further observed that if option for redemption of goods is not exercised then owner loses its property in goods, and subsequently, liability of short duty along with interest passes on to the original importer. [*Commissioner* v. *Nalin Choksey* - Customs Appeal No. 18 of 2009, decided on 3-4-2018, Kerala High Court]

Central Excise and Service Tax

Ratio decidendi

Valuation – Inclusions that enrich value of article, permissible - No difference in 'transaction value' and 'normal value': Constitution Bench (5 Judge Bench) of Supreme Court has held that inclusions that enrich value of article till its clearance, are permissible additions to value under Section 4 (prior to 2000) of the Central Excise Act, 1944 as well as transaction value under amended Section 4 effective from 1-7-2000. The Apex Court found no discernible difference in statutory concept of transaction value and judicially evolved meaning of normal price in this regard.

It approved the judgement in *Bombay Tyre International* and held that views expressed in para 84 of the judgement in *Acer India* are not in conflict with the earlier decision. The Court was of the view that the measure of the levy contemplated in Section 4 will not be controlled by the nature of the levy, and that so long a reasonable nexus is discernible between the measure and the nature of the levy, both Section 3 and 4 would operate in their respective fields. [*Commissioner* v. *Grasim Industries* – Judgement dated 11-5-2018 in Civil Appeal No. 3159/2004 and Ors., Supreme Court]

Exemption to SEZ – Notification No. 9/2009-S.T. cannot prescribe conditions: Observing that Special Economic Zone Act and the Rules thereunder do not provide any condition for exemption from service tax, CESTAT Delhi has held that Central Government cannot issue a notification under different statute, i.e. under Finance Act, 1994, to provide for conditions for grant of refund of such tax paid on taxable services used for authorised operations in SEZ. The Tribunal noted that all the activities relating to SEZ are to be guided and governed by the provisions contained in the SEZ Act and the SEZ Rules only. It observed that by virtue of Section 51 of SEZ Act, the provisions of the said Act and the Rules made thereunder have an overriding effect over the provisions contained in any other statute. [*Cummins Technologies India Ltd.* v. *Commissioner* - Final Order No. 51683/2018, dated 4-5-2018, CESTAT Delhi]

Depot sales – Applicability of valuation Rule 7 when additions made at depot: In a case involving sale of branded MS/HSD under name 'speed' from depot after addition of octane boosters, CESTAT Mumbai has held that Rule 7 of the Central Excise Valuation Rules will apply. Department's contention that sale price of Speed MS/HSD at which the goods are sold from depot is applicable, was thus rejected. The Tribunal was of the view that sale price of plain MS/HSD as cleared from factory will apply as term 'such goods' appearing in Rule 7 means goods originally cleared from the factory. [*Bharat Petroleum* v. *Commissioner* - A/86006-86007/2018, dated 13-4-2018, CESTAT Mumbai]

Cenvat credit on advertisement of brand of liquor, not available: Cenvat credit is not available on advertisement services for provision of output service of promotion and marketing of liquor produced by the clients. CESTAT Delhi while distinguishing the Bombay High Court judgement in *Coca-Cola,* has held that advertisement for soda cannot be considered as having any nexus with IMFL sought to be marketed under the agreement by the assessee. The Tribunal also upheld invocation of extended period observing that such advertisement, circumventing the ban on advertisement of liquor, is not only suppression but fraud. [*Avadh Enterprises* v. *Commissioner* - Final Order No. 51665/2018, dated 2-5-2018, CESTAT New Delhi]

Surrender charges for discontinuance of ULIP policy are not taxable: Observing that surrender charges are not for management of investment in Unit Linked Insurance Plan, CESTAT Mumbai has held that same cannot be subjected to service tax. The Tribunal was of the view that these charges, when an insured person dilutes its policy completely or partially, are in nature of penalty or liquidated damages. It noted that ULIP is a contract and said charges are compensation under Sections 73 and 74 of the Contract Act, 1872, incidental to ending of the contract. Circular No. 94/5/2007-ST in respect of entry and

exit load charges of mutual fund, and Circular No. 121/2/2010-ST in respect of container detention charges, were also relied for this purpose. [*Reliance Life Insurance* v. *Commissioner* - Order No. A/85966/2018, dated 12-4-2018, CESTAT Mumbai]

Coconut oil in small containers – Classification issue referred to Larger Bench of Supreme Court: Consequent to difference of opinion among two Judges, Supreme Court of India has referred the question of classification of coconut oil in small packages, to its Larger Bench. According to one opinion, mere packing in small containers and use of the product by some customers as hair oil cannot be a valid basis for classification under Chapter 33 as hair oil, even after amendment in 2005. However, as per another view, relying on common parlance and Interpretative Rule 3(c), the goods were held as classifiable under Chapter 33, and not under Chapter 15 as vegetable oil. [*Commissioner* v. *Madhan Agro Industries (I) Pvt. Ltd.* – Judgement dated 13-4-2018 in Civil Appeal No. 1766/2009 and Ors., Supreme Court]

Service Tax liability and sharing of fees: Observing that sharing of fee cannot be interpreted as rendering of services by appellant to clients of another company, CESTAT Mumbai has held that assessee-appellant should not suffer double taxation when another company (agent) collected fee from clients and discharged service tax liability on whole amount of fee collected. The assessee, a stock-broking company, was providing online trading facility through its affiliate who provided the online trading platform and was entrusted with the sole responsibility of collection of card fee including service tax for such consolidated service to the customer. The Tribunal further held that tax demand under Business Support Services in SCN and under Stock Broking service in the impugned order, was not permissible. [*Reliance Securities Ltd.* v. *Commissioner* - Order No. A/85964/2018, dated 10-4-2018, CESTAT Mumbai]

Cenvat credit on construction of hotel rooms: Relying on Cenvat Rule 6(5), CESTAT Mumbai has allowed Cenvat credit on Construction service used in construction and renovation of rooms by a hotel when assessee was discharging service tax on rent-a-cab service, convention service, mandap keeper service, outdoor catering service, health and fitness service, etc. Observing that hotel building was common for all taxable and non-taxable services, the Tribunal rejected Department's contention that output service had no nexus with construction service, which was used exclusively for non-taxable service. It observed that overall hotel business was rendered from the common hotel building and that the construction service received in respect of construction of any part of the hotel was a common input service which had nexus with overall hotel business. [*Lemon Tree Hotels* v. *Commissioner* - Order No. A/85880/2018, dated 3-4-2018, CESTAT Mumbai]

Abbreviation of name of jeweller whether trademark – Issue referred to Larger Bench of CESTAT: CESTAT Bangalore has referred to Larger Bench the question as to whether abbreviation of goldsmiths embossed on jewellery will amount to use of trademark/brand name. The period involved was from 1-3-2005 to 30-11-2005. The Tribunal observed that there were contrary views of different Benches with CESTAT Chennai holding that such marks embossed on jewellery were trade mark, thus

making the goods branded, while CESTAT Delhi holding that marks were not trademarks but jewellers marks and hence no excise duty was to be charged. [*Abraham Jewellers* v. *Commissioner* – 2018 (12) GSTL 344 (Tri. – Bang.)]

Inputs removed as such to own unit – Excise Valuation Rule 8 not applicable: CESTAT Mumbai has held that duty to be paid on clearance of inputs as such to own units should be equivalent to the amount of Cenvat credit availed on such inputs. Department's contention that duty was required to be paid according to Rule 8 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, was thus rejected. The period involved in the dispute was from 11-10-2003 to 25-10-2003, and the Tribunal relied on Cenvat Rule 3(4) prevalent at that time. [*Bhuwalka Steel Industries* v. *Commissioner* - Order No. A/85811/2018, dated 22-3-2018, CESTAT Mumbai]

VAT

Ratio decidendi

Works contract or sale and service contract – Nature of contract is relevant: Karnataka High Court has held that when there are two contracts, one for purchase of component and other for labour and service then the nature of contract is relevant in determining transaction as sale simpliciter or works contract. The Court, considering documentary evidence, held that transaction of sale was inter-State sale, and Section 3(a) of Central Sales Tax Act would be applicable thus excluding State authorities from imposing VAT. It observed that purchase orders were placed by the contractees/purchasers with the manufacturing unit in Maharashtra, and that movement of goods occasioned from Maharashtra to Karnataka. The ground that assessee had employed dubious method by executing separate contracts for works and sale was also rejected by the Court while allowing the writ petition. [*Thyseenkrupp Elevator* v. *Commissioner* – Judgement dated 24-4-2018 in W.P. Nos. 13607/2017 & 14081-14091/2017 (T–RES), Karnataka High Court]

Rajasthan VAT – "Ujala Supreme" is an industrial input: Supreme Court has rejected the contention of the Revenue department that item "Ujala Supreme" is to be covered under Schedule V of the Rajasthan Value Added Tax Act as it is a consumer product. The Court in this regard relied on it earlier decision in respect of *pari materia* provisions under Kerala Value Added Tax Act. The Apex Court had then held the goods to be classifiable as industrial input. The goods were held to be covered under provisions of Schedule IV, Part-B, Entry 119 of the Rajasthan VAT Act, 2003. [*Asstt. Commissioner* v. *Jyoti Laboratories* – SLP No. 36386/2017 and Ors., decided on 17-4-2018, Supreme Court]

Erection & Commissioning - Coverage under Service Tax and not Sales Tax: West Bengal Commercial Tax Appellate & Revisional Board in a revision petition pertaining to wrongful imposition of sales tax has modified the demand notice in favour of the revisionist-assessee. The

assessee had entered into an agreement for erection and commissioning of equipment which the Department considered as 'transfer of right to use goods' under Section 2(39)(d) of West Bengal VAT Act. The Board noted that concerned contract was of pure service and there was neither any transfer of possession and effective control of the materials nor any consideration was paid. [*Damodar Valley Corp.* v. *Commissioner* – Order dated 7-12-2017 in Revision VAT Case No. 2411 of 2016-17, West Bengal Commercial Tax Appellate & Revisional Board]

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