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Contents

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Article

Reversal of credit on write-off under GST – Open issues

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"Haste is of the devil" is a phrase that applies aptly to drafting of new legislations in haste which usually gives way to misinterpretation, lack of clarity, and challenges as to validity delaying the successful implementation of the statutes. The Goods and Services Tax legislation is the most recent example of this phenomenon where the implementation has been rushed giving way to ambiguity and leaving the legislation open to divergent interpretation. This article aims to highlight some of the issues being faced by the trade and industry with regard to reversal of input tax credit in case of goods written off and in case of creation of provision for write-off in the books of accounts.

CGST Act provides for specific situations where input tax credit of the GST paid cannot be availed. One of the provisions where this restriction has been imposed is "write-off" of goods. The specific provision as contained in Section 17(5) is reproduced below for ease of reference:

"Notwithstanding anything contained in sub-section (1) of Section 16 and sub-section (1) of Section 18, input tax credit shall not be available in respect of the following, namely :- ……..

*(h) goods lost, stolen, destroyed, **written-off** or disposed by way of gifts or free samples"*

On a plain reading of the above provisions, it seems that input tax credit is required to be reversed in cases when goods are written off. On the face of it, the provision looks simple and clear. However, as we delve deeper into the issue, we realise that the said provision is cloaked in obscurity and ambiguity. For one, the expression "write-off" has not been defined anywhere in the CGST Act or rules made thereunder. This raises many questions regarding the scope of the provision and includability of situations for reversal of credit.

- For instance, **does partial write-off of goods** in the books of account require reversal on the basis of the above clause?
- Will mere **creation of provision** in the books of accounts of an assessee for slow moving/obsolete goods also be covered under the phrase write-off and reversal be required?
- Will the **write-off of value only for the purpose of compliance with accounting standards** when the **goods are physically available** with the assessee also attract reversal?
- Will credit need to be reversed in case **inputs procured in the excise regime** (and Cenvat Credit transitioned in the GST regime) are now written-off or provision for write-off is being created?

The issue of reversal of credit in relation to write-off of inputs/capital goods has historically been a subject matter of dispute. The provisions for reversal of credit on account of write-off of inputs/capital goods was first introduced in the

central excise regime by way of a circular in 2002. However, the circular was set aside in a plethora of judgements and the assessees were directed not to reverse the credit in the absence of specific provisions in this regard in the Central Excise Act and the rules thereunder. To overcome this legal handicap and put an end to the ongoing litigation, the Cenvat Credit Rules were amended to provide for reversal of credit in case of write-off. Initially, when the rule was introduced, the requirement of reversal was limited to inputs and capital goods written off fully in the books of accounts or in cases where provision to write-off fully was created in the books of accounts.

Though the above amendment provided reasonable degree of certainty and clarity on the said issue yet it did not completely put the issue at rest as it did not cover situations where the inputs/capital goods were partially written-off. The amendment was also silent in respect of the treatment in case of write-off of work in progress and finished goods. The Cenvat Credit Rules were later amended in 2011 to include the reversal of credit in case of partial write-off of inputs and capital goods.

The law in the erstwhile excise regime had finally settled after various amendments in the Cenvat Credit Rules from time to time and protracted litigation in this regard. However, the Government seems to have overlooked the past issues and amendments on the said issue and simply used the term write-off while drafting the GST legislation making it susceptible to various interpretations.

It has been seen in a number of instances that the internal auditors, statutory auditors and concurrent auditors are forcing the assessees to reverse the input tax credit in cases where the value of goods have been written off or provision for write-off has been created for the purpose of compliance of accounting standards or in terms of an internal policy adopted by the company even though the goods are still lying in the possession of the registered person. The assessees are in a quandary as to *whether reversal of credit in such cases are required especially given the fact that the goods are in existence with the registered person and are capable of being used in making a taxable supply*.

The provision in its current form is not correctly worded and ripe with potential for disputes and will eventually give way to another round of litigation. This issue had been resolved to a large extent over the last one decade with successive amendments of the Cenvat Credit Rules, but it seems that we are back to square one with the introduction of GST.While the implementation has been directionally positive, there seems to be a long way to go both for the Government and the taxpayers in attaining a simplified GST regime. It is essential that necessary clarifications along with relevant amendments be carried out to facilitate the trade and align with the Government's goal of ease of doing business.

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Goods and Services Tax (GST)

Notifications and Circulars

CGST Rules – New Rule notified for recovery of dues under 'existing' laws: New Rule 142A has been inserted in CGST Rules, 2017 for recovery of dues under 'existing' laws (i.e., central excise, service tax, VAT, etc.). Accordingly, a summary of order issued under any existing law creating demand of tax, interest, penalty or any other dues will be uploaded in FORM GST DRC-07A on the common portal. Demand will be posted in Part II of Electronic Liability Register in FORM GST PMT-01. FORM GST DRC-07A and FORM GST DRC-08A have also been notified for this purpose. Notification No. 60/2018-Central Tax, dated 30-10-2018 issued in this regard amends CGST Rules for the thirteenth time in 2018. Further, new Rule 83A has been inserted relating to examination of GST Practitioners.

TDS provisions under GST – Exemption to supplies from one PSU to another PSU: Provisions relating to Tax Deduction as Source (TDS) would not be applicable in respect of supply of goods or services or both from a public sector undertaking to another public sector undertaking. This exemption as provided through Notification No. 50/2018-Central Tax, has been extended to such supplies with effect from 1-10-2018, the date when TDS provisions came into effect in the GST regime. Notification No. 61/2018-Central Tax, dated 5-11-2018 in this regard inserts second proviso in Notification No. 50/2018-Central Tax.

Job work - Form GST ITC-04 can be filed till 31-12-2018: Declaration in FORM GST ITC-04, in respect of goods dispatched to a job worker or received from a job worker or sent from one job worker to another, during the period from July, 2017 to September, 2018 can now be furnished till the 31st day of December, 2018. Notification No. 59/2018-Central Tax, dated 26-10-2018 has been issued for this purpose in supersession of Notification No. 40/2018-Central Tax whereby the last date was prescribed as 30-9-2018.

Valuation – Interest on loan/credit by Del-credere agent when includible: CBIC has clarified that when del-credere agent (DCA) is not an agent of supplier, temporary short-term transaction-based loan provided by DCA to the buyer is an independent supply of service by the DCA to the recipient on principal to principal basis and will not form part of value of supply of goods. Circular No. 73/47/2018-GST, dated 5-11-2018 also notes that credit by DCA to the recipient is not a separate supply, if the DCA acts as an agent for the principal. The circular states that in such cases, value of interest charged for such credit is includible in the value of supply of goods by the DCA to the recipient. Reiterating earlier Circular No. 57/31/2018-GST, dated 4-9-2018, it notes that where the invoice for supply of goods is issued by the DCA in his own name, the DCA would fall under the ambit of agent.

Return of goods – Procedure to be followed: CBIC has listed various procedures which may be followed by the manufacturer, wholesaler/retailer for return of time expired goods. As per Circular No. 72/46/2018-GST, dated 26-10-2018, return of such goods can be treated either as fresh supply and consequent issue of tax invoice, or by issue of credit note. In fresh supply, manufacturer destroying returned expired goods will be liable to reverse ITC availed on return supply, if any. Tax liability can only be adjusted in case of credit note, if the same has been issued within the limit specified

under Section 34(2) of the CGST Act. The circular discusses the scenarios in relation to return of goods because of expiry of the same.It also states that it will be applicable to such other scenarios where the goods are returned on account of reasons other than the one detailed in the circular.

Tea Board required to collect TCS from tea producers and auctioneers: Tea Board of India is required to collect TCS from sellers (i.e. tea producers) on the net value of supply of goods i.e. tea; and from auctioneers of the tea on the net value of supply of services (i.e. brokerage). Circular No. 74/48/2018-GST, dated 5-11-2018 clarifying so, notes that Tea Board being the operator of the electronic auction system for trading of tea across the country including for collection and settlement of payments, falls under the category of electronic commerce operator liable to collect tax at source (TCS) under GST law.

Cancellation of GST registration – Procedure clarified: Application for cancellation of GST registration is not to be rejected because of violation of 30 days deadline from the occurrence of the event warranting cancellation. Further, debit of ITC on available stock can be done at the time of submitting Form GSTR-10, whose last date has been extended till 31-12-2018, for the cancellations made by 30-9-2018. Circular No. 69/43/2018-GST, dated 26-10-2018 notes that the requirement to debit the electronic credit and/or cash ledger by suitable amounts is not a prerequisite for applying for cancellation of registration. Taxpayers who have filed application for cancellation will not be required to file other returns. This circular also states that cancellation of registration has no effect on liability.

Registration of Casual Taxable Person and recovery of excess credit distributed by ISD – Clarifications: CBIC has clarified that amount of advance tax required to be deposited by casual taxable person (CTP), while obtaining registration, is to be calculated after considering eligible ITC available to such person. It is also stated that a taxable person would not be treated as CTP beyond 180 days and would have to apply for normal registration by uploading document granting him permission to use premises for the exhibition. Also, advance tax is not required if normal registration is taken. Circular No. 71/45/2018-GST, dated 26-10-2018 also clarifies on recovery of excess credit distributed by an Input Service Distributor. According to this circular, the excess credit so distributed shall be recovered from recipients along with interest and penalty if any. ISD would also be liable to a general penalty under Section 122(1)(ix) of the CGST Act.

Refund of ITC and IGST clarified: CBIC has issued a circular clarifying certain issues on refund of ITC and IGST. According to Circular No. 70/44/2018-GST, dated 26-10-2018, since the common portal at present does not have facility for fresh refund application once deficiency memo is issued, taxpayer will be required to submit rectified applications under earlier ARN only and there is no need to recredit ITC in electronic credit ledger. It also states that a suitable clarification would be issued separately for cases in which such re-credit has already been carried out. Further, clarifying latest amendments in the refund provisions of the CGST Rules, it is stated that exporters who have received capital goods under EPCG, either through import or through domestic procurement, can claim refund of IGST paid on exports.

Ratio decidendi

Service of notice – 'Affixation' only when other methods not practicable: Allahabad High Court has held that use of words 'if none of the modes is practicable' in Section 169 of the CGST Act clearly indicates that it is only after that all

earlier mentioned methods are found as not practicable for service of notice that resort can be taken for affixation of same at some conspicuous place. The High Court observed that there was violation of natural justice as GST registration was cancelled without serving SCN. It also noted that registration was cancelled on basis of *prima facie* opinion without indicating material for same, and that there was nothing on record to establish the time, date and place and the manner in which service by affixation was resorted to. [*Kashi Bartan Bhandar* v. *State of UP* - 2018-VIL-499-ALH]

GST E-way Bill – Missing Zero in the mentioned distance, a typographical mistake: Observing that the distance between Kerala and Uttarakhand is a matter of record and thus verifiable, Kerala High Court has held that the distance showed in e-way bill as 280 km, instead of 2800 km (one zero missing), was a typographical error, and a minor error. The High Court observed that the CBIC had come across many minor discrepancies in the e-way bills, resulting in summary detention of the goods, while it issued Circular No. 64/38/2018-GST dated 14-9-2018. Fact that goods under detention had very short shelf life, was also noted. [*Sabitha Riyaz* v. *UOI* - 2018-TIOL-156-HC-KERALA-GST]

Manual filing of TRAN-1 and GSTR-3B to avoid lapse of ITC: In a case where the assessee was not able to distribute Input Tax Credit (ITC) brought forward from the erstwhile regime, due to some technical issues in uploading TRAN-1, Bombay High Court has directed the assessee to manually file copy of the revised TRAN-1, ITC-01 and GSTR-3B at Mumbai. The Court however refrained itself from giving directions to the Commissioners of Delhi, Gujarat and Karnataka where the branches to whom the credit was distributed, were located. [*Indusind Media Communications* v. *UOI* - 2018-VIL-468-BOM]

Lotteries are 'goods' – GST leviable: Relying on Supreme Court decision in the case of *Sunrise Associates*, Calcutta High Court has held that lotteries are generally speaking 'goods' and come within the definition of 'actionable claims'. It was also held that actionable claims other than lottery, gambling and betting have been kept out of the scope of CGST Act as per Schedule-III and therefore, lottery can be charged to tax under the Central GST Act, 2017. Further, the High Court held that it is within the domain of GST Council to decide the rate of tax and differential levy of tax is permissible. It, however, added that if a resolution adopted in the GST Council meeting breaches any fundamental right or any provision of the Constitution of India, the same can be adjudicated upon by a Writ Court. [*Teesta Distributors* v. *Union of India* - 2018-VIL-455-WB]

Transport planning– Admissibility of exemption : GST AAR Andhra Pradesh has held that consultancy services for preparation of transport studies such as Comprehensive Mobility Plan, Transit Oriented Development Plan, Integrated Public Transport Plan and consultancy services of preparation of detailed project reports on Metro Rail Projects, come within functions of municipality under Article 243W read with Twelfth Schedule to the Constitution of India. The AAR observed that urban transportation is part of urban planning which is entrusted to municipality, and that activities are covered under public amenities in the Twelfth Schedule. It was held that hence the activities undertaken by applicant as governmental authority are covered by exemption under Notification No. 12/2017-Central Tax (Rate). [In RE: *Amaravathi Metro Rail Corporation Limited* - Ruling No. AAR/AP/07(GST)/2018, dated 2-7-2018, AAR Andhra Pradesh]

Job work for foreign entity liable to GST @ 18%: GST AAR Andhra Pradesh has held that process of providing job work service to the foreign principal, in the premises of the applicant as per the specifications of the recipient of services, is taxable under GST and liable to tax @ 18%. AAR in this regard held that place of supply for the transaction was location of the service where actually performed i.e., business premises of the applicant. [In RE: *Synthite Industries* - Ruling No. AAR/AP/08(GST)/2018, dated 20-8-2018, AAR Andhra Pradesh]

Toll charge not excludible from value of security service: GST AAR West Bengal has held that toll charges paid by a security services provider providing services to the bank, are not excludible from value of the supply under Rule 33 of the CGST Rules, 2017. The AAR was of the view that GST will be payable on the entire value of the supply, including toll charges paid. The applicant was held as not acting as a 'pure agent' of the bank while paying toll charges. The toll charges were held as cost of service provided to the banks so that the vehicles can access roads/bridges to provide security services to the banks. [In RE: *Premier Vigilance & Security Pvt Ltd.* - 20/WBAAR/2018-19 dated 2-11-2018, AAR West Bengal]

IIMs eligible for both Sl.66(a) and 67 of Notification No. 12/2017-CT (Rate): GST AAR West Bengal has held that Indian Institute of Management, Calcutta is an educational institution within the meaning of clause 2(y)(ii) of Notification No. 12/2017-Central Tax (Rate) and is eligible for benefit of Entry No. 66(a) of said notification, applicable to such educational institutions as such. The AAR, however, also observed that applicant would also be eligible for benefit under Entry No. 67 as it specifically concerns IIMs, and courses mentioned therein will be eligible under the specific entry even if not mentioned elsewhere. [In RE: *Indian Institute of Management, Calcutta* – Order No. 21/WBAAR/2018-19 dated 2-11-2018, AAR West Bengal]

Amount received from contract brewing units for use of IP, liable to GST: Appellate Authority for Advance Rulings Karnataka has held that by permitting brewers to use trademarks owned by the applicant, permitting acquisition of know-how on production and packaging of applicant's beer, applicant has permitted the brewer to use intellectual property rights covered under clause 5(c) of the Schedule II of the CGST Act. The service supplied by the appellant was held classifiable under Service Code 999799 as 'other services nowhere else classified'. Amount in the nature of reimbursement of expenses, received from brewers, was held liable to GST @ 18%. [In RE: *United Breweries* - Order No. KAR/AAAR/03/2018-19, dated 23-10-2018, AAAR Karnataka]

No GST on quit rent paid to government on land used for agriculture: AAR Kerala has held that quit rent or lease rent paid to the Kerala Government on land used for agricultural purpose (coffee plantation) is classifiable under HSN 9986 and not 9973. The AAR noted that though lease is covered within the meaning and scope of supply, and quit rent is a tax imposed by government on occupants of freehold or leased land in lieu of services to a higher landowning authority, service is exempt under Notification No. 12/2017-Central Tax (Rate). GST was demanded by the Forest Department from the applicant under HSN 9973. [In RE: *Cochin Plantation* – Advance Ruling No. KER/11/2018, dated 20-10-2018, AAR Kerala]

No concessional GST on works contract carried for business purposes: Observing that main object of the company was to carry on business of purchasing, selling, trading of electrical energy, AAR GST Madhya Pradesh has held that projects by assessee-applicant under

various government schemes are carried out for business purposes. The applicant was hence denied the benefit of concessional rate of GST @ 12% to works contract services received by them for construction and erection for power distribution. The applicant was however held to be a government entity as per Notification No. 31/2017-Central Tax (Rate). [In RE: *MP Poorv Kshetra Company Ltd*. - Advance Ruling No. 14/2018, dated 18-9-2018, AAR Madhya Pradesh]

Bus body building on chassis provided by principal is supply of service: AAR Goa has held that in a case where bus body builder builds body on chassis provided by the principal for body building, and charges fabrication charges (including certain material that was consumed during the process of job-work), the supply shall merit classification as supply of services under HSN 9988 and hence, should be taxed @ 18% GST. The Authority placed reliance on the ratio of the judgement in the case of *Prestige Engineering (India) Ltd.* [1994 (73) ELT 497 (SC)], wherein it was held that addition or application of items by job worker would not detract from the nature and character of his work. [In RE: *Automobile Corporation of Goa Ltd.* - 2018-VIL-217-AAR Goa]

ITC available only on services used for business purposes: Observing that the services received were varied in nature and intended partly for business use (to the extent intended for the plant, plant area or plant building) and partly for non-business use (to the extent intended for use outside the plant area), AAR Odisha has held that the tax paid by the applicant for the services which were used for business purpose only would be eligible for input tax credit. The applicant was engaged in manufacture of calcined alumina in its refinery, and as part of its business had townships and residential colony. It was running hospitals for its employees and had guest houses for touring employees and guests. The applicant received various services of repair and maintenance in the townships, guest houses, hospitals and horticulture, received as part of its business operations. [In RE: *National Aluminium Company Ltd.* - 2018-VIL-208-AAR Odisha]

Service of providing Pollution Control Certificate liable to GST – Not a pure service provided by government: Service provided for issuing Pollution Under Control Certificate (PUC) for vehicles on behalf of State Government is liable to GST. AAR Goa while holding so observed that services were not covered under Schedule III to the Central Goods and Service Tax Act, 2017 as well as Goa Goods and Service Tax Act, 2017. It was held that applicant did not provide pure service provided by the Central Government, State Government, Union Territory or Local Authorities or by a Governmental Authority by way of any activity in relation to any function entrusted to a panchayat under Article 243G of the Constitution or relation to any function entrusted to the municipality under the Article 243W of the Constitution. It was also noted that services of testing of pollution were provided on payment of service charge. [In RE: *Venkatesh Automobiles* - 2018-VIL-218-AAR Goa]

Processing natural gas is job work: GST AAR Kerala has held that the activity of processing natural gas and other inputs received from the oil company (BPCL) on free of cost basis and manufacturing industrial gases shall fall under the scope of 'job work' under GST. It was held that the activity was job work as the output would not be owned by the applicant providing the service. It was held that the statute does not specify any restriction that the 'inputs' subject to the treatment or process shall be taxable goods. The activity was held to fall under Serial No.(ii) of the HSN 9988 and taxable at the rate of 18% under GST. [In RE: *Podair Air Products India (P) Ltd.* - 2018-VIL-245-AAR Kerala]

Supply of medicines to in-patients is composite supply – Exemption available under healthcare services: Supply of medicines, consumables and implants used in the course of providing health care services to in-patients for diagnosis or treatment would be considered as composite supply. The Advance Ruling Authority of Kerala in this regard observed that as far as an in-patient is concerned, the hospital is expected to provide lodging, care, medicine and food as part of treatment under supervision till discharge from the hospital. It was also held that these activities would be eligible for exemption under the category of health care services. [In RE: *Kims Healthcare Management Ltd.* - 2018-VIL-246-AAR Kerala]

Customs

Notifications, and Circulars

IGST refund in invoice mismatch issue – Officer interface facility extended: Alternative mechanism with an officer interface to resolve invoice mismatches errors for IGST refund has been extended for shipping bills filed till 15-11-2018. Further, similar mechanism will also be available in cases where the refund scroll has been generated for a much lesser IGST amount than what was actually paid against exported goods, due to errors by the exporter or the customs officer. As per Circular No. 40/2018-Cus., exporters are required to once submit Revised Refund Request for the differential amount, even in cases where compensation cess was not mentioned in shipping bill.

Reimport of goods earlier exported by post – Exemption clarified: Customs Notification Nos. 45/17-Cus, and 46/2017-Cus, issued in supersession of Notification No. 94/96-Cus., are also applicable to the re-import of goods which were earlier exported through Post. Clarifying so, CBIC Circular No. 45/2018-Cus., dated 19-11-2018 observes that concessions available under Notification No.94/96-Cus. have been continued through these notifications. This circular also states that reference to Section 51 of the Customs Act in the notification does not seek to deny the benefit to the goods to which Section 51 may not apply.

Pharma exports – Track and Trace system for drug formulations postponed: Date for implementation of Track and Trace system for export of drug formulations has been extended up to 1-7-2019. The extension is with respect to maintaining the Parent-Child relationship in packaging levels and its uploading on Central Portal, for both SSI and non-SSI manufactured drugs. Para 2.90 A (vi) and (vii) of the FTP Handbook of Procedure 2015-20 has been amended in this regard by DGFT Public Notice No. 43/2015-2020, dated 1-11-2018. The system was to be implemented by 15-11-2018.

In-bond manufacturing – Forms consolidated, and procedures clarified: CBIC has updated procedure for seeking permission for in-bond manufacturing and for maintaining various records. An elaborate Circular No. 38/2018-Cus., dated 18-10-2018 issued for this purpose also prescribes various forms and clarifies duty liability on removal of processed goods from such warehouse. The form for seeking permission for in-bond manufacture will also serve the purpose for seeking grant of license as a private bonded warehouse. Further, a separate form to be

maintained by a unit operating under Section 65 of the Customs Act, for receipt, processing and removal of goods, has been prescribed. The new form combines data elements required under Manufacture and Other Operations in Warehouse Regulations, 1966 and Warehouse (Custody and Handling of Goods) Regulations, 2016. The circular also prescribes a triple duty bond for the warehoused goods which is required to be executed by the owner of the warehoused goods.

The circular clarifies that no duty is required to be paid in respect of the imported goods contained in the resultant product in case the resultant product manufactured or worked upon in a bonded warehouse is exported. However, transaction will also be covered under the definition of 'supply' and consequently be liable to GST if the resultant product is cleared for domestic consumption.

Export of restricted items - DGFT consolidates list of documents required: DGFT has prepared a list of documents required by exporters while filing applications for grant of export authorisations for restricted items. Trade Notice No. 35/2018 also states both online and offline application processes under actions on part of firms/individuals, while also providing steps to be followed by DGFT. Some specific documents as required by concerned administrative Ministries for grant of NOC have been consolidated while check list for other frequently traded restricted goods will be prescribed shortly.

EPCG authorisations are now valid for 24 instead of 18 months: Validity period of Export Promotion Capital Goods (EPCG) Authorisations has been extended from 18 months to 24 months. DGFT Public Notice No. 47/2015-20, dated 16-11-2018 while amending Para 2.16 of the FTP Handbook of Procedures Vol. 1, also states that import validity period of EPCG Authorisations which have been issued prior to 16-11-2018 and whose validity has not expired on this date, shall also be extended to 24 months from the date of issuance of the Authorisation.

Ratio decidendi

Provisional release order appealable before CESTAT: Punjab & Haryana High Court has held that appeal against the order passed by the Commissioner (Customs) under Section 110A of Customs Act, 1962, for provisional release of the goods, lies before the CESTAT. Department's plea that such order passed by the Commissioner is essentially an administrative decision and not adjudicatory, was rejected. Citing various decisions of the Apex Court, the High Court observed that whenever civil consequences follow from an order passed by an authority, it assumes the character of a quasi-judicial order. [*Commissioner* v. *Gaurav Pharma* - 2018-VIL-484-P&H-CU]

Advance authorisation – Condition of pre-import for IGST exemption, valid: Madras High Court has dismissed writ petitions challenging Notification No. 79/2017-Cus. amending Notification No. 18/2015-Cus. and incorporating condition of pre-import and physical exports, for exemption from IGST and Compensation Cess on imports under Advance Authorisations. The case involved replenishment of inputs post exports. The Court in this regard noted that by not allowing exemption of IGST at the time of import, no benefit in the AA scheme is altered by the Government, though collateral costs get fastened. It observed that DFIA scheme suited existing operation of the petitioner in the GST regime, and that petitioner cannot choose one scheme and insist the government to modify it to its convenience. [*Vedanta Ltd.* v. *Union of India* - 2018-TIOL-153-HC-MAD-GST]

Valuation - Exports need not be by same exporter and within same month: CESTAT Hyderabad has observed that Rule 4 of Customs

Valuation (Determination of Value of Export Goods) Rules, 2007 does not require that exports should be by the same exporter. It also noted that the rule only says that the value comparison must be with the goods exported at or around the same time but does not specify that it must be within the same month. The Tribunal held that lower authority should have examined feasibility of finding price of goods of like kind and quality exported at or around the same time. The rejection of the transaction value under Rule 8 by the lower authority was however held to be correct. [*Obulapuram Mining Company* v. *Commissioner* - Final Order No. A/31240-31242/2018, dated 28-9-2018]

TED refund available for supplies to EOU before 15-3-2013: In a case involving supplies to an EOU, Delhi High Court has allowed grant of TED refund for transactions carried out before 15-3-2013 when a Policy Circular was issued by the DGFT. The circular directed non-refund of TED in cases where exemption from Central Excise duty is available. The department argued that the circular did not introduce any new provision, but only clarified the Foreign Trade Policy as was existent at the relevant time. The Court however directed processing of refund application and payment of interest @ 9% per annum. [*Hindustan Tin Works Limited* v. *UOI* - W.P.(C) 10526/2017, dated 8-10-2018, Delhi High Court]

Central Excise and Service Tax

Ratio decidendi

Cenvat credit available on towers and shelters used for telecom service: Delhi High Court has allowed Cenvat credit on towers, shelters and parts thereof used for providing telecommunication services. Allowing assessee's appeal, it observed that the goods at the time of their receipt were movable, and that CESTAT failed to appreciate the permanency test as laid down by the Supreme Court. The High Court held that machine annexed to earth by fixing with nuts and bolts on a foundation, to provide for stability and wobble free operation would not constitute an immovable property. The goods were held to be capital goods and also inputs. [*Vodafone Mobile Services* v. *Commissioner* - CEAC 12/2016 and Ors., dated 31-10-2018, Delhi High Court]

COD clearance – Tribunal not to dismiss appeal in absence of COD: Chhattisgarh High Court has held that it was not permissible for Tribunal to dismiss appeal filed in 2006 only for want of clearance from Committee on Disputes (COD). The Court observed that the Supreme Court in ONGC's case never empowered any Court/Tribunal to dismiss appeal in absence of COD clearance. The Court agreed with assessee's view that the Tribunal should have kept appeals pending till clearance was obtained. Tribunal's Order dismissing restoration application due to long delay was also set aside, considering the case to be exceptional. [*Steel Authority of India* v. *Commissioner* - TAXC No. 8, 9 and 11 of 2018, decided on 26-10-2018, Chhattisgarh High Court]

DGCEI has all India jurisdiction, pendency u/s.73 unrelated for s.14 notice: Delhi High Court has held that Officers of DGCEI have all India jurisdiction and can issue notices and enquire into matters relating to service tax against any assessee/ person even if the said person is registered with one or multiple

Commissionerates. It also held that pendency of recovery proceeding under Section 73(1) of the Finance Act, 1994 was not a condition precedent for issue of notice under Section 14 of Central Excise Act. The Court also observed that centralised investigation was desirable and necessary to curtail delay. [*National Building Construction Company* v. *UOI* - W.P.(C) 1144/2016, decided on 16-11-2018, Delhi High Court]

Cenvat credit available on cement used for filling pits for mining: CESTAT Delhi has allowed Cenvat credit on cement used for filling open pits of mines prior to initiating subsequent extraction of ore in the said mine. The Tribunal observed that filling of open pits with cement was a mandatory pre-requisite to extract ore, being a statutory requirement under Regulation 107(3) of the Metalliferous Mines Regulations Act, 1961. Such cement was held as covered under definition of 'inputs'. It was also held that such use was in relation to manufacture, i.e. extraction of ore. [*Hindustan Zinc Ltd.* v. *Commissioner* - Final Order No. 53167-53172/2018, dated 26-10-2018, CESTAT Delhi]

Cenvat credit available on product liability/recall liability insurance: CESTAT Hyderabad has allowed Cenvat credit of service tax paid on Product Liability Insurance and Product Recall Liability Insurance services taken by the assessee. It observed that the insurance was for covering financial loss of the appellant-manufacturer and it cannot be considered as a post manufacturing activity. The Tribunal also noted that finance or raising of capital or adjustment of finances by way of taking insurance etc., fell within the inclusive part of the definition of input services. [*CCL Products India Ltd.* v. *Commissioner* - Final Order No. A/31270/2018, dated 3-10-2018, CESTAT Hyderabad]

Cenvat credit on insurance of life of Joint Managing Director, admissible: CESTAT Chandigarh has allowed Cenvat credit of tax paid on insurance for the compensation of loss incurred to the assessee due to the life loss of the Joint Managing Director. The insurance, in this case, was taken by the assessee-manufacturer for their use and the premium was also paid by the assessee only. The Tribunal observed that merely because insurance was in the name of Joint Managing Director and not in the name of the company, credit could not be denied. [*HPL Additives Limited* v. *Commissioner* - Final Order No. 63255/2018, dated 10-10-2018, CESTAT Chandigarh]

Refund of service tax to SEZ – Cenvat credit not availed unless utilised: Observing that by mere maintenance of an account showing total quantum of service tax paid, it cannot be held that assessee had availed Cenvat credit, CESTAT Mumbai has allowed refund to a SEZ unit under Notifications Nos. 17/2011-ST and 40/2012-ST. Revenue department's plea that amount was also reflected in ST-3 Returns, was also rejected. The Tribunal in this regard observed that availment cannot be held to be there, unless such service tax accumulated in the accounts of the assessee stood utilized. [*Sonodyne International* v. *Commissioner* – Order No. A/87665/2018, dated 18-10-2018, CESTAT Mumbai]

Cenvat credit on supplementary invoices issued after opting for VCES: CESTAT Chennai has allowed Cenvat credit in a case where the service provider had issued supplementary invoices to the appellant-assessee after opting for Voluntary Compliance Encouragement Scheme (VCES) 2013. The Tribunal observed that the department having accepted the declaration in terms of VCES and having issued acknowledgement of discharge, cannot seek to recover or deny Cenvat credit. It

noted that department did not challenge issuance of VCES-3 nor issued any notice to service provider alleging fraud, etc. [*Sri Balaji Castings Pvt. Ltd.* v. *Commissioner* - Final Order No. 42605/2018, dated 5-10-2018, CESTAT Chennai]

Tractor Cess not imposable on parts and accessories of tractors: CESTAT New Delhi has held that Tractor Cess imposed under a notification issued under Industrial (Development and Regulation) Act, 1951, was not leviable on parts and accessories of tractors. It observed that parts and accessories of tractor cannot be compared with that of the tractor itself. Reliance in this regard was placed on Ministry of Finance Circular No. 41/88, dated 31-8-1988 relating to cess on automobiles. The Tribunal noted that the principle enunciated in the said circular was applicable. [*Gatiman Auto Pvt. Limited* v. *Commissioner* - Final Order Nos. 53087 – 53089/2018, dated 9-10-2018, CESTAT Delhi]

Export of services when outflow of foreign exchange reduced: In a case involving remittance of net charges to the foreign parent company, after deduction of service charge or commission, CESTAT Mumbai has allowed refund of service tax paid on export of Business Auxiliary Services. Relying on Income Tax case, it observed that since Indian Rupees were obtained in lieu of foreign exchange, same will be deemed to be convertible exchange. The Tribunal observed that in this way outflow of foreign exchange was reduced to the extent of commission/service charge retained in India. [*Import Express India* v. *Commissioner* - Order No. A/87580/2018, dated 10-10-2018, CESTAT Mumbai]

Full Cenvat credit available even when service used by others also: CESTAT Hyderabad has allowed full Cenvat credit to the assessee when the services of lift maintenance and security were enjoyed by other companies also in the same complex. The department had allowed proportionate credit in such case. Comparing it with the enjoyment of one's porch light by passers-by, the Tribunal observed that assessee-appellant had hired and paid for these services, and there was no rule under which the department can vivisect and partly deny the credit. [*A V R Storage Tank Terminals Pvt. Ltd.* v. *Commissioner* - Final Order No. A/31208/2018, dated 20-9-2018, CESTAT Hyderabad]

Cash refund of amount paid through Cenvat credit, once GST regime in force: Relying on Section 142(3) of Central GST Act, 2017, CESTAT Chennai has held that once GST regime is in force, pending refund claim, if sanctioned, will necessarily have to be paid in cash irrespective of the fact whether refund amount pertains to Cenvat account or was paid from account current. The Tribunal was dealing with refund of amount of 6% paid through Cenvat account mistakenly to take benefit of exemption. Allowing cash refund, it observed that any other interpretation will leave assessee high and dry. [*Toshiba Machine (Chennai)* v. *Commissioner* - Final Order No. 42462/2018, dated 25-9-2018, CESTAT Chennai]

Certification of information not covered under CA service: CESTAT Hyderabad has held that certification of information and providing comfort letter was not covered under Chartered Accountant services. It observed that activity was not related to accounting or auditing. The Tribunal noted that the assessee was not maintaining accounts as they were auditors, and that certificate issued, as per norms of US Securities Exchange Commission, was not concerned with auditing, a statutory requirement under the Companies Act. It noted that such service by a CA was not included in Notification No. 59/98-ST till 28-2-2006. [*Commissioner* v. *Price Waterhouse* - Final Order No. A/31339-31340/2018, dated 25-10-2018, CESTAT Hyderabad]

Value Added Tax (VAT) and other Taxes

Ratio decidendi

Reassessment order under Karnataka VAT, after GST regime, is valid: Karnataka High Court has held that merely because a reassessment order under Karnataka VAT Act for the year 2012-2013 was passed after coming into force of the GST regime in 2017, it would not make such order void in the eyes of law. The Court further noted that Section 174 of the KGST Act, 2017 saves all the rights, liabilities acquired, accrued or incurred under the repealed Acts enumerated under Section 173 thereof which includes KVAT. It was also held that ground of attack on Section 174 of KGST Act does not affect the validity of the KVAT Act. [*Prosper Jewel LLP* v. *Deputy Commissioner* - Writ Petition No.20642/2018 (T-RES), decided on 25-10-2018, Karnataka High Court]

Limitation for ITC - Tamil Nadu VAT Section 19(11) constitutionally valid: Supreme Court has upheld the constitutional validity of Section 19(11) of the Tamil Nadu VAT Act which restricts input tax credit beyond a certain period. It held that statutory scheme delineated by said provisions was neither arbitrary nor violate the right guaranteed to a dealer under Article 19(1)(g) of the Constitution of India. The Court held that use of the word 'shall' in Section 19(11) indicated that compliance with the same was mandatory and the same was not directory. [*ALD Automotive Pvt. Ltd.* v. *CTO* - Civil Appeal Nos. 1041210413/2018 and Ors., decided on 12-10-2018, Supreme Court]

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