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Article

Preparing for GST Audit & Annual Returns

By **Amandeep Singh**

Introduction

Goods & Services Tax (GST) is a self-assessment and trust-based system of taxation wherein the registered person himself assesses and deposits his tax liability without any interference of tax officers. Due to such nature of the tax system, various types of audit mechanism have been incorporated to ensure compliance with the provisions by verifying the correctness of declared turnover, taxes paid, refunds claimed and tax credit availed. The following types of audit mechanism has been provided under GST laws:

1. *Audit as per Section 35* - To be conducted by a Chartered Accountant or a Cost Accountant, if aggregate turnover exceeds the specified limit in terms of Section 35(5) of the CGST Act, 2017 ("the Act")
2. *Audit by Tax Authorities/ Departmental Audit*
   - To be undertaken by Commissioner or any officer authorized by him in terms of Section 65 of the Act.
   - Special Audit to be conducted as per Section 66 of the Act.

The new tax regime has already completed its first anniversary and the first financial year i.e. FY 2017- 18 post implementation of GST has also ended on 31st March 2018. Now it is time for the members of trade and industry to get ready for undertaking the exercise of GST audit and file the first GST Annual Return. In this article, we will discuss GST audit of registered persons (taxpayers) to be conducted as per Section 35(5) of the Act read with Rule 80(3) of the CGST Rules, 2017 ("CGST Rules") and the obligation to file annual return.

Statutory provisions for GST audit and annual return

Section 44(1) of the Act states that "*Every registered person, other than an Input Service Distributor, a person paying tax under section 51 or section 52, a casual taxable person and a non-resident taxable person, shall furnish an annual return for every financial year electronically in such form and manner as may be prescribed on or before the thirty-first day of December following the end of such financial year.*"

Section 35(5) of the Act states that "*every registered person whose* ***turnover*** *during a financial year exceeds the prescribed limit shall get his accounts audited by a chartered accountant or a cost accountant and shall submit a copy of the audited annual accounts, the reconciliation statement under sub-section (2) of section 44 and such other documents in such form and manner as may be prescribed.*"

Rule 80 (3) of the CGST Rules provides "*every registered person whose* ***aggregate turnover*** *during a financial year* ***exceeds two crore rupees*** *shall get his accounts audited as specified under sub-section (5) of section 35 and he shall furnish a copy of audited annual accounts and a reconciliation statement, duly certified, in FORM GSTR-9C, electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner.*

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On reading the above provisions, the applicability of GST Annual Return and Audit can be summarized as under:

Annual Return - Every registered person, except an ISD, person paying TDS/TCS, casual taxable person & non-resident taxable person.

GST Audit - Every registered person with aggregate turnover of Rs.2 crores.

Turnover and aggregate turnover

It is to be noted that Section 35(5) uses the word "**turnover**" whereas in Rule 80 (3) the words used are "**aggregate turnover**". CGST Act contains definition for 'aggregate turnover' which is computed on all India basis. There is no definition for 'turnover' in CGST Act as it defines only turnover in a State. As wordings in section and rule are not identical, an issue may arise as to whether GST audit is required for all the GST registrations once the aggregate turnover at all India level exceeds INR 2 Crores or the turnover threshold is to be seen at registration level. If there is a registration with turnover less than INR 2 Crores, whether such registration is required to comply with GST Audit requirement is an issue requiring clarification from the authorities.

Annual Return – Additional reporting requirements

Annual Return as per Section 44 of CGST Act is to be filed on or before 31st December, 2018 for the FY 2017-18. CBIC has recently notified the form for annual returns – GSTR-9 applicable to normal taxpayers and GSTR-9A applicable to taxpayers operating under composition scheme. These forms seek details of outward supplies, inward supplies, taxes paid and credits availed besides information on demands and refunds. HSN-wise summary of outward supplies for the FY 2017-18 have to be provided in a consolidated manner. Though these forms essentially seek to consolidate the figures / information submitted through monthly returns filed by the assessee, yet there are certain additional reporting requirements for which the assessee will have to work overtime to compile the required information. Additional data / information required in annual return which are not captured in monthly returns are:

- HSN wise summary of inward supplies (purchases)
- Segregation of inward supplies received from different categories of taxpayers like composition taxpayers
- Inputs / Capital Goods / Input Services – Segregation of inward supplies
- Particulars of the transactions for the previous FY declared in returns of April to September of current FY.

GST Audit – Not mere accounting exercise

GST is just-born and several taxpayers are still trying to get accustomed to the new regime in so far general compliances are concerned. Considering the number of amendments made to provisions, taxpayers may find it difficult to comprehend implications of all such changes. Therefore a lot of efforts would be required on the part of both GST Auditor and GST Auditee to prepare for highly specialized compliance like GST Audit. Certain areas which would require special attention from legal angle are briefly mentioned in the following paragraphs.

Intra-company transactions

Intra-company transactions such as stock transfer, which are taxed in GST regime in case of inter-State supplies, are not strictly speaking taxable supplies for a company. The effect of these transactions gets nullified at the consolidated financial statement level and therefore, identifying and reporting of such transactions for audit purposes would require special attention in terms of compliance with

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provisions of GST law. Liability and valuation of every transaction of this nature will require verification with the law so as to effectively comply with audit obligations.

Cross-charging intra-company expenses

There are many transactions which even without an accounting entry are liable to GST such as cross-charging of promotion and advertisement expenses incurred by head office or corporate office for the company as a whole. Such transactions are in the nature of HO providing service to its various other registrations in different States. Identification and valuation of such transactions under GST law will be key before GST audit. Reconciliation of such transactions with books of accounts will be a major challenge. GST implications on transactions with employees such as provision of various facilities and perquisites, deductions from salary, welfare schemes, etc., need to be appropriately addressed and then accounted for during GST audit.

The upcoming first GST audit shall cover the entire range of transactions undertaken in the new GST regime and therefore shall be very crucial in identification of discrepancies and in taking corrective measures timely to reduce future litigation wherever possible.

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Goods and Services Tax (GST)

Notifications and Circulars

GSTR-1 for July 2017 to September 2018 can be filed till 31-10-2018: Form GSTR-1 for the months of July 2017 to September 2018 can now be filed till 31st of October 2018, both by persons having turnover up to Rs.1.5 crore and more (with certain exceptions). Taxpayers having turnover up to Rs.1.5 crore can file quarterly GSTR-1 for various quarters starting from October to March, 2019 by the last day of the subsequent month. Taxpayers having turnover more than Rs.1.5 crore are required to file monthly GSTR-1 returns by 11th of subsequent month, for the months from October 2018 to March 2019.

Due date for filing quarterly GSTR-1 for July, 2018 to September, 2018 is 15-11-2018 in the case of registered persons in Kerala, or having principal place of business in Kodagu district in Karnataka or Mahe in Puducherry. Further, taxpayers who have obtained GSTIN in terms of Notification No. 31/2018-Central Tax, can file this return for the period July 2017 to September 2018, by 31st of December 2018. Notification Nos. 43 and 44/2018-Central Tax, both dated 10-9-2018 have been issued for this purpose.

TDS & TCS provisions to come into force from 1st October, 2018: Provisions relating to Tax Deduction at Source (TDS) and Collection of Tax at Source (TCS), provided under Sections 51 and 52 of the Central GST Act, 2017 will come into effect from 1st of October 2018. TDS provisions provide for mandatory deduction of tax at the rate of 1% of value of supply (excluding GST) by the department or establishment of Central Government or State Government, or local authority, or Governmental agencies. Notification No. 50/2018-Central Tax, dated 13-9-2018 has been issued in this regard in supersession of Notification No. 33/2017-Central Tax which though brought these provisions into effect from 18-9-2017 but stated that liability to deduct tax will come into effect from a date to be notified subsequently. It also notifies public sector undertakings and authority or a board or any

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other body set up by an Act of Parliament or a State Legislature, and certain other entities, as liable to deduct tax at source. Electronic commerce operators are liable under Section 52 of the CGST Act for collection of tax at source not exceeding 1% of net value of taxable supplies which is also defined in the provisions.

Principal-agent relationship for mandatory registration clarified: Observing that crucial element in the principal-agent relationship is the representative character of the agent, CBIC has clarified that the key ingredient for determining relationship in GST would be whether the invoice for further supply on behalf of principal is issued by the agent or not. According to Circular No. 57/31/2018-GST, dated 4-9-2018, where invoice for further supply is issued by the agent in his name then such supply will fall within Schedule I of CGST Act. But where agent's invoice is in the name of the principal, such agent will not be liable for mandatory registration.

Alternative method for reversal of wrongly availed Cenvat credit or inadmissible transitional credit: CBIC has prescribed an alternative method for reversal of inadmissible transitional credit and wrongly availed Cenvat credit under central excise and service tax law. Table 4(B)(2) of Form GSTR-3B is to be used for such reversal. Interest and penalty, applicable on all such reversals, must be paid through entry in column 9 of Table 6.1 of GSTR-3B. Circular No. 58/32/2018-GST, dated 4-9-2018 issued for this purpose, notes that functionality to record this liability in the electronic liability register (Part II of FORM GST PMT-01) is not available in the GST portal at present.

E-way bill validity – Storing of goods in transporter's godown can be opted: CBIC has clarified that in cases where consignee/ recipient taxpayer stores his goods in the transporter's godown, the same can be declared as an additional place of business by the recipient taxpayer, and mere declaration by consignee with the concurrence of the transporter in the said declaration will be sufficient for this purpose. Circular No. 61/35/2108-GST, dated 4-9-2018 also states that transportation will be deemed to be concluded once goods reach transporter's godown and therefore, validity of e-way bill need not be extended. Books of accounts in relation to such goods can be maintained by the consignee at his principal place of business.

Invoice procedure for goods transportation in batches and lots: Procedure for transportation of goods in semi-knocked down or completely knocked down condition, without invoice, will be applicable also for transportation of goods in batches and lots as well. Sub-rule 55(5) of the Central Goods and Services Tax Rules, 2017 (CGST Rules) has been amended for this purpose by Notification No. 39/2018-Central Tax, dated 4-9-2018. Accordingly, the supplier has to issue complete invoice before dispatch of the 1st consignment and delivery challans for each consignment, containing reference to the invoice. Consignment must be accompanied by copies of delivery challan along with a certified copy of invoice.

Documents for taking ITC – Provisions relaxed: CBIC has amended CGST Rules to specify that Input Tax Credit would be available even if the document does not contain all the specified particulars. According to the latest amendments made by notification dated 4-9-2018, details of amount of tax charged, description of goods or services, total value of supply, GSTIN of the supplier and recipient and place of supply in case of inter-State supply, will be sufficient. Proviso has been added in sub-rule 36(2) of the CGST Rules, by Notification No. 39/2018-Central Tax.

Late fees waived for filing GSTR-3B, 4 and 6 for specified period: CBIC has waived late fee paid by taxpayers who had submitted Form

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GSTR-3B for the month of October 2017 but was not filed in the GST portal. Similarly, such fee has been waived for persons who have filed return in Form GSTR-4 for the period October to December 2017 by the due date but late fee was erroneously levied, and for Input Service Distributors who have paid such fee for Form GSTR-6 for any tax period between 1-1-2018 and 23-1-2018. These waivers have been granted as per Notification No. 41/2018-Central Tax dated 4-9-2018.

Time limit for making declaration in FORM GST ITC-04 extended: Form GST ITC-04 for the period from July 2017 to June 2018, in respect of goods dispatched to a job worker or received from a job worker or sent from one job worker to another, can now be filed till 30th of September 2018 as per Notification No. 40/2018-Central Tax, dated 4-9-2018. It may be noted that originally the return for the period from July to September 2017 was to be filed till 25th of October 2017, but the date was extended till 30th of November and then till 31st of December 2017.

GST TRAN-1 can be filed till 31st March 2019: Registered persons who could not submit the GST TRAN-1 by the due date on account of technical difficulties in the common portal and in respect of whom the GST Council has made a recommendation for extension in time limit, can now file this declaration by 31-3-2019. Further, according to Notification No. 48/2018-Central Tax amending CGST Rules, 2017 for the ninth time this year, such persons may submit the statement in FORM GST TRAN-2 by 30-4-2019. Rule 117 of the CGST Rules has been amended with effect from 10-9-2018 to provide for such relaxation.

Audit – Reconciliation statement and certification – Form GSTR-9C notified: CBIC has notified Form GSTR-9C for the reconciliation statement and the certification which must be furnished along with the audited annual accounts, electronically through the common portal. Central GST Rules, 2017 have been amended for the tenth time this year, by Notification No. 49/2018-Central Tax, dated 13-9-2018.

Ratio decidendi

Supply or construction of solar power plant is composite supply: Maharashtra Appellate Authority for Advance Ruling for GST has held that contract for supply/construction of solar power plant for supply of both goods and services is a composite supply and not a works contract as held by AAR in its order impugned before the Appellate Authority. The Appellate Authority in this regard observed that the agreement included engineering, design, procurement, supply, development, testing and commissioning, and was a composite supply, as supplies of goods and services were naturally bundled inasmuch as it is natural and also a practice to expect that the contractor who will supply the goods will also supply the services along with it.

Applicant-appellant was however held to be providing works contract under Section 2(119) of the CGST Act, since the project fulfilled all conditions of immovable property. It was noted that the machines were embedded with no visible intention to dismantle them and they were intended to be used for a fairly long period of time. [In RE: *Giriraj Renewables* – Order No. MAH/AAAR/SS-RJ/08/2018-19, dated 5-9-2018, AAAR Maharashtra]

GST liability on activities of Charitable Trust: Deliberating on various meanings of the words 'trade' and 'commerce', Maharashtra AAR for GST has held that a charitable trust with object of advancement of religion, spirituality and yoga can be said to be in the business and be liable to be registered under the GST provisions. It was also

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held that sale of spiritual material was 'supply' under Section 7 of the Central GST Act. On claim of exemption under GST as charitable trust, it was held that activities of arranging satsang/shibir/yoga camps by applicant were not covered under 'charitable activities' and particularly under advancement of religion, spirituality and yoga, although registration was obtained under Section 12AA of the Income Tax Act. [In RE: *Shrimad Ramchandra Adhyatmic Satsang Sadhana Kendra* – Order No. GST-ARA-41/2017-18/B-48, dated 14-6-2018, AAR Maharashtra]

Supply of spares, consumables take service out of 'pure service': Observing that assessee was also supplying spares, materials and consumables to municipalities under contract for operation and maintenance of sewage treatment plants, AAR Maharashtra has held that the service is not covered as 'pure service' under Sl. No. 3 of Notification No. 12/2017-Central Tax till 24-1-2018 when Sl. No. 3A was inserted for 'composite supplies'. The Authority however noted that exemption from 25th January 2018 is available if the value of goods does not exceed 25% of the value of the composite supply. The applicant was held as eligible for availing ITC of the purchases made against such work orders. [In RE: *Khilari Infrastructure Private Limited* – 2018-VIL-134-AAR]

Customs

Notifications, and Circulars

EPCG – Shifting of capital goods, and EO fulfilment intimation: EPCG authorisation holders have been permitted to shift capital goods, imported during entire export obligation period, to their other units mentioned in their IEC and RCMC. Fresh installation certificate however would be required within 6 months. Further, Regional Authority can be intimated on fulfilment of export obligation as well as average exports, without using digital signatures. Amendments in this regard have been made in Paragraphs 5.04(a) and 5.14(b) of Handbook of Procedures Vol.1 by Public Notice Nos. 31 and 32/2015-20, both dated 29-8-2018.

Bio-fuels – Export Policy revised from 'free' to 'restricted': Ministry of Commerce and Industry has, on 28-8-2018, amended export policy of biofuels from 'Free' to 'Restricted', in line with the National Policy on Biofuels 2018. New entries at Sl. No. 115A, 115B and 115C have been inserted in Schedule 2 of ITC (HS) to cover Tariff Items 2207 20 00, 2710 20 00 and 3826 00 00. Export of bio-fuels enumerated in said entries will now be permitted under license only for non-fuel purposes. Notification No. 29/2015-2020 has been issued for this purpose. It may be noted that Import Policy for such products, with similar conditions, was notified on 21-8-2018.

Export of SCOMET items for repair/display - Procedure: DGFT has laid down elaborate procedure for export of imported or re-imported (indigenous) SCOMET items for repair or replacement purposes and for export of SCOMET items for display, exhibition, tenders, etc. Public Notices Nos. 33 and 34/2015-20, both dated 4-9-2018 insert Paras 2.79C and 2.79D in the FTP Handbook of Procedures Vol. I. It may be noted that both the paragraphs specifically mention that end user certificate will not be insisted in such cases.

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System Driven approval of MEIS for exports from EDI ports – Guidelines: DGFT will, from 13-9-2018, start a process of system driven approval of MEIS claim applications for exports through EDI shipping bills. The online module will not accept application if it is not made in one jurisdictional regional office for one financial year. Shipping bills, already attached in earlier applications and disallowed, will not be accepted again under new module, unless re-activated. According to Trade Notice No. 30/2018-19, dated 11-9-2018, all shipping bills meeting specified requirements like having Let Export date on or after 1-1-2017, total claim value of less than Rs.2 Crore, etc., would be approved by the system automatically.

Ratio decidendi

Import by EOU – Excess imports when not relevant to deny exemption: In a case involving imports by EOU, CESTAT Mumbai has held that even if the goods are found to be in excess of that declared for import, benefit of exemption notification should not be denied. It observed that to the extent that the imported goods are utilised for export, the quantity imported is irrelevant. It stated that the same is not relevant also in the context of manufactured goods cleared in DTA. The Tribunal in this regard noted that imported goods are required to be bonded and the utilization thereon is under the supervisory, and documentary, control of customs bond personnel as well as the Development Commissioner concerned. It further rejected enhancement of value to encompass the gross weight. [*Micro Inks Limited* v. *Commissioner* - Order Nos. A/87088-87089/2018, dated 14-8-2018, CESTAT Mumbai]

Freezing of bank account must comply with Customs Sections 105 and 110: Delhi High Court has held that communication by DRI to freeze bank account of the assessee for having connection in an alleged export fraud case is not sustainable as the same was without authority of law and not in accordance with Section 105 and Section 110 of the Customs Act, 1962 which provides for provisions related to search, seizure and arrest. The High Court in this regard observed that any seizure under Section 110 is to be followed by an adjudication under Section 122 which requires prior SCN under Section 124, and that these required proceedings were not initiated in the case before it. [*R K Impex* v. *UOI* - W.P.(C) 7367/2016, decided on 29-8-2018, Delhi High Court]

No Customs duty payable during redemption when no such demand made in SCN: Delhi High Court has held that the department is not entitled to recover customs duty under Section 125(2) of the Customs Act on goods which are confiscated under Section 111(d) and allowed redemption under Section 125(1), if no specific demand is made in SCN issued under Section 124. The High Court observed that if primary obligation of assessing value and indicating duty payable is not discharged, it cannot be contended at a later stage that importer was under obligation to pay relevant duty which was never assessed at first instance. [*Commissioner* v. *R.K. International* - CUS. A.C. 9/2009, decided on 23-8-2018, Delhi High Court]

Project imports – No need of registration before imports: CESTAT Kolkata has held that Regulation 5 of Project Import Regulation, 1986 is only a procedural requirement and not a condition determining eligibility of imported goods for the benefit of concessional rate of assessment. The Tribunal observed that a project can be registered before goods are cleared for home consumption, and that there was no prescribed time limit for obtaining clearance from sponsoring authority. The department had denied the benefit on the ground that registration was

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taken after imports and warehousing. [*Eveready Industries* v. *Commissioner* - Order No. FO/76541/2018, dated 13-6-2018, CESTAT Kolkata]

Pre-cooked and fried noodles can be considered as 'dried': Taking note of the fact that the term 'dried' is not defined in respect of EU's CN sub-heading 1902 30 10, Court of Justice of European Union has held that pre-cooked and fried noodles which at the end of production stage are packaged in a dry state are dried pasta under said sub-heading. The Court in this regard rejected referring court's argument that goods are covered under 1902 30 90 as 'drying' constitutes a means of preservation by extracting moisture while cooking/frying besides eliminating water also causes numerous other chemical reactions.

Further, considering the scheme of things in Heading 1902, the court was of the view that sub-heading 1902 30, within which 1902 30 10 ('dried' pasta) falls, necessarily covers cooked pasta or pasta, otherwise prepared, which is not stuffed. It was also held that scope of said sub-heading should not be limited to pasta whose dry state has been obtained by processes which are used solely for their preservation and which remove only water from the treated products, without changing them in any other way. [*Kreyenhop & Kluge GmbH & Co. KG* v. *Hauptzollamt Hannover* – Judgement dated 6-9-2018 in Case C-471/17, CJEU]

Central Excise and Service Tax

Ratio decidendi

Cenvat credit admissible on mandatory CSR activities: CESTAT Mumbai has allowed Cenvat credit on payments made to a trust for imparting training to students of underprivileged section of the society in discharge of obligations related to corporate social responsibility (CSR) of the company. Deliberating on definition of CSR by Confederation of Indian Industry, World Bank and UNIDO, it was held that CSR is not a charity anymore since it has a direct bearing on the manufacturing activity. The Tribunal, for this purpose, also held that CSR is an input service covered under 'activities relating to business', as company's image is enhanced thus increasing its credit rating. It noted that sustainability of the company is dependent on CSR without which it cannot operate smoothly for a long period. [*Essel Propack* v. *Commissioner* - *Order No. A/87216/2018, dated 31-8-2018, CESTAT Mumbai*]

Abatement under Excise Sec. 3A(2) – CESTAT refers issue to Larger Bench: Hyderabad Bench of CESTAT has referred to Larger Bench the question as to whether the sub-section 3A(2) of Central Excise Act which only deals with powers of Government of India, can be treated as a provision for abatement of duty, and if so, how that abatement should be followed. The Tribunal in this regard disagreed with the order by Bangalore Bench and held that abatement was not available if benefit of concessional rate under Rule 96ZP(3) of Central Excise Rules, 1944 was availed. It held that assessee who was availing the benefit of lower rate of tax under Rule 96ZP (3) was not entitled to the benefit of abatement under Section 3A(3) read with Rule 96ZP(2).

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[*Commissioner* v. *Kamini Ispat Limited* - Order No. A/30731/2018, dated 19-7-2018, CESTAT Hyderabad]

Valuation – Loss in final goods immaterial for captive consumption valuation: CESTAT Mumbai has held that loss in respect of the product that is cleared finally using the goods which were captively consumed as an input is not relevant for determining the notional profit envisaged in Rule 6(b)(ii) of the erstwhile Central Excise (Valuation) Rules, 1975, in respect of those inputs. The Tribunal observed that assessee was not able to show that the assessable value adopted by the department did not reflect the cost of production and the profit. [*Golden Tobacco Limited* v. *Commissioner* - Order No. A/87196/2018, dated 29-8-2018, CESTAT Mumbai]

Valuation – Value of drawing received from buyer when not includible: Observing that drawings supplied by customers were only dimensions of the components with no technical details, and therefore having no value, CESTAT Chennai has held that cost of such drawings is not required to be included in the assessable value of the final product. The Tribunal in this regard also noted that assessee was involved in cutting and welding of MS plates as per required specification which did not require any specialized drawings. It also observed that drawings were not shown as separate excisable goods. [*Technoweld Alloys (I) Pvt. Ltd.* v. *Commissioner* - Final Order No. 42263/2018, dated 7-8-2018, CESTAT Chennai]

Refund not barred by limitation when liability absent: Delhi High Court has held that an assessee, in the absence of any liability, is entitled to refund of tax paid under a wrong impression and cannot be barred for a part of it on account of limitation under Section 11B of the Central Excise Act or Section 27(c) of the Customs Act. Supreme Court's decision in *Krishna Carbon Paper* was distinguished by the High Court. The assessee was a registered society set up by the Ministry of Finance and was not liable to service tax at relevant time for any work or function undertaken, as clarified by CBEC then. [*National Institute of Public Finance and Policy* v. *Commissioner* - SERTA 13/2018, decided on 23-8-2018, Delhi High Court]

Renting of immovable property service - Refundable security not liable: CESTAT Bench at Delhi has held that the demand of service tax on the refundable security deposit in respect of Renting of Immovable Service, was erroneous because such refundable amount was not covered under 'consideration' under Section 67 of the Finance Act, 1994. The assessee had provided option to tenant according to which if they pay additional amount of security deposit then no rent was to be paid and full security was refundable on vacating of premises. The Tribunal, however, while setting aside the penalty, confirmed the service tax to the extent of annual rent. [*Satya Prakash Builder* v. *Commissioner* - Final Order No. 52663/2018, dated 24-7-2018, CESTAT Delhi]

Credit available on services from non-whole time director: CESTAT Allahabad has held that service tax paid on services received from the non-whole time Director is admissible as Cenvat credit. The appellant had availed Cenvat credit of service tax paid under reverse charge mechanism on the remuneration paid to non-whole time director. The Tribunal observed that it is deemed by law that such directors have provided services to company and therefore, it cannot be held that such service was not input service. Notification No. 45/2012-S.T., dated 7-8-2012 was relied upon. [*Mohan Steels* v.

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Commissioner - Final Order No. 71957/2018, dated 13-8-2018, CESTAT Allahabad]

Cenvat credit – Failure to ascertain exclusion under Rule 9(1)(b) is not suppression: CESTAT Delhi has allowed Cenvat credit on supplementary invoices holding that mere failure to ascertain about the exclusion part of Cenvat Rule 9(1)(b) cannot be held to be an act of suppression or collusion on the part of the assessee. The Tribunal noted that supplementary invoices were issued by coal companies which are undertakings of Government, hence, there was no presumption, unless rebutted, of alleged suppression or collusion. It noted that an element of confusion was present as connected matters are pending before the Supreme Court. [*Ultratech Cement* v. *Commissioner* - Final Order No. 52723/2018, dated 27-7-2018, CESTAT Delhi]

Cenvat credit on inputs lost in cyclone when not required to be reversed: CESTAT Kolkata has held that credit availed on inputs destroyed in natural calamity including cyclone, need not be reversed as it did not amount to removal of input as such. The inputs including coal were issued and put for continuous production process. It was observed that inputs lost during the process of manufacture were not required to be considered for reversal of credit. The Tribunal also noted that there was no provision of reversal of credit availed on inputs which were destroyed. [*Sundaram Steel Pvt. Ltd.* v. *Commissioner* - Order No. FO/76523/2018, dated 14-8-2018, CESTAT Kolkata]

Cenvat credit on laying or maintenance of railway siding track, available: Chennai Bench of the CESTAT has held that service of railway siding track laying/maintenance work did not fall within the exclusion clause of 'input service' and hence, credit availed in respect of the said service was eligible. The period in dispute was from September 2011 to August 2012 when definition of 'input service' in the Cenvat Credit Rules, 2004 excluded specified works contract services used for (a) construction of a building or a civil structure or a part thereof; or (b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services. The Tribunal observed that when works contract services were availed for painting, laying of floor tiles, etc., in the nature of completion of finishing services, these would generally be in the nature of modernisation or repair/renovation of existing structures, and eligible for credit. [*India Cements Ltd.* v. *Commissioner* - 2018-TIOL-2733-CESTAT-MAD]

Cenvat credit when part of amount payable to service provider withheld by recipient: CESTAT Delhi has held that Cenvat credit of full service tax paid by the service provider in respect of services provided would be available even if amount payable to the service provider has been withheld by the recipient-respondent, so long as there was no change in service tax paid by the service provider. In terms of the agreement entered into between the respondent and the contractors, a certain percentage of payment was to be withheld from the RA bills issued by the contractors and was required to be released after successful execution of the contract. The department had denied credit on the ground that as per Rule 4(7) of Cenvat Credit Rules, 2004, credit was allowed when full payment was made by the service recipient towards value of input service as well as service tax within three months of the date of invoice. Circular No. 122/3/2010-S.T., dated 30-4-2010 was argued by the department as inapplicable on the ground that the said circular catered to only those situations where the finally settled amount of service was

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less than the amount initially charged by the service provider. [*Commissioner* v. *Hindustan Zinc Ltd.* - 2018-TIOL-2574-CESTAT-DEL]

Cenvat credit available on capital goods predominantly used in exempted goods except for a short period: CESTAT Hyderabad has allowed Cenvat credit in a case where the assessee, for the first two years, used capital goods exclusively for manufacture of exempted goods but used them for manufacture of dutiable goods for total of 19 days in the subsequent year and thereafter never used for manufacture of dutiable products. The Tribunal observed that at the time of purchase of capital goods, the appellant had intimated his intention to use the subject capital goods for manufacture of both exempted and dutiable goods. It also noted that Rule 6(4) of Cenvat Credit Rules, 2004 entitled an assessee to avail Cenvat credit on capital goods even if the machinery was used to manufacture a single unit of dutiable goods. The appellant was engaged in the manufacture of exempted (non-carbonated beverages) as well as dutiable goods (carbonated beverages). The department had issued SCN denying credit in terms of Rule 6(4). [*Lakshmi Balaji Bottling Pvt. Ltd.* v. *Commissioner* - 2018 VIL 627 CESTAT-Hyd-CE]

Value Added Tax (VAT) and other Taxes

Ratio decidendi

Fashion show amounts to 'entertainment' and liable to entertainment tax: Karnataka High Court has held that fashion show fall within the expression 'entertainment' under Section 2(e)(iii) of the Karnataka Entertainment Tax Act, 1958, and that sponsorship fees and advertisement charges received by organisers would amount to 'payment for admission' as per Section 2(i)(iv-a) of the said Act. The Court observed that even though the 'Bangalore fashion week' served the business interests of the sponsors, the element of amusement and entertainment naturally woven in it cannot be taken out. [*Dream Merchants* v. *State of Karnataka* - Writ Appeal No.843 of 2018 (T-ET), decided on 3-9-2018, Karnataka High Court]

Deemed sale – Provision of infrastructure under exclusive control: Gujarat High Court has held that provision of passive telecommunication infrastructure under Master Service Agreement granted exclusive control to telecom operator by virtue of 'right to use goods' and hence, the transaction was not in the nature of service contract as contemplated by petitioner, but a 'deemed sale' taxable under the Gujarat VAT Act. The Court in this regard also rejected the contention that liability to pay Gujarat VAT would result in double taxation as petitioner had already paid service tax on said transaction. [*Indus Towers Ltd.* v. *State of Gujarat* - R/Special Civil Application No. 3358 of 2016, decided on 6-8-2018, Gujarat High Court]

Kerala VAT - Limitation under Section 25(1) concerns initiation of assessment of turnover: In a case concerning interpretation of provisions providing for assessment of escaped turnover, Kerala High Court has held that the words 'proceed to determine' in Section 25(1) of

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the Kerala VAT Act were for initiation of proceedings with a notice and not for completion of assessment. Relying on Full Bench judgement in *Tirur Medical Stores*, it observed that the decision as to the timeframe required for completion of assessment is the task of the legislature. The High Court set aside the notice issued beyond limitation period under Section 25(1). [*Cholayil* v. *Asst. Commissioner* - WA. No. 1184 of 2013 in WPC. 18143/2013, decided on 5-7-2018, Kerala High Court]

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