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Articles

Is time limit for filing TRAN-1 sacrosanct – Madras High Court adds a twist to the never-ending tale

By **Sai Prashanth and V. Baratwaj**

When GST was introduced in 2017, no assessee would have imagined the extent of litigation pertaining to transitioning of credit into GST three years down the line. Whether the time limit imposed on transitioning the credit into GST from the erstwhile regime is sacrosanct has now been decided by various High Courts and interestingly, not all of them have taken the same view.

Rule 117 of the Central Goods and Services Tax Rules, 2017 ('**Rules**'), imposed certain conditions for transitioning the unutilized credit from the previous regime, including a time limit within which the form TRAN-1 is to be filed. Issues arose since assessees were not able to file the form within the prescribed time limit due to problems in the GST portal. The timeline was then extended by the Government acknowledging issues in the portal. After multiple extensions, the last date for filing the TRAN-1 was fixed as 27-12-2017. However, in many cases, there were still problems and credit could not be transitioned.

Since the issue could not be resolved even after repeated follow up with the department, the assessees were forced to approach the High Courts to redress their grievance. The assessees challenged the Rule imposing time limit as being merely directory in nature and contended that the unutilized credit of the previous regime, being a vested right, cannot be taken away merely because a procedural requirement of filing a form within the prescribed time limit was not fulfilled.

While the Delhi High Court[1] and Punjab & Haryana High Court[2] had taken a liberal view and held Rule 117 to be procedural and directory, the Bombay High Court[3] had held Rule 117 to be mandatory in nature. The Bombay High Court also held Rule 117 to be within the ambit of the Act.

Recently, this issue came up before the Madras High Court in the case of *P.R. Mani Electronics*[4] ('**Petitioner**'), wherein the Petitioner had also challenged the vires of Rule 117. The Madras HC held that the provision imposing time limit is *intra vires* the Act and mandatory in nature, like the Bombay High Court. This Article analyses this decision and certain aspects of the same.

Background of the issue

Section 140 of the Act deals with Transitional Credit and Rule 117 of the Rules imposes time limit for filing TRAN-1 form.

Section 140, as originally enacted, stated that Transitional Credit can be availed 'in such manner as may be prescribed'. Assessees contended that this phrase excluded the power to impose time limits for transitioning the credit and

[1] *Brand Equity Treaties Limited v. Union of India* [Judgement dated 05-05-2020 in W.P.(C) 11040/2018 and Ors., Delhi High Court]
[2] *Adfert Technologies v. Union of India* [2019-VIL-437-P&H]
[3] *Nelco Limited v. Union of India* [2020 SCC Online Bom 437]
[4] *P.R. Mani Electronics v. Union of India* [Judgment dated 13-07-2020 in WP. No. 8890 of 2020 and WMP No. 10803 of 2020, Madras High Court]

consequently, Rule 117 is *ultra vires* Section 140 and is merely directory in nature.

Consequently, Section 140 was amended by Finance Act 2020, with retrospective effect from 01-07-2017, inserting the phrase '**within such time'** thereby giving statutory power for enacting Rule 117 and with the intent to make the time limit mandatory in nature. Prior to this amendment, various High Court decisions, without dealing with the vires of Rule 117, had held the Rule imposing time limit to be merely directory and not mandatory, the most notable being the decision of the Delhi High Court in the case of *Brand Equity*. The Bombay High Court, on the other hand, in the case of *Nelco* was of the view that Rule 117 is within the ambit of the Act and held that the Transitional credit is to be availed within the prescribed time limit.

Subsequent to the amendment, the Delhi High Court again had an instance to examine the nature of Rule 117 in the case of *SKH Sheet Metals Components*[5]. The Court held the Rule to be directory in nature post amendment as well and fortified the findings of *Brand Equity*. Both decisions of the Delhi High Court held that the credit, which stood accrued and vested on 30-06-2017, was the property of the assessee and is a constitutional right under Article 300A of the Constitution.

The ruling by Madras HC explained

The Petitioner in this case had challenged the vires of Rule 117 and also contended that the time limit is only directory and not mandatory.

The Madras HC, relying upon the decision of the Supreme Court in the case of *Jayam and Co.*[6] held that the Transitional credit is merely a concession and not a vested right in the hands of the assessee. The Court held that prior to the amendment to Section 140, the power to enact Rule 117 is traceable to Section 164 which deals with the general power to make Rules. Post the amendment, the Rule is clearly traceable to Section 140 and thus, the distinction made in the case of *SKH Sheet Metals Components* was incorrect.

As regards the contention of the Petitioner that the time limit is directory, the Court negated the same and observed that the Rule uses the phrase *'**shall** file within the prescribed time'* which means that the time limit is intended to be mandatory.

The Madras HC, thus agreed to the findings of the Bombay High Court in the case of *Nelco* and held that Rule 117 is *intra vires* Section 140 of the Act and that the time limit under Rule 117 is mandatory in nature.

Some unconsidered aspects in the decision

While the Madras HC has proceeded on similar lines as in the case of *Nelco*, the following aspects are however debatable:

a) **Appreciating the difference between availment and transition:** The decision of the Supreme Court in the case of *Jayam and Co.* was in the context of ITC which was yet to be availed by the assessee. In such a scenario, the Supreme Court held there was no right enjoyed by the assessee in respect of the ITC. On the other hand, in the present case, the credit has been validly availed within the time limit thereby becoming the property of the assessee and the delay was only on transitioning the credit. This subtle difference was noted by the Delhi HC in *Brand Equity* but has not been appreciated by the Madras HC.

[5] *SKH Sheet Metals Components v. Union of India* [2020 SCC online Del 650]
[6] *Jayam and company v. Assistant Commissioner and another* [(2016) 15 SCC 125]

b) **Reliance placed on *Nelco* disputable:** The Madras HC has placed reliance on the decision in the case of *Nelco*. The Bombay High Court had held that Transitional credit is a concession and not a right on the basis that what is saved from the earlier regime is a conditional credit and such conditional credit cannot be treated as a right. However, it is to be pointed out that the credit which is saved is the credit appearing in the credit ledger of the assessee after fulfilment of all conditions and therefore at the time of transitioning, is an 'unconditional credit' for the assessee. The conditions in GST are not for 'availment' of any new credit, but for 'transitioning' the already availed right into GST.

c) **Holistic/liberal view *vis-a-vis* Narrow/strict view:** The Madras HC in the present case seems to have proceeded strictly on the wordings of Section 140 post amendment and the usage of the words 'shall' in Rule 117 while distinguishing the decision in the case of *SKH Sheet Metals Components*. The decisions in the case of *Brand Equity* and *SKH Sheet Metals Components*, on the other hand, seem to have adopted a lenient approach whereby the intent of the legislature for transitioning credit from earlier regime was given more weightage than the mechanism to avail the same in GST regime by filing the form within the prescribed time period. The decisions placed appropriate weight to the repeated time extensions granted by the Government which indicated that the time limit was only directory and not mandatory. Following such a strict approach seems to be hard on the assessees especially when Transitional credit could be regarded as a right of the assessee.

Will this decision affect any past transitional claims filed by the assessees on specific relief granted to them by the Department? Also, can the assessees liaise with the Department to provide relief post this decision?

A question may arise as to whether this decision would affect transitional claims pending as on date, which were filed by the assessees on the basis of any relief granted by the Department earlier. Also, if the assessees approach the Department now for providing any relief does this decision estop the Department from grating any relief to the assessees?

In this regard, the Madras HC has specifically stated that this decision shall not affect dispensations granted by the Department to transition the credit, whether by allowing filing of TRAN-1 form or otherwise. This could be interpreted to cover both the existing Transitional claims as well as future claims for which dispensations may have been already been granted or could be granted in the future by the Department respectively.

Some decisions in favour and some decisions against. What now for the assessee?

Since different High Courts have taken different views on this issue we now examine their applicability from the assessee's standpoint.

The Supreme Court, in the case of *Valliamma Champaka Pillai*[7], had held that the decision of one High Court is not binding on other High Courts and can at best have persuasive value. If the Jurisdictional High Court has not decided the issue, the assessees in that jurisdiction are in a neutral position, whereby the said High Court can take an independent decision. Thus, the situs of the assessee plays an important role.

[7] *Valliamma Champaka Pillai v. Sivathanu Pillai and others* [1979(8) TMI 210-SUPREME COURT]

Conclusion

The dispute on whether the time limit for filing TRAN-1 is sacrosanct is far from over. At present, this issue is *sub judice* with the Supreme Court staying the operation of the Delhi HC decision in *Brand Equity*.

As things stand, assessees in Maharashtra and Tamil Nadu are most affected both by COVID-19 and TRAN-1!

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Ongoing concerns on 'Going concern'

By **Surbhi Premi and Ayushi Singal**

The term 'going concern' is neither new to ever growing economy nor to GST. The concept of transfer of business on going concern basis existed even prior to the introduction of GST.

'Going concern' is an accounting assumption according to which an enterprise is viewed as continuing in operation for the foreseeable future. The Bombay High Court in the case of *Jayaprakash Shamsundar v. Laxminarayan Murlidar* [8] held that if a business is to be characterised as a going concern, that business must be run at the time of the assignment. The business must be a live business, a going business when transactions take place from time to time and there must be stock-in-trade.

This article attempts to explain whether the transfer of a business should be treated as a 'transfer of a going concern, as a whole or an independent part thereof' which is an exempt supply under GST laws.

The transfer of business on going concern basis is not the same as transfer of individual assets of the business. The assets of any business can be supplied either in piecemeal or for lumpsum consideration.

Under GST, the exemption has been granted for transfer of business as a whole or an independent part thereof.

Uttarakhand Authority for Advance Ruling[9] relied upon the following internationally accepted guidelines issued by Her Majesty's Revenue & Customs (HRMC) to treat transfer of business as a going concern:

(a) The assets must be sold as part of a 'business' as a 'going concern'.

(b) The purchaser intends to use the assets to carry on the same kind of business as the seller.

(c) Where only part of a business is sold it must be capable of separate operation.

(d) There must not be a series of immediately consecutive transfers.

Thus, it emerges that the transfer of business as going concern means transfer of essential business assets along with associated liabilities which enables the transferee to carry out the same business independently in the same manner as the seller used to carry before the transfer.

[8] AIR 1983 Bom 364

[9] 2020 (035) GSTL 0510 AAR

Here, a question may arise as to what constitutes business or an independent part thereof. The Madras High Court in case of *Monsanto Chemicals* v. *State of Tamil Nadu*[10] observed that a person may carry on several lines of business and each line of business would be a unit of business by itself. The Court held that if there is a sale of that unit of the business as a whole, then the assessee would not be liable to be taxed. However, it is relevant to note that retention of few assets of business shall not cause any hinderance in treating the transfer as going concern provided that all the necessary assets required for running the business independently by transferee have been transferred.[11]

Further, the continuity of same kind of business is the essence for transfer of going concern. It may be noted that the very definition of the term 'going concern' suggests that the business should be continued for a foreseeable period and there is no intention to liquidate the same, there should be continuity of the same business by the transferee as was being carried on by the transferor. The same has also been recognized by HMRC as one of the characteristics to qualify as transfer of business as going concern. For instance, in case where the transferor, who is running business of manufacturing and sale of goods, transfers its business to a transferee and such transferee in turn leases out the manufacturing facilities then the continuity of same business may be questioned by applying principles laid by HMRC.

Taking another example, in case where the transferee merely intends to further transfer the running business onto another buyer rather than carrying on same business as that of the transferor, the availability of the exemption may be disputed.

In authors' view in order to constitute transfer as a going concern, the transferee must continue the same kind of business as carried on by the transferor for a foreseeable period of time and what constitutes to be "same kind of business" has to be considered on a case to case basis.

In the backdrop of harlequin history of taxation of transfer of business, it would be interesting to see as to how GST on the same will unfold in the times to come.

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[10] [1982] 51 STC 278 (Mad)

[11] Premier Automobiles Ltd. vs Income Tax Officer And Anr. (2003) 182 CTR Bom 202
M/S. Indo Rama Co. Petition No. 4 of 2003, Co. Appl. No 762 of 2009, July 23, 2012.

Goods and Services Tax (GST)

Notifications and Circulars

Nil GSTR-1 can be filed through short message service (SMS) from 01-07-2020: Form GSTR-1, relating to outward supplies, for a month having nil or no entry in all the Tables can be filed through a SMS using the registered mobile number. As per new Rule 67A of the Central Goods and Services Tax Rules, 2017, which is effective from 01-07-2020, the said form having details of outward supplies can be verified by a registered mobile number based One Time Password facility. It may be noted that Form GSTR-3B can also be filed through SMS and the provisions relating to the latter were made effective from 08-06-2020. Notification No. 58/2020-Central Tax, dated 01-07-2020 notifies Central Goods and Services Tax (Eighth Amendment) Rules, 2020, for this purpose.

Ratio decidendi

TRAN-1 – Rule 117 of CGST Rules is not *ultra vires* Section 140 of CGST Act – Time limit provided therein is mandatory: The Madras High Court has held that Rule 117 of the Central Goods and Services Tax Rules, 2017 is not *ultra vires* Section 140 of the Central Goods and Services Tax Act, 2017 and is liable to be construed as a mandatory provision. The Court was of the view that ITC cannot be availed without complying with the conditions prescribed thereto and that prior to the retrospective amendment to Section 140 of the CGST Act, the power to frame rules fixing a time limit was and continues to be traceable to Section 164, which is widely worded and imposes no fetters on rule making powers. The Bombay High Court's decision in the case of *Nelco Limited* v. *Union of India* [2020 SCC Online Bom 437] was held to be correct by the Court while it held that views of the Delhi High Court in the case of *SKH Sheet Metal Components* v. *Union of India Ors,* [2020 SCC online Del 650] cannot be subscribed to. [*P.R. Mani Electronics* v. *Union of India & Ors.* - Judgment dated 13-07-2020 in WP. No. 8890 of 2020 and WMP No. 10803 of 2020, Madras High Court]

Demand – Rule 142(1)(a) of CGST Rules is valid: The Gujarat High Court has upheld that validity of Rule 142(1)(a) of the Central Goods and Services Tax Rules, 2017. The contention that the said Rule was invalid on account of excessive delegation, was rejected while noting that the Rule was not in conflict with any of the provisions of the Central Goods and Services Tax Act, 2017. The writ petitioner had submitted that since Section 122 of the Act does not contemplate issue of any show cause notice, Rule 142(1)(a) travels beyond the provisions of the Act and hence deserves to be declared as *ultra vires.* The Court noted that under Section 164 of the CGST Act, the Central Government has the power to make rules generally to carry out all or any of the purposes of the Act. The High Court earlier agreed to interfere under Article 226 of the Constitution of India, against a show cause notice. [*Mahavir Enterprise* v. *Assistant Commissioner* – Order dated 25-06-2020 in R/Special Civil Application No. 7613 of 2020, Gujarat High Court]

ITC available on steel structures used to install water slides: In a case where the assessee-applicant was involved in construction of a water park, AAR Madhya Pradesh has held

that steel and civil structure on which the water slides were installed qualify as 'plant and machinery' as it formed foundation and support structure which were used to fasten plant and machinery to the earth. Allowing the input tax credit ("ITC"), the AAR also held that the water slides fell within the meaning of the term apparatus, equipment and machinery. The AAR also allowed ITC on foundations to install machines though rejected the credit in respect of construction of machine room for housing the machines. It held that such room was not a foundation for machines. ITC was also not allowed on the services used for area development and preparation of land on which water slides were placed. AAR in this regard observed that said expenses were liable to be capitalized under the head, 'land' and because of specific exclusion of land from the meaning of 'plant and machinery'. ITC was also not allowed on goods and services used for construction of swimming pools or wave pools in which the water slides directly ran into. The AAR held that such pools were civil structures. ITC on transformers, sewage treatment plant, electrical wiring and fixtures, surveillance systems. D.G. sets, lifts, air handling units, etc. was denied observing that the same were *sine qua non* for a commercial mall and hence could not be considered separate from the building or civil structure. [In RE: *Atriwal Amusement Park* – 2020 VIL 218 AAR]

ITC not available on lift installed in hotel intended for providing taxable service: AAR Madhya Pradesh has held that input tax credit of tax paid on procuring the lift to be installed in the hotel building which in turn is intended to be used for providing taxable service, is not available. Reliance in this regard was placed on the scope of Section 17 (5)(d) of the CGST Act, 2017 along with the Explanation to Section 17(6) wherein the term, 'plant and machinery' has been described. The authority observed that a lift became a part of the building and was not a separate thing and did not have an identity even when removed from the building. Additionally, the AAR was of the view that a lift was not an item that was purchased and sold but it was a customized mechanism for transportation, designed to suit a specific building. [In RE: *Jabalpur Hotels Private Limited* – 2020 VIL 220 AAR]

ITC of goods and services used in construction of commercial property on own account not available even when property subsequently used for renting: Maharashtra AAR has held that input tax credit of GST paid on inputs and input services used for construction of commercial immovable property which was subsequently used for renting, is not available to the applicant who had himself built the property. The Authority was of the view that bar under Section 17(5)(d) of the CGST Act, 2017, which bars a taxable person from taking input tax credit for construction of immovable property on his own account, will be applicable even when the immovable property is used in the course or furtherance of business. It also noted that the immovable property in the subject matter was neither a plant nor a machinery for which an exception is carved out in Section 17(5). AAR declined to rely on the Orissa High Court decision in the case of *Safari Retreats Pvt. Ltd.* allowing the benefit, as appeal against the said decision is pending with the Supreme Court. [In RE: *Ashish Arvind Hansoti* – 2020 VIL 166 AAR]

Value of HSD supplied free of cost by service recipient, includible in value of supply: The Andhra Pradesh Advance Ruling Authority has held that value of HSD Oil issued free of cost by the service recipient to the service provider-applicant would form part of the value of supply of service provided, as per Section 15(2)(b) of the

Central Goods and Services Tax Act, 2017. The authority observed that the service recipient was providing HSD oil to the applicant for using the same in the equipments and vehicles used to deliver the services under the contract, and that it formed an important and integral component of the business process of excavation of limestone at different mines, transportation and delivery of the same. It noted that according to Section 15(2)(b), the value of supply included any amount that the supplier was liable to pay in relation to such supply but which had been incurred by the recipient and not included in the price actually paid or payable for the goods and/or services. The applicant had contended that title in HSD had not passed on to the service provider. [In RE: *Pulluri Mining & Logistics Private Limited* – 2020 VIL 198 AAR]

Marketing and consulting service in India for product of overseas clients is intermediary service and not export of service: In a case where the applicant was rendering marketing and consultancy services to its overseas client and carried out all the functions in India as necessitated by its client, the Andhra Pradesh AAR has held that mere fact that the payment was received in convertible foreign exchange will not qualify the service as export of services. The Authority was of the view that the service (promotion of sale and soliciting orders for the products throughout India) was not supplied outside India, but was rather an intermediary service, further because the transaction was not done on his own account. The service was held liable to IGST. [In RE: *DKV Enterprises Private Limited* – 2020 VIL 192 AAR]

Membership/subscription fees and admission fees collected by a club from members when not 'supply': The Appellate AAR Maharashtra has held that the membership/subscription fees, admission fees collected by a club from its members is not liable to GST when the amount collected is not utilised for providing any facilities or benefits to the members. It noted that as per the financial statements, the entire subscription/membership amount was utilised solely towards expenditures incurred in meetings, communications and other administrative expenses. Allowing the appeal, AAAR observed that the club was not involved in providing any business as envisaged under Section 2(17) of the CGST Act, 2017. It held that the activities carried out by the said club would not come under the scope of 'supply' under Section 7(1). Additionally, it observed that if membership fee is held liable to GST then it would be subjected to double taxation as the amount spent towards the meetings and administrative expenditure was already subjected to GST at the hands of the suppliers. [In RE: *Rotary Club of Mumbai Queens Necklace* – 2020 VIL 38 AAAR]

Coal handling and distribution service liable @ 18% and not 5% as supply of coal: In a case where the applicant was engaged in supply of coal simpliciter and supply of coal along with coal handling and distribution service, the AAR Madhya Pradesh has held that coal handling and distribution charges would be taxable at 18% and not 5% (as applicable on supply of coal) wherever supply of such services was only intended to be expressly made to a customer. It also held that input tax credit availed as per the conditions specified in Section 16 of the CGST Act, 2017 shall be allowed for discharging the liability towards supply of coal and supply of coal handling and distribution charges, respectively. [In RE: *Agarwal Coal Corporation Pvt. Ltd*. – 2020 VIL 217 AAR]

Accounting of salary cost for compliance under Companies Act, 2013, by the project office in India when not liable to GST: AAR Maharashtra has held that accounting of salary cost of expat employees for compliance under Companies Act, 2013, by the project office in

India of the foreign company (Head office), with no obligation to pay any consideration, would not be treated as a service and be liable to GST in India under reverse charge mechanism. Observing that salary of expats was paid by the head office, and that PAN and TAN were allotted to the project office in the name of the head office situated abroad, the Authority was of the view that the foreign company and its project office in India could not be considered as distinct entities. Noting that the expat employees were employees of the employer, i.e. the head office and since the project office was an extension of the head office, it was held that there was relation of employer and employee between the project office and the expat employees, hence no liability to GST. [In RE: *Hitachi Power Europe GmbH* – 2020 VIL 167 AAR]

UK VAT – Car hire and car seat hire are independent supplies and not covered as composite supply: In a case involving letting of a car with a child car seat by a car rental company, United Kingdom's First Tier Tribunal (Tax Chamber) has held that car hire and car seat hire were independent supplies being economically distinct. The supply of car for rent involved standard rate, while the supply of child car seat was taxable at reduced rate of 5%. Rejecting the department's contention that the supply was composite supply, the Tribunal observed that the costs of car hire and car seat hire were separately set out and the car seat customers also had a genuine economic choice as to whether to hire a car seat or not. It noted that the two elements in the overall transaction are therefore 'separable', more so because the car seat hired from the company was not indispensable' to the hire of the car. The First Tier Tribunal concluded by stating that the supplies were to be regarded as distinct and independent because the car hire and car seat hire were, from car seat customers' perspective, neither so closely linked that they form a single, indivisible economic supply which it would be artificial to split, nor in a principal/ancillary relationship such that car seat hire is not an aim in itself but a means of better enjoying the car hire. [*Europcar Group UK Ltd.* v. *Commissioners for HMRC* – Decision dated 05-06-2020 in Appeal No. TC/2013/06589, First Tier Tribunal Tax Chamber, UK]

Customs

Notifications and Circulars

Contactless Customs – *Turant Suvidha Kendra* and other initiatives by Customs: CBIC has extended the facility of *Turant Suvidha Kendras* to all the Customs formations for carrying out various functions as specified in its Circular dated 05-06-2020 issued earlier to provide for setting up of such *Kendras* in Bengaluru and Chennai for the purpose of implementation of 1st phase of Faceless Assessment. Further, CBIC has enabled, w.e.f. 06-07-2020, certain functionalities in ICEGATE which would reduce the need for physical

interaction between Customs and trade and also speed up the Customs clearance process. As per Circular No. 32/2020-Customs, dated 06-07-2020, the new facilities will allow registration of Authorised Dealer Code and Bank Accounts through ICEGATE, automated debit of bond after assessment, and simplified registration of importers/exporters in ICEGATE.

All Industry Rates of Duty Drawback – Changes effective from 15-07-2020: Ministry of Finance has made certain changes in the All Industry Rates ("AIRs") of Duty Drawback which are effective from 15-07-2020. As per CBIC Circular No. 33/2020-Cus., dated 15-07-2020, while AIRs/caps of duty drawback have been enhanced for certain footwear items made of leather covered under Chapter 64 and gold jewellery covered under Chapter 71, rates of drawback have been rationalised for silver jewellery/articles covered under Chapter 71. Further, description of TIs 870301, 870303, 870305 and 870307 pertaining to motor cars of various engine capacities with Manual Transmission ("MT") has been changed. Accordingly, the change in description will allow motor cars with Automated Manual Transmission ("AMT") to claim the same AIRs of duty drawback as given to motor cars with MT. Notification No. 56/2020-Cus. (N.T.), dated 13-07-2020 has been issued to amend Notification No. 7/2020-Cus. (N.T.), effective from 15-07-2020.

AEO Certification – Extension of validity: The Central Board of Indirect Taxes and Customs ("CBIC") has further extended the validity of AEO certificates which are due for expiration between 01-03-2020 to 30-09-2020, till 30-09-2020. It may be noted that *vide* Circular No. 27/2020-Cus., dated 02-06-2020, the CBIC had earlier extended the validity of all AEO certificates which were due for expiration during the period 01-03-2020 to 31-05-2020 till 30-06-2020. Similar to the preceding circular, the latest extension will also not be granted to those AEO entities against which a negative report is received by CBIC in the abovementioned period. Circular No. 31/2020-Cus., dated 30-06-2020 has been issued for the purpose.

Preferential Certificate of Origin for India's exports to Vietnam under ASEAN-India FTA – Issuance of printed certificates as well: DGFT has clarified that in respect of issuance of Certificate of Origin ("COO"), one additional copy of COO, i.e. an electronic copy along with 4 copies shall be generated by the system. The electronic copy bearing the signature of officer and stamp shall be available instantly which can be used for immediate clearance. Where required, the exporter may collect the printed certificates duly ink-signed and stamped from the designated officer for submission to partner country authorities. Further, the COO Applications for export under ASEAN-India FTA to all ASEAN countries except Thailand should be submitted through e-COO Platform. No physical application shall be accepted from 22-06-2020. Trade Notice No. 15/2020-21, dated 21-06-2020 has been issued for the purpose.

Personal protection equipment (PPE) and masks – Export Policy revised: The export of the following types of personal protection equipment (PPEs), either as part of kits or individual items, falling under ITC HS Codes 901850, 901890, 9020, 392690,
621790 and 630790, is prohibited:

- Medical coveralls of all classes/categories,
- Medical goggles,
- All masks other than non-medical/non-surgical-masks (cotton, silk, wool, polyester, nylon, rayon, viscose – knitted, woven or blended).
- Nitrile/NBR Gloves,
- Face Shield.

It may be noted that though the above-mentioned prohibitions were introduced by Notification No.14/2015-2020, dated 22-06-2020, Notification No. 20/2015-20, dated 21-07-2020 removes from prohibition surgical drapes, isolation aprons, surgical wraps and X-Ray gowns under the medical coveralls of all classes and categories. It may be noted that export of PPE medical coveralls for COVID-19 was also made restricted (earlier prohibited) by Notification No.16/2015-2020, dated 29-06-2020, with a monthly export quota of 50 Lakh PPE medical coveralls for COVID-19. Trade Notice No. 18/2020-21, dated 20-07-2020 lays down the procedure and criteria for submission and approval of applications for export of PPE medical coveralls for COVID-19. Procedure for export of samples of PPE medical coveralls for COVID-19 is prescribed in DGFT Trade Notice dated 21-07-2020.

Cut and polished diamonds - Extension of time limit for reimport facility with zero duty: Para 4.44 of the Foreign Trade Policy 2015-20 has been amended to enhance the time limit for re-import facility with zero duty from 3 months to 6 months for cases where re-import period is expiring between 1-02-2020 to 31-07-2020. It may be noted that in terms of Para 4.44, certain exporters and certain specified authorized offices/ agencies in India of laboratories are allowed to export cut & polished diamonds (each of 0.25 carat or above) to any of the agencies/laboratories mentioned under paragraph 4.74 of Handbook of Procedures with re-import facility at zero duty within 3 months from the date of export. According to Notification No. 15/2015-2020 dated 25-06-2020 issued for the purpose, the amendment is due to COVID-19. Consequential amendments have also been made in Customs Notification No. 9/2012- Cus. by Notification No. 30/2020-Cus., dated 10-07-2020.

Power tillers and components – Import Policy revised to 'restricted': Import Policy of Power Tiller and its components, covered under HS Code 8432 8020 and 8432 9090, has been amended from 'free' to 'restricted' with effect from 15-07-2020. A new Policy Condition No. 3 has been added in Chapter 84 of ITC (HS) by Notification No. 19/2015-20, dated 15-07-2020, to also provide for definition of Power Tillers. Further, Public Notice No. 13/2015-20, also of the same date, notifies the conditions and modalities for issuance of authorisations for import.

Cut flowers – Import policy revised: The import of fresh cut flowers such as roses, carnations, orchids, etc. falling under HS Code 0603 is now permitted only through Chennai airport. Notification No.17/2015-2020, dated 09-07-2020 has been issued for the purpose. It may be noted that Import Policy of cut flowers under HS Code 0603 continues to remain 'free'.

Ratio decidendi

Valuation – Import prices as per international journals on date of contract between related parties, acceptable: CESTAT Ahmedabad has held that the portion of SVB Order, holding that if contemporaneous imports at higher prices by the importers are noticed, valuation may be done under the appropriate provisions of the Valuation Rules, cannot be read in isolation and must be read with Rule 3(3)(a) of the Customs Valuation Rules, 2007. Further, relying on *Dow Chemical International Pvt. Ltd. v. Commissioner* [2008 (226) ELT 420 (Tri- Ahd.)], it held that addition to the value was not correct as the imports were assessed on the contract price corresponding to the internationally prevailing prices as reported in international journals on the date of contract. Revenue had sought to increase the value based on import of identical goods from the same supplier and the same country of origin, at the

same bottom cargo from the same port, but assessed at a much higher price. [*Mosaic India Pvt. Ltd.* v. *Commissioner* – 2020 TIOL 998 CESTAT AHM]

Amendment is retrospective if it introduces anything omitted by mistake in original provision. The Calcutta High Court has held that if the law maker by way of amendment introduces anything which was left out or omitted by mistake in the original provision, then such amendment may operate retrospectively with effect from the date of the original provision. The Court, however, declined to grant retrospective effect to the notification dated 04-11-1999 amending Notification No. 29/97-Cus., dated the 01-04-1997. It observed that the relevant amendment in the customs notification was made to introduce two additional import items (textile and chemical sectors) to give effect to the amendment of the EXIM Policy announced on 01-04-1999 and that the notification was not issued for rectification of any mistake. Further, denying the benefit of reduced Customs duty, the High Court also held that date of filing of bill of entry is not relatable to the Foreign Trade (Development and Regulation) Act, 1992 or any notification or policy promulgated thereunder. The importer had filed the Bill of Entry after the changes in EXIM Policy though goods had arrived earlier, and hence claimed the benefit thereunder. [*Director General of Foreign Trade* v. *Ruis Cotex Ltd.* - 2020 (6) TMI 500 - Calcutta High Court]

Warehouse keeper is custodian of warehoused goods – Rent to be paid to him from sale proceeds of auctioned goods as per priority under Section 150: The Kerala High Court has held that the warehouse keeper is the custodian of goods under Chapter IX of the Customs Act, 1962 and that the proceeds of auction sale conducted as ordered by the District Court under Section 72 are to be appropriated as provided in Section 150. The Court was of the view that when the proper officer resorts to a sale invoking the power under sub-section 72(2), he is obliged to pay the rent to the warehouse-keeper as provided in Section 63(1), subject to the charge by apportionment of priority as created in Section 150. Upholding the CESTAT Order, the Court further was of the view that the quantification of customs duty, after auction of the goods, is to be made by following the cum-duty method. Lastly, it was held that interest on customs duty cannot have precedence over the claims of the warehouse keeper as the former would only come under Section 150(2)(e) of the Customs Act. [*Commissioner* v. *Konkan Storage Systems* – Judgement dated 17-06-2020 in Cus. Appeal No.4 of 2019, Kerala High Court]

BIS number wrongly embossed – Confiscation and penalty when not sustainable: CESTAT Chennai has set aside the absolute confiscation of the goods in the case where the BIS number embossed on the goods did not tally with the registration number given in the BIS certificate. It observed that it was not the case that the IS number of entirely different product was endorsed, as the IS no. of the LED panel was erroneously embossed on its driver. It noted that the driver was part of the LED panel lights and the lights cannot be used without the corresponding driver. Further, observing that the manufacturer had owned the responsibility for the difference in embossing the number and had issued a letter, the Tribunal rejected department's plea that the letter was not issued by the supplier. Penalty was also set aside. [*Care Intra Exim* v. *Commissioner* - Final Order No. 40492/2020, dated 17-01-2020, CESTAT Chennai]

Central Excise, Service Tax and VAT

Ratio decidendi

Foreclosure charges on premature termination of loan are not liable to service tax: Larger Bench of the CESTAT has held that 'foreclosure charges' levied by banks and non-banking financial companies on premature termination of a loan cannot be subjected to levy of service tax under Banking and Other Financial Services. Observing that 'consideration' ought to be understood in the light of Section 2(d) of the Indian Contract Act, 1972 and therefore must necessarily flow 'at the desire of the promisor', the 3-Member Tribunal was of the view that since premature termination of loan results in loss of future interest income, foreclosure charges do not flow 'at the desire' of the banks. It was held that there is a marked distinction between conditions to a contract and considerations for the contract. Further, the Tribunal also held that foreclosure charges are compensation paid to the banks as a result of a unilateral repudiation/ breach of contract and not towards the 'lending services', and hence would not be liable to service tax under Banking and Other Financial Services. The Larger Bench also observed that 'foreclosure' is an anti-thesis to lending, hence it cannot be construed as in relation to lending and cannot also be viewed as an 'alternative mode of performance' of contract. The dispute pertained to period from 2004 to 2007. [*Commissioner* v. *Repco Home Finance Ltd.* – Miscellaneous Order No. 40053/2020, dated 08-06-2020, CESTAT Larger Bench]

Works Contract service – Scope of exclusion to construction of roads: CESTAT Bengaluru has held that constructions like toll plaza, cattle/pedestrian crossing facilities, parking bay for buses/trucks, rest room for staff and common public at large, etc. are also part of the road, as these are meant for exclusive use by the highway staff and the people using these roads. Allowing the appeal, the Tribunal held that the assessee was eligible for exemption under Section 65(105)(zzzza) which excluded construction of roads from the ambit of Works Contract service. Department's contention that exclusion was primarily for the work of laying of road and not for allied works undertaken with regard to the said activity, was thus rejected. [*GMR Project Pvt. Ltd.* v. *Commissioner* – Order dated 17-06-2020 in Service Tax Appeal No. 25673 of 2013, CESTAT Bengaluru]

Multi-level car parking at airport is part of airport – Construction not liable under Works Contract service: CESTAT Bengaluru has held that Multi-Level Car Parking built by the assessee at airport forms part of the airport and hence construction of same is exempt from service tax. The Tribunal was of the view that the said parking is not separate from the airport and hence the construction is not taxable under Works Contract service. Definition of Airport in Section 2(b) of the Airport Authority of India Act, 1994, read with Section 2(2) of Aircraft Act, 1934, and definition of 'Aerodrome' Section 2(2) of the Aircraft Act, 1934, were relied upon. Department's contention that the facility cannot be sought to be included under passenger facility, since it is used by others also, was thus rejected. [*GMR Projects Pvt. Limited* v. *Commissioner* - Final Order No. 20363/2020, dated 17-06-2020, CESTAT Bengaluru]

Refund of duty paid by EOU on exports when rebate claim denied: In a case where a now defunct EOU had earlier paid central excise duty on exports using accumulated Cenvat credit, but where its rebate claim was denied as clearances by EOU were otherwise exempt, Madras High

Court has allowed the rebate. It relied on Karnataka High Court's decision in *Slovak India Trading Co-Private Limited* [2006 (201) ELT 559] as maintained by the Supreme Court, allowing refund of Cenvat credit. The Court noted that if the petitioner had continued to carry on the activity and registered itself under Central Goods and Service Tax, 2017, it would have been entitled to transitional credit under Section 142 of the said Act. Allowing the writ petition, it held that since the EOU was entitled to procure goods without payment of duty under Notification No. 22/2003-C.E. but had procured on payment of duty, leading to accumulation of credit, the amount of duty paid on exports can be refunded as no duty was payable by them even otherwise. The department was directed to ascertain the amount that had remained unutilised in view of the denial of rebate claim and refund the same. [*Leo Prime Comp Private Limited* v. *Deputy Commissioner* – 2020 VIL 286 MAD CE]

Provision of dedicated bandwidth by satellite company for up-linking and down-linking is not covered under Broadcasting service: CESTAT Delhi has held that securing a dedicated bandwidth on the transponder of the satellite belonging to a foreign company for up-linking and down-linking of the programme signals, and the fixed charges paid for this purpose by the Indian broadcaster to the foreign company are not liable to service tax under Broadcasting services. The Tribunal was of the view that the payment made was related to the lease of space segment capacity of the transponder and had nothing to do with the signals that were transmitted. The Tribunal agreed with the contention of the assessee that in fact it was the broadcaster, since it was engaged in the activity of dissemination of various forms of communication by transmission of electromagnetic waves through space through the medium of relay stations. Finding the foreign satellite company to be the relay station and not broadcaster under Section 2(c) of the Prasar Bharati Act, the CESTAT held that the activity of dissemination of communication by such transmission alone cannot be regarded as 'broadcasting', unless it is intended to be received by the general public through the medium of relay station and not by a relay station. Department's contention that the foreign company was a 'broadcasting agency or organization', engaged in providing service in relation to broadcasting, was also rejected. [*Vedic Broadcasting Limited* v. *Commissioner* - Final Order No. 50712/2020, dated 08-07-2020, CESTAT New Delhi]

Commission/agency fees remitted to foreign entities for handling of vessels outside India not liable to service tax: CESTAT New Delhi has held that the commission or agency fee remitted to entities for handling of vessels outside India are not liable to service tax. The Tribunal was of the view that taxation of services rendered from outside India, by the legal fiction of deeming the recipient as provider, cannot be founded on money transaction. It also held that the convenience of classification as Business Auxiliary service, to bring the activities within the residual grouping of Rule 3(iii) of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, merely from 'commission' having been paid, does not pass muster in view of competing and more specific descriptions like 'steamer agents' in Section 65(105) of Finance Act, 1994. The Tribunal in this regard also observed that taxable services described in Section 65(105)(h) [Custom house agent] and Section 65(105)(i) [steamer agent] of Finance Act, 1994 were within the ambit of Section 66A only to the extent of having been performed in India. [*Bharat Petroleum Corporation Ltd.* v. *Commissioner* - Final Order No. A/85645/2020, dated 23-07-2020]

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