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Articles

GST Council's unbalancing act on a tightrope!

By **Brijesh Kothary**

As tax professionals we get excited every time we hear news about Goods and Services Tax **("GST")** Council holding periodical meetings. Some of the GST Council meetings, particularly the ones held during the second half of financial year 2017-18 have more or less been small scale budgets, with announcement on various trade facilitation measures such as reduction in the rate of tax of goods and services, taxpayer friendly clarifications and simplification of process relating to furnishing of returns, processing of refunds, e-way bill generation, etc.

We had similar expectations from the 40th GST Council Meeting held in June 2020, considering the fact that it was the first meeting amid COVID-19 pandemic and it was to take place after a gap of almost 3 months. The trade and industry made several representations seeking tax rate cuts, providing liquidity support by way of deferment of GST payments, resolution of inverted tax structure on certain products, allowing input tax credit **("ITC")** of GST paid on goods destroyed, written off or donated during the pandemic, setting up of GSTATs and Centralised AARs, inclusion of petroleum products into the ambit of GST, etc. To our surprise, the GST Council came out with the following decisions:

- Reduction in late fee for past returns;
- Conditional lowering of interest rate for the tax period from February 2020 to July 2020;
- Conditional waiver of late fee for delay in furnishing of FORM GSTR-3B from February 2020 to July 2020;
- Conditional waiver of late fee for delay in furnishing of FORM GSTR-1 for March 2020 to June 2020; and
- One-time extension of time for seeking revocation of cancellation of registration.

The above decisions clearly failed to cheer the industry as the GST Council merely announced procedural relief rather than substantive measures to boost the demand and revive the economy. The above decisions have partially addressed certain concerns of small tax payers that constitute over 82% of assessee base but contributing less than 3.5% to the GST revenue.

Misses by 40th meeting of GST Council

The representations made by large tax payers, who contribute approximately 95% of GST revenue, particularly from tourism, travel, hospitality and real estate sectors, were not even taken up by the GST Council. Considering the recent decisions of the Council, the large tax payers have got an indication that they need to be "*Atmanirbhar*" and not expect any relief from the GST Council.

The GST Council also took a decision to bring into force certain clauses of the Finance Act, 2020 relating to the newly constituted Union Territories, jurisdictional Commissioner for approvals relating to special audit and job work provisions and power to remove difficulties for an

extended period of 2 years. These decisions were notified by CBIC on 24-06-2020. Interestingly, the notification giving effect to the amendment prescribing the time limit for taking transitional credits was issued within 2 weeks from the decision of the Delhi High Court in the matter of *Brand Equity Treaties Limited & Ors. v. Union of India & Ors.* [MANU/DE/1009/2020] with an attempt to undo the effect of the Court's judgment, while the other amendments had to wait for ratification during the meeting of the GST Council.

At this juncture, it is worth noting that some of the crucial amendments from the Finance (No. 2) Act, 2019 relating to payment of interest on the net tax liability and setting up of National Appellate Authority for Advance Ruling are yet to be notified. Also, some of the important amendments from the Finance Act, 2020, for allowing ITC of GST paid on debit notes by delinking them from invoices and amendment to Schedule II have also not been notified yet. The GST Council has also deferred a crucial decision to resolve inverted tax structure on textile products, fertilizers and footwear.

While the GST Council has taken most of the decisions in the past with the objective of making GST law more and more assessee friendly, its secondary objective of enhancing tax collections has taken a massive hit. This is evident from the monthly GST collection figures released by the Government. It may be noted that during the financial year 2019-20, the GST revenue grew by 4%, year on year. This rate is trivial as compared to the growth rate of 14% (from the base year 2015-16) as agreed between the Centre and States, for compensating States to ensure that their revenue is protected.

Shifting focus to revenue augmentation

Given the current slowdown in GDP and COVID-19 pandemic situation, the GST collection figures for the financial year 2020-21 are likely to remain sluggish. The Government is now contemplating on borrowing funds to compensate the States. It is therefore evident that the focus of GST Council will shift from trade felicitation measures to revenue augmentation approach. In my view, there are two means of achieving this goal. The simple way would be to increase the rate of tax across the board while the scientific way would be to plug the loopholes in GST with help of data analytics.

The Hon'ble MoS (Finance) has stated in the Parliament that approximately Rs. 45,682 crore worth of GST evasion had been detected within a period of 2 years. So, the Government's priority is now to plug these loopholes and boost revenue. Some of the steps taken by the GST Council recently to curb the evasion and improve tax collection are as under:

- Blocking of ITC if the jurisdictional Commissioner has "reasons to believe" that the ITC has been fraudulently availed or is ineligible;
- Authentication of Aadhaar for grant of registration;
- Physical verification of business premises;
- Restricting refund of ITC on zero rated supply of goods upto 1.5 times of the value of like goods domestically supplied; and
- Recovery of refund of unutilised ITC or Integrated Tax paid on export of goods where export proceeds are not realised.

The intention behind introduction of these provisions may have been to identify and restrict fraudulent and bogus transactions, however, they have adversely impacted genuine taxpayers by curtailing their right to claim refund resulting in blocking of working capital. It is also pertinent to note that the above amendments have been

introduced through a delegated legislation (Rules) and some of these are likely to be challenged in the court of law as being *ultravires* the Act.

Way forward

The biggest achievement associated with GST in India is the depiction of cooperative federalism and GST Council should be appreciated for the same. However, its recent decisions have failed to meet our expectations for revival of the reeling economy by way of more substantial changes. As we complete three years under the GST regime, it is time for the Council and the Government to introspect if we are moving in a right direction of achieving the objectives with which the law was introduced. The biggest challenge before the Council is taking all the stakeholders on board and dealing with unresolved issues in GSTN portal.

On the one hand, it needs to boost revenue in view of the pandemic and on the other hand, it needs to make compliance a simple and assessee friendly process. The GST Council is, thus, faced with a humongous responsibility of treading on a tightrope and performing a balancing act. We hope the GST council will strive to deliver these twin objectives.

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Rejection of transaction value – Overcoming die-hard practices of the department

By **Ratan Jain and Noyanika Batta**

"One of the great ironies of intellectual history is that Adam Smith, the apostle of free trade, ended his days as a Comptroller of Customs." **-** Michael Keen

Brief background

Customs Valuation has been an impediment to better trade facilitation and inhibits ease of doing business in India. There is a need for systemic improvement and procedural clarity for reducing disputes pertaining to Customs Valuation[1].

Though India largely adopted Article VII of GATT, certain deviations were made in adopting the Customs Valuation Agreement. India also adopted the Ministerial Decision of the WTO taken at Marrakesh, in the form of Rule 10A of erstwhile Customs Valuation Rules, 1988 ("CVR, 1988"). In the new Customs Valuation Rules, 2007 ("CVR, 2007"), it is Rule 12. This Rule mentions the broad parameters for the Customs Authorities to reject the transaction value in a given case. Rule 11 of CVR, 2007 also empowers the customs officer to question the value in appropriate cases.

As per Section 14 of the Customs Act, 1962, the value of the imported goods shall be the transaction value of such goods, that is, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf.

[1] Michael Keen, '*Challenges and Strategies for reform of Customs Administration*', 2003, International Monetary Fund

Rule 12 of CVR, 2007, contemplates that where the department has a 'reason to doubt' the truth or accuracy of the declared value, it may ask the importer to provide further explanation to the effect that the declared value represents the total amount actually paid or payable for the imported goods. The 'reason to doubt' however does not mean 'reason to suspect'. A mere suspicion upon the correctness of the invoice produced by an importer is not sufficient to reject the value of imported goods. The doubt held by the officer concerned has to be based on some material evidence and is not to be formed on a mere suspicion or speculation.[2]

Judicial developments

The Supreme Court in *Eicher Tractors Limited vs. Commissioner of Customs, Mumbai* [2000 (122) ELT 321], laid down the basic premise for customs valuation. It held that unless the price actually paid for a particular transaction falls within the exceptions laid down in the Valuation Rules, customs authorities are bound to charge duty on the transaction value (TV).

However, with the introduction of Rule 10A in CVR, 1988, it became a cause for large number of disputes raised by the customs department, even in cases of genuine transactions; or on the inclusion of royalty, etc. To curb the practice of indiscriminate rejection of transaction value by the department, several judicial decisions were pronounced directing the customs department to exercise restraint in application of Rule 10A and to cite reasonable grounds for the same. These decisions also highlighted the circumstances under which Rule 10A could be applied.

So, while the Customs officer's right to raise doubts on the authenticity of the transaction value was recognized, the price could be rejected only in exceptional circumstances. Some leading decisions that were given by the Apex Court in the context of the erstwhile Rule 10A of CVR, 1988 include:

(a) *Tolin Rubbers Pvt Ltd. v. CC Cochin* [2004 (163) E.L.T. 289 (S.C.)]

(b) *Mirah Exports Pvt. Ltd. v. CC* [1998 (98) E.L.T. 3 (S.C.)]

(c) *Vadilal Dairy International Ltd. v. CC Bombay* [2005 (180) E.L.T. 436 (S.C.)]

Rule 12 of CVR, 2007 empowers the department to reject the transaction value declared by the importer. The transaction value was merely rejected on various grounds including following:

- Price lists providing for a range of price quotation.
- Contemporaneous imports taking place at a higher price.
- Where the price is deemed to be not accurately reflective of the remuneration paid towards IP Rights, R&D Costs. Doubts are often raised of this being a medium of siphoning off funds out of the country.
- NIDB.
- Alert Circulars.
- Standing Instructions / Standing Orders.
- Guidelines issued by DGV (Director General of Customs Valuation).

Thus, while the power to reject transaction value based on the above-listed reasons may be valid, it is to be exercised sparingly and only in cases where there lie genuine doubts related to the authenticity of the declared value. This principle was followed by a catena of judgments of the Apex Court which held that the transaction

[2] *CC, Vishakhapatnam* v. *Aggarwal Industries Ltd*. [2011 (272) ELT 641 (SC)]

value cannot be rejected except for the grounds laid under the Valuation Rules. Some of the leading judgements include:

(a) *Century Metal Recycling Pvt. Ltd. v. Union of India* [2019 (367) E.L.T. 3 (S.C.)]

(b) *CC (Import) v. Bayer Corp. Science Ltd.* [2015 (324) E.L.T. 17 (S.C.)

Thus, a number of judgments were pronounced by the Apex Court to minimize the arbitrary rejection of the transaction value by the Customs department. A gist of the ratio that has been set out by the Apex Court time and again dealing with arbitrary rejection of transaction value is as follows:

- Rule 12 of CVR, 2007 applies where the proper officer has reason to doubt the truth or accuracy of the value declared for the imported goods. The proper officer must ask and call upon the importer to furnish further information including documents to justify the declared transaction value. The proper officer may thereafter accept the transaction value as declared.
- It is only in case where the doubt of the proper officer persists after conducting examination of information including documents or on account of non-furnishing of information that the procedure for further investigation and determination of value in terms of Rules 4 to 9 would come into operation and would be applicable.
- Reasonable doubt will exist if the doubt is reasonable and for 'certain reasons' and not fanciful and absurd. Subjecting imports to detailed enquiry on mere suspicion without reasonable and certain reasons would be contrary to the scheme and purpose behind the provisions which ensure quick and expeditious clearance of imported goods.
- Secondly, there lies a mandate to record reasons at the second stage of enquiry.
- The Price list of the foreign supplier/ manufacturer is not a proof of transaction value invariably and also existence of the price list cannot be the sole reason to reject the transaction value. A price list is no more than a general quotation. It does not preclude discounts which may be granted for a variety of reasons including stock clearance. Mere production of price list cannot discharge the onus on the customs authorities to prove the existence of special circumstances indicated under Section 14 of the Customs Act r/w the Customs Valuation Rules.
- It is upon the Department to prove that the importer has resorted to under-valuation and the department must produce the necessary evidence to prove the said charge. The Courts should ordinarily proceed on the basis that the price charged by the importer reflect the real state of affairs.

Where does the problem lie?

Rule 12 of CVR, 2007 gives an option to the Customs department for rejecting the transaction value declared by the importer where there is a reasonable doubt as to the truth or accuracy of the declared value.

There has, however, been indiscriminate use of the Rule 12 by the Customs, to reject

transaction value declared by the importers, even in genuine cases. In majority of the cases, the department fails to consider common business reasons such as marketing and discount practices for importers submitting a lower declared value than Customs might expect based on the information of customs valuation databases. The value stored in the database should, alongside other indicators applied by the Customs, serve only as an indicator of potential risk and represent no more than initial indicative information.[3]

The national valuation databases are thus risk assessment tools which may be used by the Customs to assess potential risk regarding the truth or accuracy of the declared value for imported goods. The concern however lies when the Customs Department uses these databases in violation of the regulations by setting reference or minimum prices for import declarations.

Narrowing the problem and importance of a comprehensive and accurate valuation database

Practically, it is observed that the department does not follow the true ratio of law laid down by the Apex Court. The department merely doubts truth and accuracy of the value declared by the importer and enhance the value of the imported goods either based on price of identical goods or any other arbitrary basis.

The misuse of databases leads to delays, uncertainty and higher trade costs for businesses. Adherence to set standards while resorting to these databases by the Customs is thus vital to foster an environment encouraging cross-border trade and ease of doing business in India. Thus, in order to curb the problems caused by delayed valuation proceedings, it is most important to address the misuse of customs valuation databases to set reference or minimum prices.

Based on the guidelines on the development and use of national valuation databases issued by the WTO and the practices adopted in other nations, certain changes can be brought about by the Indian Customs to ensure higher quality of the recorded import data. These include:

a) The information in the database should be recent data reflecting the Customs value and other pertinent information for previously imported goods.

b) Price variations must be recognized as a normal part of international trade. While an abnormally large difference between the declared value and the databases value for that product could constitute a potential risk factor, any such difference must be considered along with other potential risk factors, such as the lack of supporting documentation, prior problems with the importer, etc.[4]

c) The database may also include other pertinent and reliable data for risk assessment purposes. In an automated database, virtually all of this data could constitute keywords providing search access.

d) A group of specialists should vet the data extracted from the Customs clearance database before it is input into the database[5].

e) Values should not be included where, descriptions are inadequate, or prices vary considerably for goods within a particular classification depending on

[3] '*Guidelines on the development and use of a national valuation database as a risk assessment tool'*, Committee of Customs Valuation, World Trade Organization (4th April 2014)

[4] *Ibid*

[5] "*Valuation database as a risk assessment tool: Ecuador, India and Kenya Customs share their experience*", WCO News

brand, package size, quality, and country of manufacture.

f) Further, like the project initiated by the Ecuador Customs, there should be a practice to enhance the quality of the goods description by creating detailed catalogues on certain products for customs clearance purposes.

Steps for importers in case of arbitrary rejection of declared value

The importer must be aware of the reasoning resorted to by the department for rejecting the value declared for a transaction and must take the following steps to build a good case in case of further litigation. Some of these steps include:

a) Challenging the rejection of the transaction value by the department by providing all necessary corroborative evidence showing the authenticity of the transaction value.

b) In case of heavy discounts being offered by the supplier, the importer must keep in mind to enter into a written contract with the supplier to provide for a written proof for the lower transaction value.

c) All pricing documentation for a particular transaction must further be retained for a minimum of five years from the date of imports.

d) The importers/agents must further ensure furnishing accurate description of goods and other related parameters. This will not only expedite clearance of the goods, but also make the database more reliable.

e) The importer must ask the department to furnish information related to database values used to reject the declared value, such as- applicable method of valuation (transaction value, computed value method etc.), other elements included in the Customs value (assists, royalties, selling commissions) etc.

Thus, a more effective valuation procedure will go a long way to improve the Ease of doing business rankings of India and to make it a preferred destination for the foreign investor.

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Goods and Services Tax (GST)

Notifications and Circulars

GSTR-1 – Waiver of late fee for delayed submission of GSTR-1 – Time period extended: Late fee payable under Section 47 of the Central Goods and Services Tax Act, 2017 for non-furnishing of Form GSTR-1 by the due date has been waived if the Forms for the months of March, April and May, 2020 are furnished by 10th, 24th and 28th of July, 2020, respectively. The last date for furnishing the said return for said months, without the late fees, was earlier 30-06-2020. Notification No. 53/2020-Central Tax, dated 24-06-2020 amending Notification No.

4/2018-Central Tax, also provides that the late fees would be waived if the Form GSTR-1 for the month of June 2020 is filed by 05-08-2020. For quarterly filers, there would be no late fees if the said Form for quarters from January to March 2020 and from April to June 2020, are filed by 17-07-2020 and 03-08-2020, respectively.

GSTR-3B – Manner of calculation of interest relaxed for taxpayers with aggregate turnover more than Rs. 5 crore: CBIC has relaxed the manner of calculation of interest in case of delayed furnishing of GSTR-3B. Accordingly, a lower rate of interest of NIL for first 15 days after the due date of filing return in Form GSTR-3B and @ 9% thereafter till 24-06-2020 has been notified. After this date, normal rate of interest, i.e. 18% per annum shall be charged for any further period of delay in furnishing of the return. Hitherto, the interest at 18% per annum was to be charged from the due date of return, till the date on which the return is filed, in case the return was not filed till 24-06-2020 by the taxpayers having aggregate turnover more than Rs. 5 crore. Notification No. 51/2020-Central Tax and Circular No. 141/11/2020-GST, both dated 24-06-2020 have been issued for the purpose.

GSTR-1 – Verification through Electronic Verification Code – CGST Rules amended: Registered persons registered under the provisions of the Companies Act, 2013 have been allowed to furnish the details of outward supplies in Form GSTR-1 verified through Electronic Verification Code ("EVC"), during the period from 27-05-2020 to 30-09-2020. As per sixth amendment to the Central Goods and Services Tax Rules, 2017 by Notification No. 48/2020-Central Tax, dated 19-06-2020, effective from 27-05-2020, period during which Form GSTR-3B has been allowed to be verified through EVC has also been revised. The new period is from 21-04-2020 to 30-09-2020 instead of from 21-04-2020 to 30-06-2020 as notified earlier on 05-05-2020 and effective from 21-04-2020.

Nil GSTR-3B can be filed through short message service (SMS) w.e.f. 08-06-2020: Form GSTR-3B for a month having nil or no entry in all the Tables can be filed through a SMS using the registered mobile number and the said return shall be verified by a registered mobile number based One Time Password facility. This facility introduced *vide* Rule 67A of the Central Goods and Services Tax Rules, 2017 has been made effective w.e.f. 08-06-2020.

E-way Bills – Extension of validity: Validity period for e-way bills which were generated on or before 24-03-2020 and whose validity has expired on or after 20-03-2020 has been extended till 30-06-2020. Notification No. 47/2020-Central Tax, dated 09-06-2020 issued for the purpose amends Notification No. 35/2020-Central Tax with effect from 31-05-2020. It may be noted that earlier, the validity of e-way bills generated on or before 24-03-2020 and expiring between 20-03-2020 to 15-04-2020 was extended till 31-05-2020.

Refund of accumulated ITC where invoice details not reflected in GSTR-2A clarified: The Central Board of Indirect Taxes and Customs (CBIC) has clarified that its Circular No.135/05/2020-GST, dated the 31-03-2020 (relating to mandatory reflection of invoice in Form GSTR-2A) does not in any way impact the refund of accumulated ITC in respect of invoices / documents relating to imports, ISD invoices and the inward supplies liable to Reverse Charge (RCM supplies), etc. It may be noted that the said circular restricted the refund to the ITC available on those invoices, the details of which are uploaded by the supplier in Form GSTR-1 and

were reflected in the Form GSTR-2A of the applicant. Before the circular, refund was being granted even in respect of credit availed on the strength of invoices not reflected in Form GSTR-2A, but which were uploaded by the applicant along with the refund application on the common portal. Circular No. 139/09/2020-GST, dated 10-06-2020 has been issued for the purpose.

GST liability on director's renumeration clarified: The CBIC has clarified various circumstances when the renumeration paid to the director is liable/not liable to GST under reverse charge. According to Circular No. 140/10/2020-GST, dated 10-06-2020, GST is not payable on employee director's renumeration paid as 'salaries' where the same is subjected to TDS under Section 192 of the Income Tax Act, 1961. Such consideration for services by an employee to the employer in the course of or in relation to his employment is in terms of Schedule III of the Central Goods and Services Tax Act, 2017 and is not taxable. However, GST is liable to be paid by the company on employee director's renumeration paid as 'fees for professional/technical services'. The Circular states that where a part of employee Director's remuneration is declared separately other than 'salaries' in the Company's accounts and is subjected to TDS under Section 194J of the Income Tax Act as '*Fees for Professional or Technical Services*', it becomes a consideration for providing services which is outside the scope of Schedule III of the CGST Act. GST in this case has to be paid on reverse charge basis under Sl. No. 6 of Notification No. 13/2017-Central Tax (Rate). Similarly, GST is liable on reverse charge basis on renumeration paid to independent directors (not employees) as the said service is also outside the scope of Schedule III.

Construction of residential apartments – Form for GST payment on shortfall value of inward supplies from registered supplier: CBIC has clarified that a person required to pay tax in accordance with the Notification No. 11/2017-Central Tax (Rate) on the shortfall from threshold requirement of procuring input and input services from registered person, shall use Form DRC-03 to pay the tax electronically on the common portal. For FY 2019-20, tax on such shortfall is to be paid by 30-06-2020 by the promoter/developer. It may be noted that the said notification provides for concessional rate of GST on construction of residential apartments if at least 80% of value of input and input services (other than few specified services), used in supplying the construction service, is received by the promoter/developer from registered supplier only. Instruction No. 3/2/2020-GST, dated 24-06-2020 has been issued for the purpose.

Ratio decidendi

TRAN-1 – Delhi High Court decision in *Brand Equity* stayed by Supreme Court: A 3-Judge Bench of the Supreme Court has stayed the Delhi High Court decision in the case of *Brand Equity Treaties Ltd.* The High Court had held that an assessee can avail Input Tax Credit of the accumulated Cenvat credit as on 30-06-2017 by filing GST Form TRAN-1 beyond the period of limitation prescribed under Rule 117 of Central Goods and Services Tax Rules, 2017. Allowing the assessee to file the said return by 30-06-2020, the High Court had observed that there was no specific provision providing for the time limit under the Central Goods and Services Tax Act, 2017. The High Court had read down Rule 117 as being directory in nature, insofar as it prescribed the time-limit for transitioning of credit. It held that the same would not result in the forfeiture of the rights, in case the credit is not

availed within the period prescribed. [*Union of India* v. *Brand Equity Treaties Ltd.* - Order dated 19-06-2020 in SLP Nos. 7425-7428/2020, Supreme Court].

Proceedings for Recovery of interest cannot be initiated without adjudication: Jharkhand High Court has held that though the liability of interest specified under Section 50 of the Central Goods and Services Tax Act, 2017 is automatic, but in case the assessee disputes the computation or leviability of interest, adjudication proceedings should be initiated under Section 73 or 74 by way of notice of recovery of interest under Section 50. The Court was of the view that till such adjudication is completed by the proper officer, the amount of interest cannot be termed as an amount payable under the CGST Act or the Rules. Further, it was also held that recovery proceedings under Section 79 cannot be initiated without initiation of adjudication proceedings. The decision of the Madras High Court in the case of *Assistant Commissioner v. Daejung Moparts Pvt. Ltd.*, was relied upon. [*Mahadeo Construction Co.* v. *Union of India* – 2020 VIL 185 JHR]

National Centre for Biological Sciences not a 'Government Entity' – Works Contract service provided thereto liable to 18% GST: Karnataka Advance Ruling Authority has held that the works contract agreement with National Centre for Biological Sciences ('NCBS') for construction of a hostel building at their Campus is liable to GST at the rate of 18% (9% CGST + 9% KGST) and not 12%. The AAR observed that NCBS was not a Central or State government or Union Territory or a local authority or a governmental authority and was neither set up by an Act of Parliament or State Legislature nor was established by any Government. It noted that the Council which administers NCBS has only four members appointed by the government and hence the government does not have more than 90% control over it. Lastly observing that NCBS was not established to carry out a function entrusted by the government, it was held that NCBS was not covered under the definition of a "Government Entity" as per Notification No. 11/2017-Central Tax (Rate). [In RE: *Hombale Constructions and Estates Private Limited* – 2020 TIOL 107 AAR GST]

Ex-factory inter-State supply liable to IGST: Telangana AAR has held that ex-factory inter-State supplies would be liable to Integrated Goods and Services Tax (IGST). The goods are made available by the supplier to the recipient at the factory gate, but the recipient subsequently assumed the charge for transportation of the goods up to the destination in another State. The Authority observed that the movement of goods got terminated at the location (in a different State) to which the goods were consigned/destined and such movement was affected by the recipient or by any other person such as transporter authorized by the recipient. The Authority was of the view that in terms of Section 10(1)(a) of IGST Act, 2017, movement of goods in case of ex-factory inter-State sales does not conclude at factory gate but terminates at the place of destination where the goods finally are destined as per the billing address. [In RE: *Penna Cement Industries Limited* – 2020 TIOL 112 AAR GST]

Online test at test centre under supervision of invigilator covered under OIDAR services: AAR Karnataka has held that provision of online exam/test where the test taker must go to a test centre where he is continuously monitored by invigilator who also verifies his identity and delivers test report after the test, is classifiable as Online Information Database Access and Retrieval (OIDAR) services. The AAR was of the view that human activity on the side of the supplier was focussed on the whole environment, i.e. the whole test centre and not on the specific need of individual test takers. It observed that the provision of taking tests online at designated

centres are naturally bundled activities and are supplied in conjunction with each other and that the principal supply is of OIDAR service. In respect of another kind of test which involved evaluation of essay-based questions by a human evaluator, the AAR held that the service was not covered under OIDAR services and hence was exempt under Sl. No. 10 of Notification No. 9/2017-Integrated Rate (Tax). [In RE: *NCS Pearson Inc.* - 2020 TIOL 115 AAR GST]

Merchant trade – GST payable on sale outside India when goods shipped directly from vendor outside India: AAR Gujarat has held that applicable GST would be payable on the goods sold to the customer located outside India, where the goods are shipped directly from the vendor's premises located outside India to the customer's premises. The AAR was of the view that transaction undertaken was an Inter-state supply and would be liable to IGST and will not qualify as exports since there was no question to taking the goods out of India when the same were not available in the Indian territory. The Authority was however of the view that GST is not payable on goods procured from vendor located outside India, where the goods so purchased are not brought into India. [In RE: *Sterlite Technologies Ltd.* – 2020 TIOL 124 AAR GST]

Serving of ice cream and allied products at parlour is 'restaurant service': AAR Telangana has held that serving of ice cream and ice cream allied products, milk shakes in the parlour with or without adding ingredients like fruits or topping sauces, according to the customer taste or requirements, or selling ice cream products as such, falls under the definition of 'restaurant service' attracting GST at the rate of 5% without availability of ITC. The AAR also held that serving of ice creams as per the guest requirements or taste at customers premises during party events falls under Outdoor Catering services attracting 18% GST for period from 15-11-2017 to 30-09-2019 and 5% GST without ITC from 1-10-2019. It was also held that in sale of bulk ice creams to caterers as takeaway as party orders and to pushcart vendors who in turn sold to their customers, there was no element of service and hence Notification No. 11/2017-Central Tax (Rate) was not applicable. [In RE: *Sri Venkateshwara Agencies* - 2020 TIOL 111 AAR GST]

EU VAT – Amount received for early termination of contract which required tie-in period, when liable to VAT: The Court of Justice of the European Union ("CJEU") has held that amounts received by an economic operator in the event of early termination of a services contract (for reasons specific to the customer) requiring compliance with a tie-in period in exchange for granting that customer advantageous commercial conditions, must be considered to constitute the remuneration for a supply of services for consideration. The Court observed that the amount payable in the event of early termination constituted a contractual obligation for the customer and was an integral part of the price which the customer committed to paying for the provider to fulfil its contractual obligations. It noted that the amounts reflected the recovery of some of the costs associated with the supply of the services and which the customer committed to reimbursing in the event of a termination. The argument of the assessee that the amount payable was similar to a payment intended to compensate for the damage sustained, was found to run counter to the actual position of the law in Portugal, where an operator was not able to charge compensation or indemnification, in the event the contract is terminated early. [*Vodafone Portugal — Comunicações Pessoais SA* v. *Autoridade Tributária e Aduaneira* – Judgement dated 11-06-2020 in Case C-43/19, Court of Justice of the European Union]

EU VAT – Inter-State supply – Supply when to be regarded as 'by or on behalf of supplier' to purchaser in another State: In a case where the goods were sold by a supplier established in one Member State (Country in the European Union) to purchasers residing in another Member State and the same were delivered to those purchasers by a company recommended by that supplier, but with which the purchasers were free to enter into a contract for the purpose of that delivery, the Court of Justice of the European Union has held that those goods must be regarded as dispatched or transported 'by or on behalf of the supplier' if the role of that supplier is predominant in initiating and organising the essential stages of the dispatch or transport of those goods. The Court further laid down the guidelines for the referring Court for consideration of 'prominent role'. It observed that it needs to be found as to whether,

- the activity consists in actively offering goods to purchasers residing in the other Member State;
- the choices relating to the methods of dispatch or transport of the goods concerned may be attributed to the supplier or purchaser;
- which economic operator bears the burden of risk in relation to the dispatch and supply of the goods at issue; and
- the acquisition of goods and their dispatch or transport are the subject of a single financial transaction.

[*KrakVet Marek Batko sp.k.* v. *Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* – Judgement dated 18-06-2020 in Case C-276/18, Court of Justice of the European Union]

Customs

Notifications and Circulars

Faceless assessment – First phase of All India roll-out launched at Bengaluru and Chennai: With the objective of speedy and uniform assessment practices, the Central Board of Indirect Taxes and Customs ("CBIC") has launched Phase 1 of Faceless Assessment of bills of entry for goods imported primarily under Chapters 84 and 85 of the Customs Tariff Act, 1975 at Bengaluru and Chennai with effect from 08-06-2020. As per Circular No. 28/2020-Cus., dated 05-06-2020, this program launched under the umbrella of 'Turant Customs' will be rolled out in phases and would be implemented pan India by 31-12-2020. Accordingly, a Bill of Entry which is selected for verification of self-assessment would be assigned to an officer of the Faceless Assessment Group by the Customs Automated System randomly.

In order to operationalise the program, the Board has also issued 2 notifications. While Notification No. 50/2020-Cus. (N.T.), dated 05-06-2020 enables an assessing officer who is physically located in a particular jurisdiction to assess a Bill of Entry pertaining to imports made at a different Customs station, whenever such a Bill of Entry has been assigned to him in the Customs Automated system, Notification No. 51/2020-Cus. (N.T.), also dated 05-06-2020 empowers the jurisdictional Commissioners of Customs

(Appeals) at Bengaluru and Chennai to take up appeals filed in respect of Faceless Assessments pertaining to imports made in their jurisdictions even though the assessing officer may be located at the other Customs station. Procedural details of the Faceless Assessment scheme are available in CBIC Instruction No. 9/2020-Cus., dated 05-06-2020.

LEO and eGatepass copy of shipping bill to be electronically transmitted – Printing of Shipping Bills discontinued: CBIC has from 22-06-2020 discontinued the practice of printing copies of Shipping Bill bearing the Final Let Export Order ("LEO") for the exporters and for maintaining a docket in the Customs House. As per Circular No. 30/2020-Cus., dated 22-06-2020, the Final LEO copy of the Shipping Bill in PDF will be electronically transmitted to the exporter. The PDF version will bear a digitally signed and encrypted QR code which can be scanned to verify the authenticity of the document. Similarly, the Board has decided to do away with the printing of Transference copies of Shipping Bill. The Directorate General of Systems would henceforth communicate through email, the eGatepass PDF copy of the Shipping Bill to the customs broker and the exporter, if registered. The Principal Commissioners / Commissioners of Customs have been directed to take a decision on allowing printouts only in exceptional situations.

MEIS/SEIS – Increase in duration of validity of scrips and relaxations in last date of filing applications: Duty Credit Scrips issued under Chapter 3 of the Foreign Trade Policy between 01-03-2018 and 30-06-2018 will be valid till 30-09-2020. Further, for MEIS applications which attracted a late cut as on 01-03-2020, the period between 01-03-2020 and 30-06-2020 shall not be counted. Consequently, the last date for submission of various categories of application attracting late cut and the applicable rate of late cut will be suitably re-determined. In respect of SEIS, in respect of application for services rendered in FY 2016-17, the last date of application with 10% late cut would be 30-06-2020 and thereafter it would be time barred. For services rendered in FY 2017-18, 5% late cut as was applicable on 31-03-2020 will continue to be applicable for applications submitted till 30-06-2020 and thereafter a late cut of 10% would be applicable for applications submitted till 31-03-2021. Amendment in this regard have been made in Chapter 3 and 9 of the Handbook of Procedures Vol. 1 by DGFT Public Notice No. 08/2015-20, dated 01-06-2020.

Relaxation to submit bonds extended: In light of the extension in the lockdown period, the Central Board of Indirect Taxes and Customs (CBIC) has by Circular No. 26/2020-Cus., dated 29-05-2020 extended the period of relaxation of submission of bonds under Sections 18, 59 and 143 and under notifications issued under Section 25 of the Customs Act, 1962, till 15-06-2020. Now, the undertaking submitted in lieu of bond during such relaxation period will have to be replaced with a proper bond till 30-06-2020. It may be noted that *vide* Circular No. 17/2020-Cus., dated 03-04-2020, the CBIC had relaxed requirement to submit bonds prescribed under specified provisions in order to expedite Customs clearance of goods during the COVID-19 pandemic. The aforesaid relaxation was available against submission of an undertaking having the same contents as those of a prescribed bond. Earlier, the requirement from submission of bond was relaxed till 30-05-2020 *vide* Circular No. 23/2020-Cus., dated 11-05-2020 and the undertaking submitted in lieu of bond was required to be replaced with a proper bond till 15-06-2020.

AEO certification – Extension of validity: The validity of Authorised Economic Operator ("AEO") certificates where the same has expired between 01-03-2020 and 31-05-2020, has been extended to 30-06-2020. However, according to CBIC Circular No. 27/2020-Cus., dated 02-06-2020, this extension will not be granted to those AEO entities against which a negative report is received by CBIC in the abovementioned period. It may be noted that Para 5.1 of Circular 33/2016-Cus., dated 22-07-2016 which deals with 'Validity of AEO Certificate' provides that AEO certificates issued to AEO-T1 and AEO-T2 will be valid for a period three years and those issued to AEO-T3 and AEO-LO will be valid for a period of five years. The AEO entities had expressed difficulties in renewing their certifications owing to the restrictions imposed under national lockdown.

Revalidation of export authorization/license by DGFT (Hqrs.): Para 2.20(b) of the Handbook of Procedures Vol.1 has been amended to allow revalidation of the Export Authorization/license for Non-SCOMET and SCOMET items by DGFT(Hqrs). Prior to the amendment by DGFT Public Notice No. 10/2015-20, dated 08-06-2020, the Regional Authorities had the power of revalidation except for the cases covered by Para 2.16(b) of the HBP.

Paracetamol API and Hydrochloroquine API – Export Policy relaxed: The export policy of Paracetamol Active Pharmaceutical Ingredients ("APIs") falling under HS Code 2922 2933 has been revised from restricted to free. Similarly, export policy of Hydrochloroquine API (Heading 2933) and formulations made from Hydrochloroquine falling under Heading 3004 has been revised from prohibited to free. In effect, both the products are now freely exportable. DGFT Notifications Nos. 07/2015-20, dated 28-05-2020 and 13/2015-20, dated 18-06-2020 have been issued for the purposes.

Alcohol-based hand sanitizers – Export Policy relaxed: Export of alcohol-based hand sanitizers in containers with dispenser pumps, falling under any ITC (HS) Code including Headings 3004, 3401, 3402 and sub-heading 3808 94, only is prohibited. As per amendments by DGFT Notification No. 8/2015-20, dated 01-06-2020 in Notification No. 4/2015-20, dated 06-05-2020, export of alcohol-based hand sanitizers in any other form/packaging is now free.

Tyres – Import policy tightened: The import of new pneumatic tyres falling under ITC (HS) Codes 4011 10 10, 4011 10 90, 4011 20 10, 4011 20 90, 4011 40 10, 4011 40 20, 4011 40 90, 4011 50 10 and 4011 50 90 has been revised from "free" to "restricted". DGFT Notification No. 12/2015-20, dated 12-06-2020 issued for this purpose amends specified entries in Chapter 40 of the Schedule-1 to ITC (HS) Classification of Export and Import Items.

Ratio decidendi

Valuation – Contemporaneous imports – Transaction value when not to be rejected: Observing that the declared value of the imported goods matched with the lower accepted contemporary value, CESTAT Delhi has held that there was no ground for rejection of the transaction value of the goods. The Tribunal was of the view that since the declared value matched with the already accepted assessable value of the goods at different ICDs, only because two consignments of JNCH, Nhava Sheva were imported at higher prices, same cannot be taken as the contemporary import value of the imported items. It also noted that the show cause notice did not gave details as to why the transaction value was not acceptable. [*Varaha Infra Ltd.* v. *Commissioner* – 2020 VIL 274 CESTAT DEL CU]

SAD refund – Mere mis-match of description no ground to deny refund: CESTAT Chandigarh has held that that mere mis-match in the description of the goods cannot be a reason to deny the refund claim of Special Additional Duty (SAD). Observing that the onus was on the Revenue to prove that the goods sold by the assessee were not the same goods which were imported earlier, the Tribunal held that the fact could have been verified by the authorities after verifying the records of the assessee itself. Allowing refund of SAD in terms of Notification No. 102/2007-Cus., it noted that the assessee had paid VAT on domestic sales and the invoice mentioned that the burden of SAD was not passed. [*Texas Hosiery Mills* v. *Commissioner* – 2020 TIOL 862 CESTAT CHD]

Valuation – Lower price from principal to compensate for marketing services, not wrong: In a case involving imports from the foreign principal and other foreign affiliates, CESTAT Bangalore has held that it is not correct to reject the transaction value just because there were imports by third parties at a higher price. Allowing the appeal, the Tribunal found justified, the objections that the principals offered a lower price to compensate appellant for the services rendered in marketing the product and in obtaining orders and that profit percentage earned by the appellants cannot by itself be a matter of suspicion. It also noted that the goods were imported at pre-notified inter-company price list and that the Appellate Authority while rejecting the declared value, did not discuss on the methodology to arrive at the import price and hence said Order could not be implemented. [*Ebro Armaturen India Private Limited* v. *Commissioner* – 2020 (6) TMI 95 CESTAT Bangalore]

Classification of goods – Importance of origin of goods and test reports: CESTAT Bengaluru has held that Squalene oil is classifiable under Heading 1504 and not under Heading 2901 of the Customs Tariff Act, 1975. The Tribunal though accepted the principle that classification of goods should not be based on test reports, it observed that the test reports give a fair idea of the nature and characteristics of the product. Observing that Central Institute of Fisheries Technology and Customs Laboratories had reported that the impugned product was fish oil (of marine origin), and that their report cannot be ignored, the Tribunal held that the product could not be classified under Heading 2901 as saturated or unsaturated acyclic hydrocarbons. It also observed that there was no reference to the percentage of unsaponifiable matter with respect to classification under Heading 1504 and that even going by the principles of '*ejusdem generis*' or '*Noscitur a sociis*', the impugned goods being of animal origin were rightly classifiable under Heading 1504. [*Arbee Biomarine Extracts Pvt. Ltd.* v. *Commissioner* – 2020 VIL 247 CESTAT BLR CU]

Valuation – Value cannot be enhanced merely based on DGOV Circular: CESTAT Ahmedabad has held that when the enhancement is not based on any contemporaneous import, particularly when the invoice price of the assessee is not disputed on the basis of any evidence of wrong declaration of the value, the enhancement of the value merely on the basis of the DGOV Circular is illegal and incorrect. The Tribunal observed that the enhancement of value was based on DGOV Circular irrespective of the mention made in the consent letter that the assessee had gone through the contemporaneous import data. It noted that the Assessing Authority must examine each and

every case on merit for deciding its validity and that he cannot reject transaction value only on the basis of a general criteria based on DGOV Circular. [*Guru Rajendra Metalloys India Pvt. Ltd.* v. *Commissioner* – 2020 VIL 245 CESTAT AHM CU]

Valuation – Related person – Rule 3(3) to be followed before adjusting value as per Rule 4: In a case involving imports from related person, where the deductive value for calculation was not rebutted by the Revenue, the CESTAT Delhi has allowed assessees appeal by way of remand. The Tribunal held that the deductive value must be followed for calculation of any adjustment in the transaction value in terms of Rule 3(3) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Application of Rule 4 by the Commissioner (A) was held to be not justified when the deductive value available before the authorities below was not rejected by a speaking order. It also held that there was no reasonable basis for enhancement of 77% in the transaction value. [*Lutron GL Sales & Services Pvt. Ltd.* v. *Commissioner* – 2020 VIL 238 CESTAT DEL CU]

Advance authorisation – Categorisation or re-categorisation cannot be done by DGFT Policy Circulars/Public Notices: The Delhi High Court has held that the Public Notice issued by the DGFT which puts restriction upon issuance of Advance Authorisation for Gold medallions and coins is in excess of power and jurisdiction of the DGFT. The Court was of the view that such categorisation or re-categorisation cannot be done by Policy Circulars which in effect amends the Foreign Trade Policy ("FTP"). It observed that such exercise must be undertaken by a specific amendment to the FTP under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992. The DGFT had *vide* Public Notice dated 26-09-2019 disallowed the issue of Advance Authorization for two export items namely 'Gold Medallions and Coins' or 'Any Jewellery manufactured by fully mechanized process'. [*M.D. Overseas Ltd.* v. *Union of India & Ors.* - 2020 (6) TMI 140 Del HC]

Search by DRI at premises of manufacturer who supplied to exporter, valid: Punjab and Haryana High Court has held that Section 105 of the Customs Act, 1962 does not restrict the search only with regard to importer or exporter and that other premises can also be searched. The search by DRI was in connection with an investigation going on for availing ineligible drawback and IGST refund by few exporters to whom the petitioner had supplied goods. Dismissing the writ petition, the High Court rejected the contention that DRI had no jurisdiction to conduct search at the premises of the manufacturer-petitioner as he was not an exporter, and that in case of any doubt or dispute it was only the officials of Goods & Services Tax Department who could have proceeded further in the matter so far as the petitioner was concerned. [*Shri Vishnu Processors* v. *Union of India* – 2020 VIL 227 P&H CU]

Central Excise, Service Tax and VAT

Ratio decidendi

Cenvat credit of mandatory services of DICGC availed by banks, available: The Larger Bench of CESTAT has held that service received by the banks from Deposit Insurance and Credit Guarantee Corporation (DICGC) qualify as 'input service' and accordingly Cenvat credit of such services can be availed by the banks. The Tribunal noted that it was mandatory for all banks who have obtained a licence from the Reserve Bank of India under Section 22 of the Banking Regulation Act to register themselves with the DICGC and that if a bank fails to pay the premium amount to DICGC, it would not be able to retain its registration. It observed that such service received by the banks from the DICGC would fall in the main part of the definition of 'input service' and such Cenvat credit would be eligible. The Tribunal was also of the view that accepting deposits do not come within Section 66D(n) of the Finance Act, 1994 relating to Negative List. The contention that insurance premium was paid only on the deposits of the customers, was also rejected. [*South Indian Bank* v. *Commissioner* - Interim Order Nos. 13 - 31 / 2020, dated 20-03-2020, CESTAT Larger Bench]

Appeal to Appellate Tribunal – Maintainability of appeal against Order-in-Revision passed after 19-08-2009 – Issue referred to Larger Bench: CESTAT Hyderabad has referred to the Larger Bench the question as to whether appeals by the Revenue and assessee against Orders-in-Revision passed after 19-08-2009 are maintainable before the CESTAT in the absence of any specific saving clause in Section 86 of the Finance Act 1994. The Tribunal noted that there were conflicting decisions of the Tribunal in the cases of *T.A. Pai Management Institute* (By CESTAT Bengaluru) and *Zee Entertainment Enterprises Ltd.* (By CESTAT Mumbai). Sections 84 and 86 of the Finance Act, 1994 were amended in 2009 to align the provisions relating to service tax with the central excise provisions, and though the amended Section 84 provided for the saving clause, same was not incorporated in Section 86 relating to Appeal to CESTAT. [*Flytech Media Pvt. Ltd.* v. *Commissioner* – 2020 VIL 277 CESTAT HYD ST]

Transfer of Know How not covered under Intellectual Property Rights service: CESTAT Delhi has held that grant of exclusive right to the assessee by a foreign company to use the 'know how' in any plant in accordance with the processes, specifications and recipes thereof in connection with the manufacture, marketing, sale and distribution of products is not covered in the definition of 'intellectual property right' so as to make it taxable under Section 65(105) (zzr) of the Finance Act, 1994. Department's contention that since the items mentioned in the definition of 'know how' in the agreement were covered by the term 'process' contained in Section 2(l)(j) of the Patents Act 1970, 'technical Know How' would be covered by the Patents Act, 1970 and, therefore, would be 'intellectual property right', was thus rejected. The Tribunal was of the view that there should be an independent law that protects 'know how', if same is to be included in the residuary clause 'or any other similar intangible property' in the definition of 'intellectual property right'. CESTAT Bengaluru decision in case of *ABB Ltd.*

and CESTAT Mumbai decision in case of *Tata Teleservices Ltd.,* were relied upon. [*Modi-Mundipharma Beauty Products Pvt. Ltd.* v. *Commissioner* – 2020 VIL 256 CESTAT DEL ST]

Refund of Cenvat credit to be allowed if assessee not in position to utilise credit within 'reasonable period': CESTAT Ahmedabad has held that condition 5 of Notification No. 11/2002-C.E. (N.T.), relating to refund of accumulated Cenvat credit due to exports, does not mean that the appellant should not be able to utilize the credit at all. The Tribunal was of the view that the condition must be read harmoniously to mean that the refund should be allowed if the assessee is not in a position to utilize the Cenvat credit within a reasonable period. The refund claim was filed in 2004 and matter was under litigation for long time, during which the assessee utilised a substantial part of the credit. Department denied refund observing that assessee might have further utilised credit. [*Koshambh Multitred Private Limited* v. *Commissioner* – 2020 VIL 258 CESTAT AHM CE]

TN VAT – ITC of tax paid in excess by supplier, available: Madras High Court has held that even if the registered dealer had deliberately paid tax in excess and passed on the incidence of such tax to the assessee-petitioner with a view to liquidate the excess credit of input tax accumulated in their hand, the petitioner/recipient of goods cannot be denied the input tax credit of tax paid and reflected in the invoice. According to the Court whether the tax was paid at 4% or 12.5%, it was irrelevant as far as the petitioner was concerned as the issue was revenue neutral. The issue involved availing of ITC under Section 19(3) of the Tamil Nadu VAT Act, 2006. Interestingly, the Court opined that the option available to the commercial tax department would be to recover the amount of tax passed on in excess from the registered dealer who sold the goods to the petitioner if it facilitated the petitioner to avail credit of such tax if such tax was otherwise not payable. [*Visteon Automotive Systems Pvt. Ltd.* v. *Deputy Commissioner (CT)* – 2020 VIL 264 MAD]

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