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Article

New Rule 88B providing for manner of calculating interest – Susceptible to challenge?

By **Sahana Rajkumar and Balaji Sai Krishnan**

Introduction

Due to periodical amendments, the provisions relating to levy of interest under GST has been the subject matter of varied interpretations. The issue concerning payment of interest on the gross/net tax liability in case of delayed payment of taxes was the subject matter for our article published in Tax Amicus (May 2022/Issue 131).

Post the said article, there have been further developments in respect of provisions relating to interest. Recently, the Central Goods and Services Tax Rules, 2017 ('**CGST Rules**') have been amended *vide* the Amendment Rules, 2022 to introduce a new Rule 88B, retrospectively with effect from 1 July 2017. The said rule provides for the manner of calculating interest on delayed payment of tax.

In this Article, the authors intend to analyze the nuances of the new Rule 88B and the implications arising therefrom.

Section 50(1) of the CGST Act, 2017 – A recap

Section 50(1) of the Central Goods and Services Tax Act, 2017 is the substantive provision which provides for the levy of interest in cases where a person fails to pay tax within the prescribed period. With the introduction of the *proviso* to Section 50(1)[1] with effect from 1 July 2017[2], the legislature indicated that their intention is to levy interest only on the portion of output tax liability discharged by way of cash (i.e., the net tax liability).[3] The intention behind introducing the *proviso* was the natural concept of 'interest' which signifies a compensatory character.[4]

However, the language in which the *proviso* has been couched created a doubt on its exact contours and ambit. The scope of the *proviso* to Section 50(1) came up before the Madras High Court in the case of *Srinivasa Stampings*[5]. The High Court held that the *proviso* will apply only in cases where tax had been belatedly paid through returns filed after the prescribed due date. The *proviso* was interpreted strictly to not apply to all cases of delayed payment of tax.

Through our previous article, we had examined the implications of this interpretation especially on those cases where liabilities have been discharged belatedly through returns filed on time. We had foreseen a situation where the Department could levy interest even on liabilities

[1] Section 50(1) - *Provided that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be payable on that portion of the tax which is paid by debiting the electronic cash ledger.*

[2] Section 112 Finance Act, 2021

[3] The 39th GST Council meeting was held on 14 March 2020.

[4] *Pratibha Processors* v. *Union of India*, 1996 (88) ELT 12 (SC)

[5] 2022-VIL-285-MAD.

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paid through credit in cases where there was no belated filing of returns as the same did not explicitly fall within the scope of *proviso* to Section 50(1). This apprehension has now turned into reality through the introduction of Rule 88B.

Rule 88B of the CGST Rules

Section 50(2) of the CGST Act, 2017 has always provided that interest payable shall be calculated in such manner as may be prescribed. Section 2(87) of the CGST Act defines the term 'prescribed' to mean prescribed by the Rules made under the Act on the recommendation of the Council. Until recently there was no specific Rule prescribing the manner of calculation of interest. Now, the Central Government on the recommendation of the GST Council has introduced Rule 88B *vide* Notification No. 14/2022-Central Tax, dated 5 July 2022 with retrospective effect from July 2017. The said Rule prescribes the manner of computing interest on delayed payment of tax.

The Rule can be classified into the following three categories: -

Provision	**Scenario**	**Period for which interest is payable**	**Amount on which interest liability has to be computed**
Rule 88B(1)	If tax has been belatedly paid through credit balance on account of delayed filing of return, before commencement of proceedings under Section 73 or 74 of the CGST Act [proviso to Section 50(1)]	Interest to be paid for the period of delay in filing the said return beyond the due date upto date of filing GSTR-3B	Tax paid by debiting the electronic cash ledger
Rule 88B(2)	In all other cases where interest is payable on delay in payment of tax covered by Section 50(1)	Period starting from the date on which such tax was due to be paid till the date such tax is paid	Amount of tax which remains unpaid
Rule 88B(3)	Where interest is payable	Period starting from the date of utilisation of	Amount of input tax credit wrongly

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Provision	Scenario	Period for which interest is payable	Amount on which interest liability has to be computed
	on the amounts of ITC wrongly availed and utilised covered by Section 50(3)	such wrongly availed input tax credit till the date of reversal of such credit or payment of tax in respect of such amount	availed and utilised

From a bare reading of the above Rule, it appears that the benefit of paying interest on the net cash component has been restricted to cases where there is a delay in filing the return in Form GSTR-3B. In all other cases, such as delay in payment of tax due to inadvertence or an interpretation issue, though returns are filed on the due date, the provision suggests that interest would have to be remitted on the gross tax liability.

That said, it becomes relevant to consider the *vires* of Rule 88B of the CGST Rules.

As the law stands on date, Section 50 of CGST Act read with Rule 88B of the CGST Rules provides for a levy of interest on the gross tax liability for short payment or non-payment of tax in cases other than situations where tax has been paid after the due date on account of delay in filing the returns.

The benefit of levying interest on the net cash liability has been extended only to a limited situation of delay in filing returns leading to late payment of tax. This distinction, although not explicitly carved out in Section 50, has been specifically created through Rule 88B and the same has been brought in with retrospective effect as well.

Even if the *proviso* appended to Section 50 is read in a strict manner to only apply to cases where there is delay in filing returns, prior to insertion of Rule 88B, there was no explicit condition in the main sub-clause (1) of Section 50 which required tax to be paid on the gross tax liability. In fact, the Madras High Court in the case of *Refex Industries* v. *Assistant Commissioner*[6] held that once sufficient ITC is available, then no interest can be charged under Section 50 for delayed payment of tax.

The fact that the condition has been introduced retrospectively goes to show that the Rule is introducing a restriction that did not explicitly exist prior to introduction of the amendment to the CGST Rules.

Therefore, the *vires* of Rule 88B is susceptible to challenge and the question as to whether the taxpayers can still avail the benefit of paying interest on net cash liability in cases where sufficient balance was maintained in electronic credit ledger for short paid liability is not settled. It will have to be seen if the Rule survives the test of time.

[Both the authors are Principal Associates in GST Advisory practice at Lakshmikumaran & Sridharan Attorneys, Chennai]

[6] 2020 (2) TMI 794 - Madras HC.

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Goods and Services Tax (GST)

Notifications and Circulars

E-invoice – Threshold limit to be decreased from INR 20 crore to INR 10 crore: Registered person (except specified persons) having aggregate turnover exceeding INR 10 crore in any preceding FY from 2017-18 onwards will be required to comply with Rule 48(4) of the Central Goods and Services Tax Rules, 2017, i.e., E-invoice provisions with effect from 1 October 2022. The limit is INR 20 crore at present. Notification No. 17/2022–Central Tax, dated 1 August 2022 amends Notification No. 13/2020-Central Tax, for this purpose.

Arrests not to be made in routine and mechanical manner – CBIC lays down guidelines: The Central Board of Indirect Taxes and Customs (CBIC) has laid down guidelines for arrest and bail in relation to offences punishable under the Central Goods and Services Tax Act, 2017. According to the Instruction No. 2/2022-23 [GST – Investigation], dated 17 August 2022, the relevant factors before deciding to arrest a person must be the need to ensure proper investigation and to prevent the possibility of tampering with evidence, etc. It is stated that arrest should not be resorted to in cases of technical nature (involving interpretation of law) and that the prevalent practice of assessment can also be one of the determining factors while ascribing intention to evade to the alleged offender. Similarly, the Instruction notes that other factors influencing the decision to arrest is the co-operation of the offender in the investigation. The Instruction also details the procedure for arrest, post arrest formalities and reports to be sent within 24 hours of arrest.

Summons under Section 70 of CGST Act – CBIC lays down guidelines: The CBIC has laid down guidelines for issuance of summons under Section 70 of the CGST Act, 2017. Instruction No. 3/2022-23 [GST – Investigation], dated 17 August 2022, in this regard, states that senior management officials such as CMD/ MD/ CEO/ CFO, etc., should not generally be summoned unless there is a clear indication of their involvement in the decision-making process which led to loss of revenue. It also states that issuance of summons may be avoided to call upon statutory documents which are digitally/online available in the GST portal. As per the latest guidelines, summons by Superintendents should be issued after obtaining prior written permission from Deputy/Assistant Commissioner with reasons to be recorded in writing.

Liquidated damages, compensation and penalty arising out of breach of contract – GST applicability clarified: The CBIC has issued an elaborate Circular on applicability of GST on payments in the nature of liquidated damages, compensation, penalty, cancellation charges, late payment surcharge etc., arising out of breach of contract or otherwise and scope of the entry at para 5(e) of Schedule II of the Central Goods and Services Tax Act, 2017. A detailed analysis of the Circular No. 178/10/2022-GST, dated 3 August 2022 is available here. The Update in the link highlights certain principles as laid down by the Circular and discusses elaborately the treatment of liquidated damages.

Ratio decidendi

Tran-1 and 2 – GSTN directed by Supreme Court to open common portal for availing transitional credit: The Supreme Court has directed the Goods and Service Tax Network

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(GSTN) to open common portal for filing forms for availing Transitional Credit through TRAN-1 and TRAN-2 for two months i.e. w.e.f. 1 September 2022 to 31 October 2022. The concerned officers have been given 90 days thereafter to verify the veracity of the claim/transitional credit and pass appropriate orders thereon on merits after granting appropriate reasonable opportunity to the parties concerned. The Court in this regard also stated that the GST Council may also issue appropriate guidelines to the field formations in scrutinizing the claims. Further, according to the directions, any aggrieved registered assessee can file the relevant form or revise the already filed form irrespective of whether the taxpayer has filed writ petition before the High Court or whether the case of the taxpayer has been decided by the Information Technology Grievance Redressal Committee (ITGRC). The Apex Court also observed that GSTN must ensure that there are no technical glitches during the said time. [*Union of India* v. *Filco Trade Centre Pvt. Ltd. and another* – Judgement dated 22 July 2022 in SLP Nos. 32709-32710/2018 and Ors., Supreme Court]

Blocking of electronic credit ledger – Availability of balance in credit ledger, not required: The Calcutta High Court has held that there is no requirement under Rule 86A of the Central Goods and Services Tax Rules, 2017 that the electronic credit ledger should contain sufficient balance for the purpose of blocking the credit by invoking the said rule. The Court observed that otherwise it would amount to making the rule redundant and defeating the very purpose of enacting such a rule. According to the Court, if the statute does not use the expression negative balance, such theory cannot be imported to justify the contention that there should be a positive balance to invoke Rule 86A. Differing with the views of the Gujarat High Court in the case of *Samay Alloys India Pvt. Ltd.* v. *State of Gujarat* [MANU/GJ/0572/2022], the Calcutta High Court agreed with the Allahabad High Court decision in the case of *R M Dairy Products LLP* v. *State of U.P.* [Writ Tax No. 434 of 2021]. It held that the word 'available' occurring in Rule 86A(1) cannot be read in isolation and has to be read along with the remaining words which are 'in the electronic credit ledger has been fraudulently availed or is ineligible'. It also noted that words 'has been fraudulently availed' would undoubtedly denote a situation which had occurred in the past. [*Basanta Kumar Shaw Propreitor of M/S N.M.D. Engineering Works* v. *Assistant Commissioner* – 2022 VIL 529 CAL]

Confiscation – No provision in Section 130 which prohibits interim release: Observing that there is no provision in Section 130 of the Central Goods and Services Tax Act, 2017 which prohibits the interim release of goods which are detained pending finalization of proceedings under Section 130, the Kerala High Court has allowed release of the goods and conveyance on deposit of certain amount. The Court was also of the view that in the case of a domestic transaction, the question of ordering an absolute confiscation does not arise. Court's earlier decision in the case of *State Tax Officer* v. *Balakrishnan* [2022 (1) KLT 83], was agreed with. [*Golden Traders* v. *Assistant State Tax Officer* – 2022 VIL 519 KER]

Provisional attachment – SC decision on limitation does not extend time-frame under Section 83: The Delhi High Court has held that the decision passed by the Supreme Court in *Suo Motu Order* extending limitation for various actions, will not extend the time frame provided under Section 83 of the CGST Act. The High Court in this regard observed that Section 83 of the CGST Act, 2017 provides a timeframe i.e., statutory space for enabling investigation, to protect the interest of the revenue and not a

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period of limitation. The issue involved blocking of bank account of the assessee-petitioner and the Court was also of the opinion that blocking order did not comply with the jurisdictional prerequisites embedded in Section 83. [*Zuric Traders* v. *Commissioner* – 2022 VIL 522 DEL]

Interest for delayed refund – SC decision on limitation does not extend limitation for processing refund claims: The Delhi High Court has rejected the submission of the Revenue department that the limitation for processing refund claims stood extended by virtue of orders passed by the Supreme Court in *Suo Motu petition.* The Court noted that statutory rate of interest provided under Section 56 of the CGST Act is a compensation for use of money and that the Revenue department cannot retain the money beyond the period stipulated under said section. Disposing the writ petition, the Court also noted that neither the Supreme Court orders nor the Madras High Court judgement in *GNC Infra LLP* concerns grant of interest on refund withheld beyond the period prescribed under the Act. [*Ankush Auto Deals* v. *Commissioner* – 2022 VIL 561 DEL]

Search and seizure – Section 129 cannot be invoked to search godown premises: The Allahabad High Court has held that the provision of Section 129(3) of the CGST Act, 2017 can not be invoked to subject a godown premises to search and seizure operation unmindful of the Act that no action was taken or contemplated under Section 67. Allowing the writ petition, the Court noted that the departmental authorities had chosen to exercise powers vested in them to search a vehicle carrying goods during transportation to proceed against goods lying in a godown and had deliberately described the vehicle being checked as 'UPGODOWN02' and 'GODOWON'. Amount deposited by the assessee was directed to be refunded along with interest @ 8%. [*Mahavir Polyplast Pvt. Ltd.* v. *State of U.P.* – 2022 VIL 559 ALH]

Seizure of goods and conveyance in transit – Appeal can be filed even if payment opted under Section 129(1)(a): The Kerala High Court has held that whether or not a payment is made under Section 129(1)(a) of the CGST Act, 2017 or security is provided under Section 129(1)(c), the person who is the subject matter of proceedings under Section 129 has the right to challenge those proceedings before the Appellate Authority under Section 107 of the Act. The Court was also of the view that the fact that the culmination of proceedings does not result in the generation of a summary of an order under Form DRC-07 cannot result in the right of the person to file an appeal under Section 107 being deprived. It also observed that the fact that the system does not generate a demand or that the system does not contemplate the filing of an appeal without a demand does not mean that the intention of the legislature was different. [*Hindustan Steel and Cement* v. *Assistant State Tax Officer* – 2022 VIL 547 KER]

Appeal under Section 107 of CGST Act – Provisions of Limitation Act are not applicable: The Chhattisgarh High Court has rejected the contention that since there is no express provision in the CGST Act, 2017 excluding applicability of the Limitation Act, 1963, necessarily it has to be held that the Limitation Act applies. Taking note of Section 29(2) of the Limitation Act, the Court observed that CGST Act is a 'special law' which prescribes a specific period of limitation in Sections 107(1) and 107(4), and therefore, the provisions of CGST Act will apply. It also noted that there is no provision under the Limitation Act dealing with the subject matter of appeal under the CGST Act and that legislative intent was not to apply the Limitation

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Act in the proceedings to be taken under the CGST Act. [*Nandan Steels and Power Limited* v. *State of Chhattisgarh* – 2022 VIL 564 CHG]

Supply of services to local authority – Relationship must between pure service provided and functions discharged by Municipality: The Telangana AAR has held that there must be a relationship between the pure service provided and the functions enlisted under Article 243W of the Constitution, in order to avail the exemption under S. No. 3 of Notification No. 12/2017-Central Tax (Rate) dated 28 June 2017. Relying on the judgment of the Supreme Court in the *Madhav Rao* case (AIR 1971 SC 530), the Authority for Advance Ruling observed that a relation must be established, i.e., a direct and immediate link must exist between the service provided by the Applicant and the functions discharged by the municipality under Article 243W, read with schedule 12 of the Constitution, without which, exemption would not apply. [In RE: *Vodafone Idea Limited* – 2022 (8) TMI 146-AAR Telangana]

Providing space to advertisers on e-commerce website is classified under Heading 9983: The Karnataka AAR has held that providing advertisement services to customers on e-commerce website, by way of lease of advertising space will be covered under the 'Sale of Internet Advertising Space (except on commission)' under Heading 9983 and would be leviable to GST @18%. Such a contract does not entail any warranty or undertaking on the part of the supplier in relation to the display of such advertisement. It is merely related to providing the space for the advertisement. [In RE: *Myntra Designs Private Limited* – 2022 (7) TMI 410 – AAR Karnataka]

Toll charges paid by service provider and subsequently reimbursed by service recipient, are includible in the value of supply: The Tamil Nadu AAR has held that toll charges incurred while renting of road vehicles service are incidental to the supply of the service. Delving into the terms 'reimbursement' and 'disbursement', it was further held that toll charges paid back are in the nature of reimbursement. The Authority was of the view that these charges are cost incurred by the service provider and are therefore includible in the value of supply provided to the service recipient. GST was hence held liable to be paid at the applicable rate on the entire value of supply, including the toll charges. [In RE: *NTL India Pvt. Ltd.* – 2022 TIOL 89 AAR GST]

Healthcare services provided to 'in-patients' in hospitals constitutes composite supply while that provided to 'out-patients' is not composite supply: AAR Tamil Nadu has held that in case of in-patients, i.e., patients who are admitted to the hospital, the supply of service to them from admission till discharge would be a composite supply of services as the treatment is considered to be complete only with the help of medicines to be taken during treatment and consumables used during their stay in the hospital. However, in case of out-patients, i.e., patients who merely avail the supply of consultation and advice, it would not be considered as composite supply as the supply of medicine and consumables is not inextricably linked with consultation. [In RE: *Be Well Hospitals Private Limited* – 2022 (7) TMI 403-AAR, Tamil Nadu]

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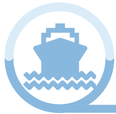

Customs

Notifications and Circulars

Arrest and prosecution in Customs offences – CBIC revises thresholds: The Central Board of Indirect Taxes and Customs has revised the threshold limits for purpose of arrest in cases involving offences under Customs Act, 1962. The new threshold, as per Circular No. 13/2022-Cus., dated 16 August 2022, is INR 50 lakh (market value of goods) for cases involving unauthorised importation in baggage/ cases under Transfer of Residence Rules, and outright smuggling of high value goods such as precious metal, restricted items or prohibited items or goods notified under Section 123, or offence involving foreign currency. Similarly, the threshold is INR 2 crore in case of fraudulent evasion or attempt at evasion of duty. The threshold is INR 2 crore also in case of drawback or any exemption in relation to export of goods. As before, the new Circular also states that this value thresholds would not apply in cases involving offences relating to items i.e. FICN, arms, ammunitions and explosives, antiques, art treasures, wild life items and endangered species of flora and fauna.

Similarly, the threshold limits for various categories of cases for launching prosecution have been revised by Circular No. 12/2022-Cus., dated 16 August 2022. So, the market value of the goods must be equal to or more than INR 50 lakh in case of baggage and outright smuggling cases. In case of commercial frauds/appraising cases, the market value of the offending goods or the duty evaded should be equal to or more than INR 2 crore. It may be noted that all cases where sanction for prosecution is accorded after the issuance of this Circular, shall be dealt in accordance with provisions of this Circular irrespective of the date of offense.

Passenger Name Record Information Regulations, 2022 notified – Aircraft operators to share passenger name record information with Customs: Every aircraft operator shall transfer the passenger name record information of passengers to the designated Customs systems, not later than twenty four hours before the departure time or at the departure time. The new Regulations also provides for imposition of penalty from INR 25000 to INR 50000, for each act of non-compliance, on an aircraft operator or his authorised agent who contravenes or fails to comply with any provisions of these regulations. Annexure II to the Regulation in this regard provides the list of passenger name record information fields which includes all available contacts, payment/billing information, travel itinerary, travel agency, etc.

Rules of Origin to prevail over CAROTA Rules: The Central Board of Indirect Taxes and Customs has reiterated that in the event of a conflict between a provision of Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 and a provision of the Rules of Origin, the provision of the Rules of Origin shall prevail to the extent of the conflict. Instruction No. 19/2022-Cus., dated 17 August 2022 has been issued for the purpose.

Rice exports to Europe – Date of requirement of certificate of inspection for exports to other than specified countries, postponed: Export of rice (both basmati and non-basmati) to European countries, other than United Kingdom, Iceland, Liechtenstein, Norway and Switzerland, will now require a certificate of inspection from Export Inspection Council or Export Inspection Agency, for exports from 1 January 2023. Earlier the date

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was 1 July 2022. DGFT Notification No. 27/2015-20, dated 17 August 2022 amends Notification No. 61/2015-20, dated 23 March 2022 for this purpose.

Non-ferrous Metal Import Monitoring System (NFMIMS) – Advance registration not required – DGFT also clarifies various issues: The Ministry of Commerce has removed the requirement of advance registration of minimum 5 days from the expected date of arrival of import consignment under the Non-ferrous Metal Import Monitoring System. Hitherto, the importer was liable to register not later than 5 days before the expected date of arrival of import consignment. It may be noted that NFMIMS is at present applicable for import of copper and aluminium. Policy Condition No. 3(c) of Chapter 74 and Policy Condition No. 1(c) of Chapter 76 of Schedule-I of ITC(HS) have been amended for the purpose by Notification No. 26/2015-20, dated 10 August 2022.

Further, the DGFT has *vide* its Policy Circular No. 42/2015-20, dated 27 July 2022 clarified that while NFMIMS will not be applicable on air-freighted goods, it will be applicable on imports under Advance Authorisations, DFIA, and import to SEZs. It has also been clarified that any number of consignments can be imported by a single valid registration and that the information relating to proper Quality Control Order can be treated as optional category in the description to be filed by the importer.

Ratio decidendi

SEIS benefits available even when no valid IEC number held at time of export of services: The Bombay High Court has allowed the benefit of Services Exports from India Scheme (SEIS) in a case where the exporter had no valid Importer Exporter Code (IEC) number at the time of rendering export of services. The Court in this regard observed that the eligibility criteria incorporated in para 3.08(f) of the Foreign Trade Policy (condition of having an active IEC number at the time of rendering services for claiming reward) was inconsistent with Section 7 of the Foreign Trade (Development and Regulation) Act. It was of the view that by way of delegated legislation, additional rights or obligations cannot be imposed. The High Court noted that the proviso to Section 7 of the FTDR Act does not lay down that the IEC number is essential at the time of rending services of said specified kind. [*Smarte Solutions Pvt. Ltd.* v. *Union of India* – Judgement dated 27 July 2022 in Writ Petition No. 503/2021, Bombay High Court]

Aircraft imports – Non-scheduled (passenger) operator can carry out charter services and still be eligible for exemption under Notification No. 21/2002-Cus.: The Larger Bench of the CESTAT has held that a non-scheduled (passenger) operator can carry out charter service and be not ineligible for exemption under Notification No. 21/2002-Cus. The Court noted that an operator providing non-scheduled (passenger) services can always provide such services either on individual seat basis or by chartering the entire aircraft and that such a restriction was not contained either in Condition No. 104 to the said notification or the Aircraft Rules or the Civil Aviation Requirements. It also noted that as per the definition of non-scheduled (passenger) services contained in the Explanation to Condition No. 104, all air transport services other than scheduled (passenger) air transport services were included. The Tribunal also held that non-publication of tariff was not violative of Explanation (c) of Condition No. 104 and that the aircraft was available for use by public. It observed that even personnel of companies which are group companies of the assessee were also members of public. The Larger Bench was hence was of the view that the Division Bench in *King Rotors* was not justified in holding that the decision of the earlier Division

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Bench in *Sameer Gehlot* was rendered *per incuriam.* [*VRL Logistics Ltd.* v. *Commissioner* – 2022 TIOL 717 CESTAT AHM-LB]

Customs have no jurisdiction in case of alleged violation of FTP and FEMA: The CESTAT Ahmedabad has held that Customs authorities have no jurisdiction to issue show cause notice in case of alleged violation of provisions of Foreign Trade (Development & Regulation Act), 1991 and the rules made there under as well as that of Foreign Exchange Management Act, 1999. The case involved alleged violation of paras 2.40 and 2.53 of the Foreign Trade Policy as goods were initially marked for export to Iran but were delivered in UAE and hence there was liability to get payments in foreign exchange. The Revenue department had invoked the provisions of Section 113 of the Customs Act, 1962. [*Bansal Fine Foods Pvt. Ltd.* v. *Commissioner* – 2022 TIOL 649 CESTAT AHM]

Demand – Limitation – Date of dispatch of notice and not date of its receipt relevant: The Madras High Court has upheld the CESTAT decision wherein the Tribunal, relying upon Section 27 of the General Clauses Act, 1897 had held that the date of despatch of notice alone, will be taken into account for limitation. The Court in this regard relied upon the Supreme Court decision in the case of *Hari Chand Shri Gopal* (on the question of doctrine of substantial compliance) and the Gujarat High Court decision in the case of *Kanubhai M. Patel (HUF)* v. *Hiren Bhatt or His Successors to office* wherein the notices sent for booking to the speed post Centre were taken into consideration for the purpose of limitation. [*Lalchand Bhimraj* v. *Customs, Excise and Service Tax Appellate Tribunal* – 2022 SCC OnLine Mad 3930]

Rectification of error under Section 154 when assessment order not following SC decision: The CESTAT Kolkata has held that not following the order of the Supreme Court would amount to a mistake/error which is rectifiable under the provisions of Section 154 of the Customs Act, 1962. The Tribunal in this regard observed that the Assistant Commissioner had not followed the decision of the Supreme Court in *Union of India* v. *Gangadhar Narsingdas Aggarwal* [1997 (89) ELT 19 (S.C.)], in respect of determination of Fe content in the exported ore. The Tribunal was of the view that hence the decision of Assistant Commissioner was not in order and that the same was rectifiable within the meaning of Section 154. [*Vedanta Ltd.* v. *Commissioner* – 2022 VIL 563 CESTAT KOL CU]

Conversion of shipping bill from Drawback to Advance licence – Surrendering drawback amount is as good as not availing: The CESTAT Ahmedabad has allowed assessee's appeal in the case involving conversion of shipping bill from one export promotion scheme to another - from Duty Drawback (DBK) to Advance Licence. The Revenue department had earlier rejected the conversion interpreting clause 3(e) of the CBIC Circular No. 36/2010-Cus., dated 23 September 2010, that since the appellant have availed the DBK Scheme under which the goods were exported the appellant had violated the condition 3(e). The Tribunal however observed that though the assessee was granted the DBK but the appellant had already informed the department that they do not wish to get the DBK amount and if at all it is credited they offered to surrender the same amount along with interest. According to the Tribunal, this approach of the assessee-appellant, was as good as non availment of any Export Promotion Scheme. [*Atul Ltd.* v. *Commissioner* – 2022 VIL 548 CESTAT AHM CU]

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Central Excise, Service Tax and VAT

Ratio decidendi

No service tax on composite works contract prior to 2007 changes – Supreme Court rejects plea to reconsider decision in *Larsen and Toubro Ltd.*: The Supreme Court has reiterated that service tax could not be levied on the service portion of the indivisible/composite works contracts prior to the introduction of the Finance Act, 2007, by which the Finance Act, 1994 came to be amended to introduce Section 65(105)(zzzza) pertaining to works contracts. The Apex Court rejected the prayer of the Revenue Department to re-consider the decision of Supreme Court in the case of *Larsen and Toubro Limited* [(2016) 1 SCC 170] and refer the matter to the Larger Bench. The Court noted that the decisions of the various High Courts and the Tribunals, which were passed after following the decision the Larsen and Toubro Limited decision have attained finality and in many cases the Revenue had not challenged the said decisions. The Supreme Court also observed that relevance and significance of the principle of *stare decisis* must be kept in mind and that in law, certainty, consistency and continuity are highly desirable features. The Court relied upon decision in the case of *Dr. Shah Faesal and Ors.* v. *Union of India and Anr.* [(2020) 4 SCC 1] and reiterated that doctrines of precedents and stare decisis are the core values of our legal system. [*Total Environment Building Systems Pvt. Ltd.* v. *Deputy Commissioner* – Judgement dated 2 August 2022 in Civil Appeal Nos. 8673-8684 of 2013 and Ors., Supreme Court]

No intention to evade if Cenvat credit available of tax to be paid: The CESTAT Chandigarh has held that if the assessee pays service tax (under RCM) and can get Cenvat credit immediately of what it paid, there cannot be any intention to evade. The Tribunal in this regard noted that the assessee had, in fact, lost by not paying service tax in time and had not gained anything at all since it had to pay interest which was not available as credit. It was of the view that although revenue neutrality does not make any change to the charging section, it becomes significant to determine if the appellant had an intention to evade or otherwise. Service tax, in the dispute, was paid by the assessee after being pointed out by the DGCEI. Assessees plea of invoking Section 73(3) of the Finance Act, 1994 was rejected by the Department who contended application of Section 73(4). [*Interglobe Aviation Ltd.* v. *Commissioner* – 2022 TIOL 720 CESTAT CHD]

Classifying services under incorrect head is not fraud or wilful misstatement: The CESTAT New Delhi has held that mere omission or merely classifying its services under an incorrect head does not amount to fraud or collusion or wilful misstatement or suppression of facts on the part of the assessee. Setting aside the demand on basis of limitation, the Tribunal noted that there was no proof of intent to evade either from the show cause notice or from the impugned order. The Department had demanded service tax under the Works Contract Services while the assessee was paying tax under Commercial or Industrial Construction Services for the period after 1 June 2017. The Tribunal however rejected the plea that the service provider had an option to pay service tax either under CICS or under WCS. [*Incredible Unique Buildcon Pvt. Ltd.* v. *Commissioner* – 2022 VIL 540 CESTAT DEL ST]

Demand of service tax under Section 73A(2), and non-inclusion of expenses for training of insurance agents: The CESTAT Mumbai has reiterated that the insurance company is not

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liable to pay service tax again on the amount deducted from their agents as service tax. Service tax was sought to be recovered from the assessee (insurance company), under Section 73A(2) of the Finance Act, 1994, who was paying service tax under RCM and recovering the said amount from its insurance agents. The Tribunal was of the view that as per correct reading of the provisions, the amount representing service tax would necessarily mean the service tax not paid, and that there is no provision to say that service tax which has already been paid should not be recovered from anyone. Further, the Tribunal also held that the expenses incurred by the assessee for training of the insurance agents and business promotion expenses, are not includible in the value for payment of service tax on consideration paid/payable to the insurance agents, before or even after 14 May 2015 when Explanation was inserted in Section 67. [*SBI Life Insurance Company Ltd.* v. *Principal Commissioner* – 2022 TIOL 653 CESTAT MUM]

Sabka Vishwas (LDR) Scheme – Deposit made during enquiry/investigation is to be deducted after extending benefit of Scheme: Observing that Section 121(c) of the Finance (No.2) Act, 2019 covering the Sabka Vishwas (Legacy Dispute Resolution) Scheme used the term 'recoverable' as opposed to the term 'outstanding', the Jharkhand High Court has held that CBIC Circular No. 1072/05/2019/CX, dated 25 September 2019 has an effect of altering the definition of 'amount in arrears' and hence the same is contrary to the Scheme itself. The Court was of the view that if the term 'recoverable' is understood as 'outstanding', the same would lead to incongruous interpretation leading to absurdity. The High Court hence held that the amount of deposit made during enquiry, investigation or audit is required to be deducted after extending relief under Section 124(1) of the Scheme. The Revenue department had contended that benefit of tax relief must be granted on the net outstanding amount. [*Vassu Enterprises* v. *Union of India* – 2022 TIOL 1107 HC JHARKHAND ST]

Sabka Vishwas (LDR) Scheme – Date of audit and not date of MoM is the date of quantification of tax dues: The Bombay High Court has held that the date on which audit committee decides to have its meeting and issue Minutes of Meeting (MoM) can never be stated to be the date on which the tax amount is quantified. Allowing assessee's petition, the Court held that since audit was conducted on 29 March 2019 and 1 April 2019, these would be the dates on which amount of duty had to be considered as quantified. Distinguishing the earlier decision of the Court in the case of *JSW Steel Ltd.* v. *Union of India and Others* [2021 SCC OnLine Bom 3584], the Court also noted that the draft of the Minutes of the Managing Committee had been prepared by June 2019 itself, i.e. before the cut-off date. [*B. Chopda Construction Private Limited* v. *Union of India* – 2022 VIL 532 BOM ST]

Consultant gives ideas and not performs task himself – Activity of mediator is not covered under Management Consultant Service: The CESTAT Kolkata has observed that the work of the consultant falls in the realm of thinking and giving ideas and not executing the work or performing the task himself. Rejecting the Revenue departments plea that there was provision of Management Consultancy service, the Tribunal observed that the company had in fact mediated between the two organisations in settling a financial dispute. Noting that the company had performed the actual act of mediation and their work did not end with mere advice or consultancy, the Tribunal held that the activity of the mediator cannot be said to fall under the category of management of business

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consultant. [*Paradeep Phosphates Ltd.* v. *Commissioner* – 2022 VIL 595 CESTAT KOL ST]

Relays for railway signalling equipment classifiable under Heading 8608 – Supreme Court dismisses Review Petition against the *Westinghouse Saxby Farmer* case: The Supreme Court has dismissed, on grounds of delay and on merits, the Review Petition filed by the Revenue department against the Court's decision in the case of *Westinghouse Saxby Farmer Ltd.* v. *Commissioner* [Judgement dated 8 March 2021]. The 3-Judge Bench of the Apex Court had in its earlier decision held that 'relays' used only as railway signalling equipment would fall under Heading 8608 as claimed by the assessee and not under sub-heading 8536 90 of the Central Excise Tariff, 1985 as claimed by the Department. The Court had held that those parts which are suitable for use solely or principally with an article in Chapter 86 cannot be taken to a different Chapter as the same would negate the very object of group classification. [*Commissioner* v. *Westinghouse Saxby Farmer Ltd.* – 2022 VIL 55 SC CE]

Service of fitment of wig is incidental to the sale of wig: In a dispute as to whether the activity carried on by a hair studio constitutes sale of a product, being a wig or service of preparation of wig and fitment thereof, the Madras High Court has held that the integral component of the transaction was the wig and hence the fitment of the wig and the preparation of the scalp to receive the wig is incidental to the product. Allowing the writ petition, the Court held that the dominant transaction was the manufacture and supply of the wig. It also noted that the assessee was paying VAT on the transaction. [*White Cliffs Hair Studio Private Ltd.* v. *Additional Commissioner* – 2022 VIL 540 MAD ST]

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NEW DELHI
5 Link Road, Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014
Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave
New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing,
Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden, 2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Phone : +91-80-49331800
Fax:+91-80-49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church,
Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail : lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road,
Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail : lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building
41, Chowringhee Road,
Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59,
Sector 26,
Chandigarh -160026
Phone : +91-172-4921700
E-mail :lschd@lakshmisri.com

GURUGRAM
OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,
Sector 25-A,
Gurgaon-122001
Phone : +91-124-477 1300
E-mail : lsgurgaon@lakshmisri.com

PRAYAGRAJ (ALLAHABAD)
3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.P.)
Phone : +91-532-2421037, 2420359
E-mail : lsallahabad@lakshmisri.com

KOCHI
First floor, PDR Bhavan,
Palliyil Lane, Foreshore Road,
Ernakulam Kochi-682016
Phone : +91-484 4869018; 4867852
E-mail : lskochi@laskhmisri.com

JAIPUR
2nd Floor (Front side),
Unique Destination, Tonk Road,
Near Laxmi Mandir Cinema Crossing,
Jaipur - 302 015
Phone : +91-141-456 1200
E-mail : lsjaipur@lakshmisri.com

NAGPUR
First Floor, HRM Design Space,
90-A, Next to Ram Mandir, Ramnagar,
Nagpur - 440033
Phone: +91-712-2959038/2959048
E-mail : lsnagpur@lakshmisri.com

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