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Contents

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Article

Compensation Cess and sharing of revenue with States – Some points to ponder

By **Murtaza Hussain and Manoj Gupta**

We will be soon celebrating the 5th anniversary of GST implementation in India and with the completion of this period, a significant source of revenue being received by the States will come to an end. We are of course talking about the compensation that the States have been receiving during the transition period of 5 years, from the Centre, post introduction of the GST regime. As the law stands today, from 1 July 2022, the States will not receive funds from the Centre in the form of compensation for the revenue loss, however, the levy and collection of compensation cess will continue till March of 2026.

Let us delve into the background of compensation cess, its origins, legal provisions for the extension of levy, and analyse the necessity behind extension of compensation to the States. The article also intends to cover some issues in the way forward.

What is compensation cess?

GST is a comprehensive destination based indirect value added tax levied on the supply of goods and services. It was introduced in India on 1 July 2017 replacing most of the indirect taxes which were levied by the Centre and the States. GST subsumed most of the taxes into one tax which is predominantly collected by the Centre and then, as per the rates prescribed, distributed to the concerned States. This means that now the States do not have the power to levy their own taxes on most of the goods and services. This led to a serious yet legitimate apprehension by the States that with the advent of GST, they may lose a large chunk of their revenue.

Section 18 of the Constitution (One Hundred and First Amendment) Act, 2016 was implemented with a view to compensate the State Governments for a period of five years for the loss incurred by them due to the implementation of GST. To give effect to this, the Goods and Services Tax (Compensation to States) Act, 2017 ('**Compensation Act**') was enacted. Section 7(1) of the Compensation Act provides that compensation shall be payable to any State during the transition period. The 'transition period' means a period of five years from the transition date.

The Centre hence compensates the States by levying a cess on top of the GST on certain luxury and sin goods which is called the compensation cess. These goods include aerated water, pan masala, cigarettes, tobacco products, vehicles etc. This cess is also leviable and collectable on these goods imported into India.

Meeting the shortfall

The proceeds under the cess were rising steadily till 2019-20. In fact, the Compensation Cess Fund saw a surplus during the last quarter of FY 2019-2020 and the compensation in full could be released till March 2020. However, due to the impact of Covid-19 on GST revenues, the compensation requirement for 2020-21 increased and at the same time the cess collections

dropped. This created a huge gap in the resources available for payment of compensation to States. As the Compensation was to be provided from the Public Account Fund only, Centre needed to come up with another method to provide the mandated compensation to the States.

In the 41st GST Council meeting it was thus pointed out that the compensation to States can only be paid from the Compensation Fund and not from any other source. The compensation fund shall be credited with the compensation cess. On the issue of Central Government's liability to release compensation from Consolidated Fund of India over and above the amount of Cess collected, Ld. Attorney General of India opined that,

> *'There is no express provision in the Compensation Act for the Government of India to bear the liability of making good the shortfall. It is the GST Council which has to decide on making good the shortfall in the GST Compensation Fund, by providing for sufficient amounts to be credited to it.'*

To make up the difference, the Centre borrowed INR 1.1 Trillion in FY21 and INR 1.59 Trillion in FY22 from the market under a special borrowing window set up by the Reserve Bank of India with low interest rates and passed them on to the States on a back-to-back basis.

Extension in levy of compensation cess

For the specific purpose of repayment of loan extending the levy on collection of cess proceeds beyond the initial period of five years became necessary. Various legal aspects, the budgetary status of the Centre and States, and solutions available to handle this eventuality were discussed at the 41st GST Council meeting. The Ld. Attorney General of India opined that,

> *'The cess cannot be collected for adding to the general revenues of the Central Government. … **the GST Council would recommend the continuance of the cess beyond the transition period of 5 years only in a situation of shortfall during the transition period**, which would necessitate the raising of funds for paying the compensation to the States after the 5-year period is over.'*

Finally, at the 43rd GST Council meeting, it was agreed that the cess must be collected beyond July 2022 for repaying the loans taken. After working out the detailed financial statements, the Finance Minister, during the press briefing on the outcome of 45th GST Council meeting, announced that the compensation cess collection would be continued till March 2026.

Certain issues in way forward

In the upcoming 47th GST Council meeting scheduled in June end, compensation to the States will be a hot topic in discussion. States, especially those which are heavily dependent on the compensation, like previous occasions, may demand an extension in granting compensation for another five-year period. They may argue that the expected growth through GST collection has not been achieved.

An interesting point to note here is that, though the levy as such is being extended as noted above, till date there is no mention of the extension either by any Bill introduced in the Parliament or through any notification by the Central Board of Indirect Taxes. In this regard it may be noted that provisions of Section 8 of the Compensation Act provide that the levy is '*for a period of 5 years or for such period as may be prescribed on the recommendations of the Council*'. Since the recommendations are in place

for the extension, in our understanding these recommendations will soon be implemented also.

An absence of a law regarding the extension in levy (to service the loan) but continued collection could open doors for legal disputes. Now with less than a week left for expiry of the compensation period and the parliament currently not in session, it needs to be seen whether the Government will issue an Ordinance to give effect to the extension of levy. In either case, extension in the levy is exigent.

Even if we assume that the Centre would agree to further compensate the states beyond the initial five-year period, a million-dollar question is what would be the source of revenue for that compensation, considering that clearing of debt only requires an extension in levy for approximately four more years. It is also very likely that the cess rates would be subsumed into the GST rate only post clearing of debts. That way the revenue of states through GST may increase more than through compensation. But this may happen only after March 2026.

As the extension of compensation seems extremely unlikely to occur, the States are now required to come up with ways to upsurge their revenue. There are already instances where certain authorities levying certain charges and those charges are also being upheld by the Courts. One recent example is the case of *Hubballi Dharwad Advertisers Association* v. *State of Karnataka*[1] in respect of advertisement tax by a Municipal Corporation. It is also likely that after the Kerala Flood Cess, we may even see similar cess in certain North Eastern States and for that matter even a 'drought cess' in few States.

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Goods and Services Tax (GST)

Notifications and Circulars

GSTR-4 for 2021-22 – Late fees waived for period from 1 May 2022 till 30 June 2022: The Central Board of Indirect Taxes and Customs (CBIC) has waived the late fees payable for delay in furnishing Form GSTR-4 for the financial year 2021-22. The fees will stand waived for the period from 1 May 2022 till 30 June 2022. GSTR-4 is filed by registered person who has opted for composition levy or avails benefit of Notification No. 2/2019-Central Tax (Rate). Notification No. 7/2022-Central Tax, dated 26 May 2022 has been issued for the purpose.

No interest on specified e-commerce operators who failed to file GSTR-8 during specified period due to technical glitch on the portal: The CBIC has notified the rate of interest per annum to be 'Nil', for specified e-commerce operators, who were required to furnish the

[1] 2022 VIL 310 KAR

statement in Form GSTR-8 but failed to furnish the said statement for the specified months by the due date. As per Notification No. 8/2022-Central Tax, dated 7 June 2022, there will be no interest for the period from the date of depositing the tax collected under Section 52(1) of the Central Goods and Services Tax Act, 2017 in the electronic cash ledger till the date of filing of statement under Section 52(4).

Refunds – CBIC issues procedure for sanction, post-audit and review of refunds: Observing that different practices are being followed in various commissionerates, the CBIC has issued elaborate guidelines/instructions for sanction, post-audit and review of refunds. Stating that proper officer is also required to upload a detailed speaking order along with refund sanction form, the CBIC Instruction No. 3/2022-GST, dated 14 June 2022 points out the details which a speaking order should *inter alia* contain. Likewise, it also provides for additional details in respect of refund of accumulated ITC (in case of zero-rated supplies and inverted duty structure) and refund of IGST in case of zero-rated supplies. Details required in case of refund due to deemed exports, excess balance in cash ledger, and other categories, are also enumerated in the Instruction. The Instruction also benevolently restricts the post-audit to only for refund claims of amounts equal to or more than INR 1 lakh. Elaborate procedure for conducting offline post-audit has also been provided here.

No recovery during search, inspection or investigation – Assessee can however deposit tax voluntarily: The CBIC has stated that there may not arise any situation where recovery of tax dues has to be made by the tax officer from the taxpayer during the course of search, inspection or investigation, on account of issues detected during such proceedings. The Instruction No. 1/2022-23 [GST – Investigation], dated 25 May 2022 in this regard observes that no recovery can be made unless the amount becomes payable in pursuance of an order passed by an adjudicating authority or becomes payable otherwise. The Instruction however observes that the law does not bar the taxpayer from voluntarily making payment of any tax liability ascertained by him or the tax officer.

Ratio decidendi

Pre-show cause notice consultation is mandatory – Voluntary statement cannot substitute a statutory notice: In a case concerning non-issuance of notice for pre-show cause notice consultation, during the period prior to 15 October 2020, the Delhi High Court has again rejected the contention that since voluntary statement was made, the requirement of issuing a pre-show cause consultation notice stood satisfied. The Revenue Department had contended that all that they would have said in the pre-show cause consultation notice was put to the authorised signatory at the time of recording his statement. According to the Court, a voluntary statement cannot substitute a statutory notice, which is contemplated under Rule 142(1A) of the Central Goods and Services Tax Rules, 2017. Department's argument that since the statutory form was not activated on the web portal, pre-show cause notice consultation notice was not issued, was also dismissed by the Court while it observed that the Department could have made an attempt by serving on the assessee, albeit manually, the very same statutory form. [*Gulati Enterprises* v. *CBIC* – 2022 VIL 354 DEL]

Interest on delayed payment of self-assessed tax cannot be paid in instalments: Observing that Section 80 of the Orissa GST Act clearly excludes grant of instalment in respect of amount due as per self-assessment return(s) furnished, the Orissa High Court has upheld the

Department's view rejecting the prayer of the assessee-petitioner to deposit the interest levied on account of belated deposit of admitted tax as per self-assessed returns, in instalments. The Court in this regard noted that the liability to pay interest under Section 50(1) is a statutory obligation which the taxpayer is obligated to comply with 'on his own' accord and that the default arising out of non-payment of tax on an admitted liability in the case of self-assessment attracts automatic levy of interest. It held that since interest is a part of tax and such tax being belated payment in respect of self-assessment, Section 80 of the OGST Act clearly excludes grant of instalment. [*P.K. Ores Pvt. Ltd.* v. *Commissioner* – 2022 VIL 365 ORI]

ITC blocking under Rule 86A – Mere recording that some investigation is going on, not enough: The Punjab and Haryana High Court has held that merely by recording that some investigation is going-on, a drastic far-reaching action under Rule 86A of the CGST Rules, 2017 (blocking of credit) cannot be sustained. Allowing the writ petition against blocking of Input Tax Credit account, the Court observed that the order for blocking of credit was bereft of any material or 'reason to believe' that the petitioner was guilty of fraudulent transaction or was ineligible under Section 16 of the CGST Act, 2017. The Court observed that there was no reason recorded by the Authority for exercising power under Rule 86A which would show independent application of mind that can constitute reasons to believe which is *sine qua non* for exercising such power. It noted that it was trite law that a speaking order has to be self-sustainable and the Department, at this stage, cannot be allowed to justify the same by adding reasons to it by filing additional affidavits. [*Rajnandini Metal Ltd.* v. *Union of India* – Decision dated 31 May 2022 in CWP No.26661 of 2021 (O&M), Punjab & Haryana High Court]

Mis-match in ITC can be communicated by way of show cause notice: In a case involving mis-match of ITC since the supplier had allegedly not paid the tax, the Madras High Court has rejected the contention of the assessee that the show cause notice cannot be treated as communication intimating the mismatch between the supplier and the assessee-petitioner. The assessee in this case had pleaded that under Section 42(3) of the CGST Act, the mismatch should have been communicated at the earliest point of time. The Court agreed with the Department that the rectification would be possible at the hands of the petitioner who was the dealer who received the goods by way of input supply, at least at the time of receipt of show cause notice issued in this regard by the Revenue. [*Mahendra Feeds and Foods* v. *Deputy Commissioner* – 2022 VIL 380 MAD]

No penalty for inadvertent human error in e-way bill: The High Court of Uttarakhand has held that if there is no apparent intention as such to deceive the State with the revenue, the error (wrong mention of invoice number in e-way bill by omitting the alphabets while quoting the numbers only) would fall within an exception Clause 5 of the Circular of 14 September 2018. The Court noted that imposition of the penal consequences was caused on account of the inadvertent human error by not referring the invoice number as 'SAI/V-235' and by referring it to '235' only. Further, noting that the invoice number '235' was consistently maintained in all the documentations which were made by the petitioner, the Court was of the view that the assessee never cleverly intended to evade the tax. The penalty was directed to be refunded. [*Sonal Automation Industries* v. *State of Uttarakhand* - 2022-VIL-383-UTR]

Refund – Procedures under Rule 96 not to be applied strictly so as to defeat legitimate export incentives: Observing that procedures are nothing but handmaids of justice and not mistress of law, the Madhya Pradesh High Court has held that the procedures under Rule 96 of the CGST Rules, 2017 should not be applied strictly so as to defeat the legitimate export incentives, which an exporter otherwise would have been entitled to but for the technicality involved in the system. The petitioner had though correctly declared the details in Form GSTR-1 regarding the exports made on payment of tax by debiting the input tax credit, a mistake was committed while filing Form GSTR-3B, wherein the assessee-petitioner gave the details of the export as outward taxable supply instead of zero-rated supply. The Department contended that since no data was transmitted from the GST common portal (due to the mistake by assessee), the question of sanctioning refund under Rule 96 of CGST Rules, 2017 was neither permissible nor practically possible. The Court however was of the view that if indeed there was an export and a valid debit of tax was made, the refund shall be granted. The Department was directed to get the data directly from the petitioner and from the customs department. [*ABI Technologies* v. *Assistant Commissioner* – 2022 TIOL 746 HC MAD GST]

Refund of credit of compensation cess in case of exports – Domestic supply of finished goods which are not liable to compensation cess are to be reckoned as exempted supplies: The Calcutta High Court has held that for the purpose of computing refund of credit of compensation cess to be made under Section 54(3) of the CGST Act read with Rule 89(4) of the CGST Rules, the domestic turnover of final products which are not taxable under the Cess Act, are to be excluded to arrive at the adjusted total turnover under Rule 89(4) of the CGST Rules. The Court was of the view that such domestic supplies, which are subject to nil rate of cess, are to be regarded as exempted supplies for the purpose of calculation of refund in terms of Rule 89(4). The assessee had earlier reversed the ITC of cess on account of domestic supply of finished goods not subject to cess and non-GST turnover during the relevant period by treating the same to be exempt supplies. [*Principal Commissioner* v. *Electrosteel Castings Ltd.* – Judgement dated 10 June 2022 in WPA No. 17567 of 2021, Calcutta High Court]

Gratuitous payment received from outgoing member by Cooperative Housing Society is liable to GST: The Maharashtra AAR has held that receipt of a gratuitous payment from an outgoing member for the time he had resided in the Cooperative Housing Society is taxable under the provisions of Central Goods and Services Tax Act, 2017. Rejecting the contentions that the amount was paid voluntarily and there was no corresponding service provided separately by the tax payer society, the Authority noted that the society could not at all accept voluntary donations from a Transferor or Transferee in transgression of the Model Bye Laws of Cooperative Housing Societies in Maharashtra. It was of the view that payment from an outgoing member to a society was a payment made for the services rendered by society to the outgoing member during his stay as a member in society, and hence was a consideration received to the society against satisfaction of the said member. The AAR compared this payment to service charges levied by restaurants on which GST is collected. [In RE: *Monalisa Co-operative Housing Society Limited* – 2022 VIL 153 AAR]

'Physical fitness' training and 'summer coaching' are not exempt: The Maharashtra AAR has held that exemption from GST under Sl. No. 80 of Notification No. 12/2017-Central Tax (Rate) is not available to physical fitness and

summer coaching activities. The Authority in this regard observed that physical fitness can neither be considered as sports nor arts or culture, and further, the term 'summer coaching' is a general term which cannot be said to cover sports, arts or culture. The AAR was however of the view that training and coaching in football, basketball, athletic, cricket, swimming, karate and dance by the applicant would be covered under the abovementioned exemption. [In RE: *Navi Mumbai Sports Association* – 2022 TIOL 61 AAR GST]

Residential property leased to a corporate for residence of latter's staff exempt: The Maharashtra AAR has held that exemption under Entry No.12 of Notification No. 12/2017- CT (Rate) would be available to the applicant leasing out premises on leave and licence basis to M/s. Life Insurance Corporation of India for residential purposes to the latter's staff members. The Authority was of the view that the exemption was given on the basis of nature of the property as well as the usage of the property and was not based on the status of the recipient. It noted that the relevant entry did not specify to whom the services were to be supplied. [In RE: *Kasturi & Sons Ltd.* – 2022-VIL-155-AAR]

Medical insurance for employees has no relation to functions discharged under Article 243W of Constitution – Premium paid for vehicle insurance may get exemption, subject to conditions: Observing that there was no direct relation between the medical insurance services procured by the Applicant for their employees, pensioners and their family and the functions discharged by them under Article 243W of the Constitution of India, the Telangana AAR has held that the same did not qualify for exemption as pure service provided to Central Government, etc. The AAR was however of the view that the premium paid for vehicle insurance of Hyderabad Metropolitan Water Supply and Sewerage Board's vehicles may qualify for exemption subject to the same being directly used for providing functions as prescribed under Article 243W of the Indian Constitution of India. It held that in the event the vehicles were used for transportation of employees/board or another person and not for providing functions as prescribed under Article 243W of the Constitution, exemption will not be available. [In RE: *Hyderabad Metropolitan Water Supply and Sewerage Board* – 2022 VIL 157 AAR]

Mining lease is not leasing of goods – Covered under 'licensing services for the right to use minerals including its exploration and evaluation': The Telangana AAR has held that mining lease is an interest in immovable property and does not constitute payment for leasing of goods. The Authority noted that the right granted by the lease deed was to extract and remove the minerals and the royalty was the payment towards the minerals extracted in proportion to the quantity extracted and therefore the service in relation to the royalty could not be classified as 'leasing or renting of goods'. Accordingly, it was held that, the lease licence was to be classified under Heading 997337 pertaining to 'licensing services for the right to use minerals including its exploration and evaluation' and the applicable rate of GST will be 18%. Further, it was held that the amount paid towards District Mineral Foundation and National Mineral Exploration Trust under the MMDR Act, 1957 shall be classified under the same category as royalty and shall be chargeable to GST at the rate of 18%. [In RE: *Singareni Collieries Company Ltd*. – 2022 VIL 159 AAR]

Occupational health check-up services provided by clinical establishment outside the hospital premise qualify as healthcare service: The Gujarat Appellate AAR has held that the medical services provided by doctors, nurses, medical assistants, paramedical staff /

personnel in different corporates outside the hospitals are to be treated as health care service and qualify for exemption under Notification No. 12/2017-CT (Rate). Entry No. 74 of the said Notification was perused for the purpose. Accordingly, the order passed by the AAR, considering the impugned service under SAC 9993 as 'Human Health and Social Care Services', was set aside and occupational health services provided by clinical establishment outside the hospital premise was held to be an exempt supply of service. [In RE: *Baroda Medicare Private Ltd.* – 2022 VIL 56 AAAR]

Customs

Notifications and Circulars

Electronic cash ledger – General exemption from 1 June 2022 till 29 November 2022: *Vide* Notification No. 47/2022-Cus (N.T.), dated 31 May 2022, the Central Board of Indirect Taxes and Customs ('CBIC') has exempted the deposits pertaining to all classes of persons and all categories of goods as required under Section 51A of the Customs Act, 1962. This exemption has been made applicable w.e.f. 1 June 2022 till 29 November 2022. Further, the effective date for deposits for certain class of persons or categories of goods has also been amended. It may be noted that *vide* Notification No. 19/2022-Cus., dated 30 March 2022, in terms of Section 51A of Customs Act, certain class of persons and categories of goods were exempted from the deposits. Keeping in mind the general extension given for all classes of persons and categories of goods, the limited exemption from deposits under Section 51A has been given effect from 30 November 2022.

Mega Power Projects – Exemption condition relaxed: *Vide* Notification No. 31/2022-Cus., dated 7 June 2022, the time for furnishing the final Mega Power Project Certificate has been extended from 120 months to 156 months in respect of exemption claimed under Notification No. 50/2017-Cus., dated 30 June 2017. Further, the validity of security in the form of Fixed Deposit Receipt or Bank Guarantee has been extended from 126 months to 162 months in case of provisional mega power projects.

EPCG scheme – Date for filing of report on annual export obligation for year 2022-2023 extended: The requirement to file report on Annual Export Authorisation prescribed under Para 5.15 of the Foreign Trade Policy covering EPCG Scheme has been extended till 30 September 2022. This is in furtherance to reduce the compliance burden on the industry and to promote Ease of Doing Business. DGFT Public Notice 13/2015-2020, dated 9 June 2022 has

been issued for the purpose also states that imposition of penalty of INR 5000 for late filing of annual returns is applicable in respect of returns due to be filed from the year 2022-23 onwards.

e-BRC for exports made under RoSCTL scheme – Last date for uploading notified as 15 July 2022: Observing that the required timeline to receive export proceeds in respect of RoSCTL shipping bills up to 31 December 2020 has expired, all exporting firms have now been requested to direct their AD Banks to upload the e-BRC on DGFT server by 15 July 2022. DGFT Trade Notice 12/2022-23, dated 30 May 2022 has been issued for the purpose also states that in case of failure of such uploading, the rebate issued under the scheme will be deemed to have never been allowed and action shall be initiated for recovery of such amount.

Paper Import Monitoring System (PIMS) notified: The Indian Ministry of Commerce has notified a new Paper Import Monitory System ('**PIMS**') requiring mandatory prior registration in case of import of certain 201 specified tariff lines under Chapter 48 of the ITC (HS) Classifications. The importer can apply for registration not earlier than 75th day and not later than 5th day before the expected date of arrival of import consignment. As per Notification No. 11/2015-20, dated 25 May 2022, importer would have to enter the Registration Number and expiry date of registration in the Bill of Entry to enable Customs for clearance of consignment. This system will come into force from 1 October 2022. Online registration would be available from 15 July 2022.

SCOMET items/technology/software – Amendment in procedure for global authorisation for intra-company transfers: Existing entry at Paragraph 2.79F of the Handbook of Procedures Vol. 1 has been substituted to amend the procedure for issue of Global Authorisation for Intra-Company Transfer (GAICT) of SCOMET items including software and technology. Henceforth, GAICT policy would be applicable only for export / re-export of items as against only re-export earlier including software and technology under SCOMET Category 8 (except items listed in Annexure-I). Further this will only be applicable when such exports/re-exports are made to the countries listed in Table 1 under Para 2.79F. Revised ANF (Aayat Niryat Form) - applying for GAICT has also been notified. DGFT Public Notice 14/2015-2020, dated 13 June 2022 has been issued for the purpose.

Ratio decidendi

Advance authorisation – Transfer of duty-free inputs to other unauthorised units of importer itself, not fatal: In a case involving transfer of duty-free imported inputs to other units of the assessee-importer itself, the CESTAT Chennai has held that even though all the other units were not endorsed in the Advance Authorization, such dispatch of the imported goods directly from the port to the appellant's own units for processing would not constitute diversion / sale or transfer of the imported goods. The Tribunal noted that there was no change of title in the goods. It also observed that clause (x) of Notification No. 18/2015-Cus. allowed transfer of the imported materials to a job worker for processing subject to complying with the conditions of relevant central excise notifications. Allowing the appeal of the assessee-importer, the Tribunal observed that that as per Para 4.35 of the Handbook of Procedures, if the manufacturer / importer was not required to obtain central excise registration, it was not required to insist for endorsement of the name of supporting manufacturers in the Advance Authorization. It also noted that the importer was issued Export Obligation Discharge

Certificate after perusing the shipping bills, whether foreign exchange was realized and also examining whether the appellant had fulfilled the conditions. [*S.A. Cashews* v. *Commissioner* – 2022 VIL 352 CESTAT CHE CU]

SEZ – Merely moving goods out of SEZ for exports or for storage in bonded warehouse does not give jurisdiction to DRI officers under Customs Act: The Andhra Pradesh High Court has held that merely because the goods were taken out from Special Economic Zone (SEZ) area, to be transported to port or to a storage unit before they are exported, they cannot be brought within the jurisdiction of Customs authorities. Allowing the writ petitions, the Court held that DRI officials had no jurisdiction to issue the impugned show cause notice. It was of the view that removal of the goods from SEZ area or storage of goods in bonded warehouse for the purpose of export, cannot be brought within the purview of DRI officials under the Customs Act and it is only officials under SEZ Act, who would be bestowed with jurisdiction to initiate the proceedings. The Revenue department had contended that since the goods were not seized from the SEZ area, the provisions of Sections 51 and 52 of the Special Economic Zone Act, 2005 (excluding jurisdiction of Customs) have no application. [*Divine Chemtee Ltd.* v. *Principal Commissioner* – 2022 VIL 355 AP CU]

Ownership of imports – Mere filing ex-bond Bill of Entry not vests title of goods into importer: The Gujarat High Court has held that mere filing of the ex-bond bill of entry, by itself, would not vest the title of the goods into the importer if ultimately such goods are not cleared by the importer, or in other words, if such goods are abandoned. The Court was hence of the view that the title over the imported goods would remain with the exporter and the exporter may, in the peculiar facts and circumstances of the case, request the Commissioner to permit him to re-export the goods as an unpaid seller. The High Court in this regard noted that as per the contract between the exporter and importer, the title of the goods did not pass until the importer/buyer paid the amount in entirety, and that in the present case the exporter remained an unpaid seller. The Court also noted that the goods stood secured in the customs frontier and had not entered the domestic market. [*ED and F Man Commodities India Pvt. Ltd.* v. *Union of India* – 2022 VIL 364 GUJ CU]

Iron ore only crushed and screened without any special process cannot be classified as iron ore concentrate: The CESTAT Mumbai has held that the process of crushing and screening undertaken on the iron ore after it was mined in Brazil and its subsequent blending at Oman with 5-10% iron ore concentrate, would not result in the goods imported being classifiable under CTI 2601 11 50 as Iron Ore concentrate. The Tribunal was of the view that the goods will be classifiable under CTI 2601 11 31 as Iron Ore fines and consequently the benefit of the exemption from payment of CVD would be available to the imported goods in question under Serial. No. 56 of Notification No. 12/2012-C.E., dated 17 March 2012. It noted that as per HSN Explanatory Notes as also from the judgment of the Supreme Court in *National Minerals Development Corporation* case and the dictionary meanings relied upon therein, 'iron ore concentrate' refers to an ore that has been subjected to 'special processes' for removal of all or part of the foreign matter. The Court observed that as per CBIC Circular dated 17 February 2012, crushing and screening followed with processes such as milling, hydraulic separation, magnetic separation, floatation and concentrate thickening must be undertaken for

ores to be converted into concentrate, and that the Department had failed to produce that other processes were done on the goods. [*Amba River Coke Ltd.* v. *Principal Commissioner* – 2022 VIL 391 CESTAT MUM CU]

Summons under Section 108 to Managing Directors to be issued only as a last resort: Relying upon C.B.E & C Letter F. No. 208/122/89-CX.6, dated 13 October 1989, the Gauhati High Court has observed that summoning of the Managing Director or Director under Section 108 of the Customs Act, 1962 should be undertaken only as a last resort in cases where assesses are not cooperating or the investigations are to be completed expeditiously. Disposing the writ petition, the Court found that in the instant case no material was available that there was a reasoned view formed by the Department that the petitioner assessee was not cooperating or that the presence of the Managing Director specific was required for the investigation for any reason. The Department was directed not to issue summons directly to the Managing Director of the petitioner company and on the other hand to issue it to an authorized representative of the company in terms of the provisions of the circular. [*Century Plyboards (India) Ltd.* v. *Union of India* – Order dated 18 May 2022 in WP(C)/3210/2022, Gauhati High Court]

Pea protein powder, with less than 90% protein concentrate, classifiable under Heading 2106: The Customs Authority for Advance Rulings, Mumbai has held that pea protein powder is not classifiable under Heading 3504 of the First Schedule to the Customs Tariff Act, 1975. The Authority noted that Heading 3504 covers protein isolates obtained by extraction from a vegetable substance with protein concentrate not less than 90% and that the product under consideration did not satisfy the 90% threshold and is different from protein isolate. Classification under the residuary Heading 2106 of the First Schedule was hence concluded. [In RE: *Anshul Life Sciences* – Ruling Nos. CAAR/Mum/ARC/13/2022, dated 18 May 2022, Customs AAR, Mumbai]

Revenue Department not bound to reveal sources of information: The Madras High Court has held that the facts gathered by the Department during the investigation is merely for ascertainment of facts. The Department is not bound to reveal the sources of such information and is only required to articulate the proposal in the show cause notice. Thereafter the decision must be made basis the preponderance of probability. [*Black Gold Technologies* v. *Joint Commissioner* – 2022 TIOL 800 HC MAD CUS]

DRI officer is 'proper officer' for issuance of show cause notice: The Madras High Court has held that the provisions of the Customs Act, 1962 implicitly granted powers to different 'Officers of Customs' to perform specific functions under the statute. The Court was of the view that officers of Directorate of Revenue Intelligence are also one among the class 'Officers of Customs' like any Officer of Customs as per Section 3 and 4 read with notification issued for the said purpose are competent to issue show cause notice. It noted that the introduction of Finance Act, 2022 has made such provision more explicit by amending Customs Act, 1962. Thus, the Court held that show cause notices issued under various provisions cannot be stifled to legitimize evasion of customs duty on technical grounds that the officer from DRI were incompetent to issue notices. [*N.C. Alexander* v. *Commissioner* – Decision dated 9 June 2022 in W.P. No. 33099 of 2015, Madras High Court]

Central Excise, Service Tax and VAT

Ratio decidendi

Integrated logistics for export of goods – No service tax on part of service provided in India: In a case where the assessee was involved in providing integrated logistics and cargo transportation in conjunction with a foreign company, providing end-to-end delivery, the CESTAT Mumbai has set aside the demand of service tax on the re-compensation from the overseas entity for the period between July 2012 and March 2015, to the extent attributable to the carriage within India. The assessee had contended that the composite engagement to deliver goods outside the country, for which consideration was received from the recipient of services located outside India, was linked with export of goods and, therefore, performed outside the 'taxable territory'. Observing that there was identifiable recipient of service located outside the taxable territory with concomitant absence of 'goods provided by recipient of service' as well as the marked absence of recipient of service in the truncated segment of the activity, Rule 4 of Place of Provision of Service Rules, 2012 was not applicable. [*ATA Freightline (India) Pvt. Ltd.* v. *Commissioner* – 2022 TIOL 445 CESTAT MUM]

Cenvat Credit not available on services used for corporate social responsibility (CSR): The CESTAT Delhi has held that the expenditure incurred by the appellant-assessee in discharging its corporate social responsibility (CSR) cannot be considered as input service under the provisions of Rule 2(l) of the Cenvat Credit Rules, 2004. Period involved was from 1 April 2011 to 31 December 2015. The Tribunal noted that obligation to spend some amount on the CSR activities was consequent to the rendering of the output services (and earning profit) and not before they were rendered. It was of the view that only such services which are used by such provider for providing an output service qualify as input service. It noted that even in case of manufacturer, only services which are used directly or indirectly in or in relation to manufacture of final product and its clearance up to the place of removal, are eligible. The Tribunal in this regard also observed that CSR was not included in the inclusion part of the definition of 'input services' along with other services which are not input services per se. Decision in the case of *Essel Propack Ltd*. v. *Commissioner* [2018 (362) ELT 833 (Tri-Mumbai)] was disagreed with. [*Power Finance Corporation Ltd.* v. *Commissioner* - Final Order No. 50502/2022, dated 9 June 2022, CESTAT Delhi]

Manufacture – Blending of oils when covered under 'manufacture': In a case where two oils (turpentine oil and furnace oil) were mixed with the electric motor to reduce the viscosity of the final product used as an industrial oil, sold with a different name and brand, the Himachal Pradesh High Court has held the process to amount to 'manufacture'. The assessee had contended that there was no chemical reaction and simple process of blending cannot be covered under manufacture. The Tribunal held that reducing the viscosity of two oils by electric process is nothing but manufacturing and the further act of selling the same with a new name and brand is also an additional ingredient to conclude that the assessee was doing the manufacturing process. [*SRK Petrochemicals Ltd.* v. *Commissioner* – 2022 VIL 357 HP CE]

Storage in container freight station is incidental to cargo handling activity: The CESTAT Ahmedabad has rejected the contention of the Revenue Department that the activity of

cargo handling in the container freight station is incidental to the storage and warehousing activity. Observing that the main purpose of the container freight stations is to handle cargo for the purpose of import or exports and not storage and warehousing, the Tribunal held that storage in the container freight station is only incidental to the cargo handling activity. It was hence held that if a composite all-inclusive rate is charged for handling of cargo from receipt of cargo in the premises of CFS to the clearance up to the port then all the activities undertaken like loading, unloading, warehousing, stuffing, transport, destuffing, etc. are covered under the category of 'cargo handling services'. Setting aside the demand of service tax under Storage and Warehousing services, the Tribunal observed that service tax on storage and warehousing is chargeable only on the amount separately collected as Storage and Warehousing charges. [*Seabird Marine Services Pvt. Ltd.* v. *Commissioner* – 2022 VIL 378 CESTAT AHM ST]

Clandestine removal – Print-outs from external hard discs recovered from premises when not reliable: In a case involving alleged clandestine removal, the CESTAT Kolkata has held that prints out taken from the hard disk recovered in the premises of the alleged secret office (claimed to be a third party premises or godown) are not acceptable as evidence. The Tribunal in this regard noted that the said hard disc was an external hard disc admittedly recovered from the bag of one person when he entered the office of the assessee and not a hard disc, internal or integral to any computer which could be said to be installed and being used regularly for their activities by the assessee. The Tribunal in this case also noted procedural violations of provisions of Section 36B of the Central Excise Act, 1944. On the question of procedural irregularities in the conduct of the Panchnama proceedings, the Tribunal observed that repeated use of the same Panch witnesses all around different places by the same agency, give scope for avoidable allegations while casting doubts on the proceedings initiated by using them. [*Makers Castings Private Ltd.* v. *Commissioner* – 2022 VIL 381 CESTAT KOL CE]

Kerala VAT – Credit notes from manufacturer when not includible in assessment: A Full Bench of the Kerala High Court has held that in cases in which tax is paid at the time of invoice by the manufacturer, even if the dealer sells the goods at a lesser price and claims input credit proportionate to the sales price, and subsequently receives credit note from the manufacturer/supplier, such credit notes are not to be included for assessment, subject to manufacturer/supplier not claiming refund or adjustment of input tax already deposited. The Court was hence of the view that the credit notes not affecting input tax already deposited cannot be treated as taxable turnover by the extended meaning of Section 2 sub-section (lii) Explanation VII of the Kerala Value Added Tax Act. [*M.V. Sons Trading Company* v. *State Tax Officer* – 2022 VIL 384 KER]

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