Lakshmikumaran & Sridharan attorneys

TAX

amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

March 2022 / Issue – 129

Contents

March
2022

Article

(In)voluntary payments made during investigations – Perspectives from *Bundl Technologies*

By **Kiran Manokaran and M.V. Vishal Sundar**

Background:

One of the common woes of an assessee facing an investigation, under the Central Goods and Service Tax Act, 2017 ('CGST Act') is that they are often compelled to make payments during the pendency of the investigation, mostly only to buy peace temporarily. A few instances have come to light where assessees have made payments under supposed coercion under Section 74(5) of the CGST Act, in the absence of any adjudication of liability or issuance of show cause notice. Recently, a division bench of the Karnataka High Court in *Union of India* v. *Bundl Technologies Pvt. Ltd.* [2022 (3) TMI 625 Kar.] had the occasion to consider a situation where the assessee claimed refund of the amount paid involuntarily during investigation.

Facts of the Case:

M/s. Bundl Technologies Pvt Ltd ('**Assessee**') operates an e-commerce platform under the brand name of 'Swiggy' through which consumers can place orders for delivery of food from nearby restaurants. The assessee's delivery module involved pickup and delivery partners (PDP) directly engaged by the Company as well as temporary delivery executives ('**Temp Des**') engaged through third party service providers. The Assessee procured Temp DEs from one such third-party service provider against valid tax invoices and upon payment of GST and later availed input tax credit ('**ITC**') in terms of Section 16 of the CGST Act.

Initiation of investigation:

An investigation was initiated by the Director General of Goods and Services Tax Intelligence, Hyderabad Zonal Unit ('DGGI') on the ground that the third-party service provider was a non-existent entity and consequently, the ITC availed by the Assesses and the GST component paid by it against the invoices raised by the third-party service provider were fraudulent.

During the investigation, which was spread over three days, the DGGI Officers issued spot summons to the Directors of the Assessee and recorded their statements. A sum of INR 15 Crores was deposited by the Assessee at about 4.00 a.m. Thereafter, the Directors were summoned to appear before the DGGI office, where they were retained until early next day. The Assessee made a further payment of INR 12 Crore at this stage. Subsequently, the Assessee filed an application for refund of the amount deposited during investigation. Since the application failed to evoke any response, the Assessee was constrained to file a Writ Petition which was ruled in favour of the Assessee, against which the Department preferred an intra-court appeal.

Findings of the Court:

The principal issue for consideration before the Division Bench of the Hon'ble Karnataka High Court was whether the payments made by the Assessee were voluntary payments made under Section 74(5) of the CGST Act or involuntary payments made under coercion and threat of arrest. In this regard the Court placed reliance on

the interim order passed by the division bench of the Hon'ble Gujarat High Court in *Bhumi Associates* v. *Union of India* [2021 (46) GSTL 36 (Guj)], where the Hon'ble Court had directed the CBIC to enforce the following guidelines:

1. No recovery in any mode should be made at the time of search / inspection proceedings under Section 67 of the CGST Act under any circumstances.
2. Even if the assessee comes forward to make voluntary payment by filing Form DRC 03, the assesee should be advised to file such Form DRC 03 on the next day after the end of search proceedings and after the officers of the visiting team have left the premises of the assessee.
3. Facility of filing complaint / grievance after the end of search proceedings should be made available to the assessee if the assessee was forced to make payment in any mode during the pendency of the search proceedings.
4. If complaint / grievance is filed by assessee and officer is found to have acted in defiance of the afore stated directions, then strict disciplinary action should be initiated against the concerned officer.

The Court observed that there was no material on record to suggest that the above guidelines were followed during the investigation. Further, the Hon'ble Court took cognizance of the fact that the payments were made at odd hours of 4 p.m. and 1 a.m. during the pendency of the investigation. Additionally, there was no communication in writing from the Assessee to the proper officer as contemplated under Section 74(5) of the CGST Act. On the contrary, the Assessee had clearly mentioned in its form GST DRC – 03 that the payments were made as a gesture of good will without prejudice to their rights and the same should not be regarded as an admission of liability. It was also observed that the Assessee has been regularly filing service tax returns. Considering the above findings, the Hon'ble Court held that the payments made by the Assessee were not voluntary and thus, they were entitled to a refund.

The Court further relied on *Vodafone Essar South Ltd* v. *Union of India* [2009 (237) ELT 35 (Bom)] to reiterate that an assessee should not be forced to pay any amount during investigation without any adjudication of liability.[1]

In the present case, it was held that the Department cannot retain the amount collected during investigations without a show cause notice having been issued.[2] It is reassuring that the Hon'ble Court emphasized on how statutory powers must be exercised reasonably and in good faith, and not with a view to instill fear in the mind of the taxpayers.

Contra ruling in Yasho Industries

The division bench of the Gujarat High Court, while considering a similar issue in *Yasho Industries Ltd. v Union of India* [2021 (54) GSTL 19 (Guj)], took a narrow view of the orders passed in Bhumi Associates (*supra*) and held that the guidelines would be applicable only in a search and seizure proceedings under Section 67 of the CGST Act. It further took note that the Form GST DRC-03 filed by the assessee mentioned the cause of payment as 'voluntary' and the reasons column in the form had recorded '*enquiry in connection with the incorrect claim of double benefit, that is exemption of IGST, Advance Authorization and Refund of IGST: under protest*'. The Court held that even though the reasons recorded 'under protest' there was

[1] Similar view taken in *Makemytrip (India) Pvt. Ltd* v. *Union of India* [2016 (44) STR481 (Del)]
[2] Relied on *Century Knitters (India) Ltd.* v. *Union of India* [2013 (293) ELT 504 (P&H)] and *Concepts Global Impex* v. *Union of India* [2019 (365) ELT 32 (P&H)].

no complaint made by the petitioner before the grievance cell or before any authority that the payment was made under duress. Consequently, the payment was held to be voluntary in that case.

Conclusion:

The GST authorities are vested with vast powers under the CGST Act in respect of search, seizure and investigations. While it is necessary for the assesses to co-operate with the authorities, it is imperative for one to also adopt a balanced strategy so as to mitigate liability without foreclosing any legal rights. From the above jurisprudence, an assessee may bear the following points in mind while facing a search and seizure proceeding under section 67 of the CGST Act:

- There is no obligation to pay any amounts during the pendency of an investigation without any adjudication of liability.
- Payments made at odd hours during inquiry and investigation could be considered as a factor in inferring that the same was forced and involuntary.
- If any payment is made during investigation, it is imperative to record in the relevant returns that the same is made without admission of liability and without prejudice to the assessee's rights.
- A prompt communication or complaint made to the grievance cell explicitly stating that the payment made was involuntary.
- Timely filing of refund application without laches is imperative to get a refund of the amount paid under coercion and duress.

As an added step, assessees may wield their right to seek legal representation at all stages, to seek copies of the statement recorded by the investigating officer(s) and to seek cross-examination of a statement. It is relevant for assessees to understand their rights relating to retraction of statements and redressal in extreme situations.

[The authors are Senior Associate and Associate, respectively, in Lakshmikumaran & Sridharan Attorneys, Chennai]

Goods and Services Tax (GST)

Notifications and Circulars

Test purchases by Revenue department – Tamil Nadu GST authorities lay down guidelines: The Tamil Nadu GST authorities have issued a comprehensive Circular laying down the guidelines for conduct of test purchases under Section 67(12) of the Tamil Nadu GST Act, 2017. Observing that the test purchases should be done on rare occasions, where there is strong proof of evasion of tax, the Circular No. 5 of 2022, dated 7 March 2022 also lists the criteria for selection of cases. The list of evasion prone commodities and retail business covers cement, tiles, granite, hardware, paints, electrical and electronic goods, iron and steel, timber, jewellery, house hold articles, furniture, automobile spare

parts, edible oils, FMCG, groceries, bakery products, medical shops, etc. In respect of services, the Circular lists all services offered in hotels, restaurants, sweet stalls, educational institutions, amusement parks, personal grooming services and rental services. The Circular also prescribes elaborate procedure for test purchases, reporting procedure and the monitoring procedure.

Proper officers for adjudication in cases of DGGI notices – All India jurisdiction notified for specified Additional/Joint Commissioners: The Additional/Joint Commissioners of Central Tax of some of the specified Central Tax Commissionerates have been empowered with all India jurisdiction for the purpose of adjudication of the show cause notices issued by the officers of the Directorate General of Goods and Services Tax Intelligence (DGGI). The officers have been empowered to pass orders in respect of notices issued by the DGGI under Sections 67, 73, 74, 76, 122, 125, 127, 129 and 130 of Central Goods and Services Tax Act 2017. Notification No. 2/2022-Central Tax, dated 11 March 2022 amends Notification No. 2/2017-Central Tax for this purpose. It may be noted that as per CBIC Circular No. 169/01/2022-GST, dated 12 March 2022, the amendment would help in adjudication of cases (with SCNs issued by DGGI) where the principal place of business of noticees fall under the jurisdiction of multiple Central Tax Commissionerates or where multiple show cause notices are issued on the same issue to different noticees, including the persons having the same PAN but different GSTINs, having principal place of business falling under jurisdiction of multiple Central Tax Commissionerates. The Circular also states that such show cause notices issued prior to issuance of Notification No. 2/2022-Central Tax may be made answerable to the Additional/Joint Commissioners of Central Tax, having All India jurisdiction, by issuing corrigendum to such show cause notices.

Scrutiny of returns for FY 2017-18 and 2018-19 – Standard Operating Procedure prescribed: The Central Board of Indirect Taxes and Customs ('CBIC') has prescribed a Standard Operating Procedure (SOP) in order to ensure uniformity in selection/ identification of returns for scrutiny, methodology of scrutiny of such returns and other related procedures. It may be noted that this is an interim measure till the time a Scrutiny Module for online scrutiny of returns is made available on the CBIC-GST application. The Instruction No. 2/2022-GST, dated 22 March 2022 elaborately covers topics like selection of returns for scrutiny, proper officer for scrutiny of returns, scrutiny schedule, process of scrutiny by the proper officer, timelines for scrutiny of returns, and reporting and monitoring.

Ratio decidendi

Amount deposited involuntarily during investigation violates Articles 265 and 300-A of the Constitution – To be refunded to assessee: The Division Bench of the Karnataka High Court has upheld its single-judge decision which had held that the amount paid during investigation by the assessee was not paid voluntarily under Section 74(5) of the CGST Act, 2017. A Division Bench in this regard observed that there was no communication in writing from the assessee to the proper officer about either self-ascertainment or admission of liability. It noted that the assessee in fact reserved its rights to claim refund as evident from its communication and GST DRC-03. The Court was also of the view that the amount was paid by the assessee involuntarily. Further, observing that the amount was collected from the assessee in violation of Articles 265 and 300-A of the Constitution, the

Court rejected the contention that refund of the amount under deposit be made subject to the outcome of pending investigation. It held that the Department was liable to refund the amount to the assessee. [*Union of India* v. *Bundl Technologies Pvt. Ltd.* – Judgement dated 3 March 2022 in WA No. 1274 of 2021, Karnataka High Court]

Confiscation – No vicarious liability, in respect of goods, on the owner of conveyance: The Punjab and Haryana High Court has reiterated that owner of the conveyance cannot be foisted with the vicarious liability of any mis-declaration/fraud by the owner of the goods. The case involved non-release of the conveyance even after the owner of the conveyance had paid necessary fine on its detention and confiscation, because the owner of goods had not come forward to pay tax and fine, etc. The Revenue department had argued that there was no warrant for the proposition that the owner of the goods and the owner of the conveyance are two separate entities because under the main sub-section (2) of Section 130 of the CGST Act it was clear that whoever wants the goods or the vehicle to be released has to pay the tax, penalty and fine imposed for all the things i.e. to say for the goods also as well as for the conveyance also. The High Court rejected the argument and directed for release of the conveyance. [*Vijay Mamgain* v. *State of Haryana* – 2022 TIOL 344 HC P&H GST]

Service of notice through registered/speed post or courier to continue till problems with GST portal are resolved: The Madras High Court has directed the department to continue the service of notice through registered post or speed post or courier with acknowledgment to the petitioners at their last known place of business or residence and simultaneously upload the same in the web portal. The Court directed that once all the technical problems with the GST portal are resolved, the practice of sending physical copy through registered post or speed post or courier with acknowledgment may be dispensed with. On the assessee's plea that SCN was not served, the department had contended that notices and other orders are uploaded in the web portal of the State Government, i.e. tngst.cid.tn.gov.in and were auto populated in the GST web portal maintained by the Central Government and therefore, the petitioners cannot state that the show cause notices have not been served. [*Pushpam Reality* v. *State Tax Officer* – 2022 VIL 146 MAD]

Provisional attachment of personal property of partner of LLP, not permissible: The Gujarat High Court has set aside the provisional attachment of personal property owned by a partner of the firm under Section 83 of the CGST Act, 2017. Terming the provisional attachment as wholly unjustified, the Court was of the view that the legislature having treated an LLP as a taxable entity, distinct from the individual partners constituting it, it was not open for the department to provisionally attach the immovable property owned by a partner of the firm. The Court, in this regard, also noted that the liability of the firm was yet to be determined and there was no assessment so far as the liability of the firm was concerned. It however observed that the day such liability is determined and fixed, it is open for the department to proceed not only against the firm as a taxable person, but also against individual partner of the firm. Sections 90 and 137 of the CGST Act were held as not applicable here. Further, relying upon CBIC guidelines for provisional attachment, the Court also disapproved the provisional attachment of the goods, stock and receivables, while it also noted that the entire stock and receivables were pledged and a floating charge had been created in favour of a bank. [*Utkarsh Ispat LLP* v. *State of Gujarat* – 2022 VIL 143 GUJ]

Non-issuance of notice under Section 46 before assessment under Section 62 is a serious lacuna: The Jharkhand High Court has held that assessment order passed under Section 62 of the CGST Act, 2017 suffers from a serious lacuna if there is non-issuance of notice under Section 46 of the said Act. Setting aside the assessment order as also the summary of the order contained in DRC-07, the Court observed that the impugned action had led to serious penal consequences which cannot be sustained in view of serious infirmities in the procedure adopted by the Assessing Officer. The Court in this regard also noted that the Revenue department had not brought on record any document to show that the assessment order was served upon the petitioner before issuance of DRC-07. [*Vinman Constructions Limited* v. *State of Jharkhand* – 2022 VIL 157 JHR]

Demand – DRC-01 notice is also mandatory – Notice under DRC-01A not enough: In a case where DRC-01A was issued and thereafter straightaway the Revenue Department proceeded to pass the assessment order, the Madras High Court has held that the DRC-01 notice under Section 74(1) of the CGST Act is also mandatory to be issued before passing the order of assessment. Quashing the assessment order, the Court remanded the matter back for issuance of DRC-01 notice to the petitioner-assessee. The Court noted that a Section 74(1) notice is an independent notice to be issued in DRC-01, whereas the notice under Section 74(5) was to be issued in DRC-01A. [*V.R.S. Traders* v. *Assistant Commissioner* – 2022 VIL 177 MAD]

Demo cars not eligible for Input Tax Credit: The Haryana Appellate AAR has upheld the AAR ruling denying Input Tax Credit (ITC) on motor vehicles which were first used as demo cars for some time before selling. Taking note of Section 17(5)(a) of the Central Goods and Services Tax Act, 2017, the AAAR held that it cannot be said that the demo vehicle was for 'further supply of such motor vehicles'. The Authority observed that during demonstration run the vehicle lost the character of the new vehicle and was sold akin to second hand goods which are different from the new vehicles and accordingly treated differently under GST law. It observed that the uses to which the demo vehicles were put to, did not fit into the uses which find mention in sub-section 17(5). The demo vehicle was also not held to be an 'input'. Relying on Section 17(5)(ab), the AAAR also denied credit of the input services of repair/ insurance/ maintenance used in respect of said vehicles. [In RE: *Platinum Motocorp LLP* – 2022 VIL 18 AAAR]

Input Tax Credit – Invoice dated 1 April 2020 but pertaining to supply in 2018-19 is barred by limitation under Section 16(4): The Andhra Pradesh Appellate AAR has held that invoice dated 1 April 2020, pertaining to the period FY 2018-19, is not eligible for input tax credit as is hit by the limitation for claiming Input Tax Credit under Section 16(4) of the CGST Act, 2017. Assessee's reliance on CBIC Circular No. 160/16/2021-GST and drawing analogy with debit note issued later, was rejected by the Appellate AAR while it noted that the current issue pertained to invoice and not debit note. The Authority noted that the date of invoice was leading to mis-interpretation of the period of invoice which in fact was the period of supply, i.e., 2018-19. [In RE: *Vishnu Chemicals Limited* – 2022 VIL 11 AAAR]

Renting of property of partner to the partnership firm is supply – Taxable event even if no consideration: The Tamil Nadu AAR has held that GST is liable to be paid in respect

of properties of the partner of the firm rented out to the partnership firm to carry out the business of the firm even if it is free of rent. The AAR was of the view that the activity is in furtherance of business and amounts to supply as per Section 7(1)(a) read with Schedule I of the CGST/TNGST Act, 2017. Observing that the rent-free accommodation provided by the applicant-partner indirectly accrues as profit for the firm which is enjoyed by the applicant as partner, the Authority held that hence the economic benefit accrues to the partner as this is supply in the course of and furtherance of business. The Authority also held that the value of taxable supply in this case was to be as stipulated under Rule 28 of the CGST Rules, 2017. [In RE: *Shanmuga Durai* – 2022 VIL 60 AAR]

Drilling and blasting using explosives for construction of tunnel is composite supply of works contract: The Maharashtra AAR has held that the activity of drilling and blasting using explosives and cleaning of rubble, is a composite supply. The AAR was further of the view that since the work was done for construction of tunnel which can be considered as immovable property belonging to the Govt. of Maharashtra, the activity was a composite supply of works contract service. The activity was held as covered under Entry 3(iv) of Notification No. 11/2017-CT (Rate) taxable at the rate 12% GST. The applicant was engaged in drilling and blasting works using industrial explosives and other materials. The main contractor engaged by Maharashtra State Road Development Corporation Limited (MSRDC, a fully owned Maharashtra govt. corporation) for undertaking construction of tunnel under EPC contract had appointed the applicant under a sub-contracting arrangement for the construction by drilling and blasting method. [In RE: *Kapil Sons (Rajendra Kumar Baheti)* – 2022 VIL 27 AAR]

Seeds for sowing are not agricultural produce – Exemption under Notifications Nos. 11 and 12/2017-Central Tax (Rate) not available: The Telangana AAR has held that the seeds produced/ procured, processed, packed and sold by the applicant-assessee as seeds for sowing are not 'agricultural produce' in terms of the definition under Notification No. 11 and 12/2017-Central Tax (Rate). The Authority observed that 'seed' was treated differently from 'grain'. It noted that the goods supplied were produce of cultivation of plants but, these were of seed quality and not grain and were not meant for food, fiber, fuel or raw material or other similar products meant for direct consumption. The Authority also noted that the processing done by the applicant to turn grain into seed quality goods was different from the processing done by a cultivator or producer of grain for primary market. It was hence held that the storage of seeds in the storage facility/godown loading/unloading and packaging by job worker was not exempt under above mentioned notifications. The process of cleaning, drying, grading and treatment with chemicals carried out by a job worker or on job work basis was similarly held as not exempt. It also held that the transportation of seeds from farm to storage facility and then transportation of packed seed from storage facility to distributors was not exempt under S. No. 21(a) of the Notification No. 12/2017-Central Tax (Rate) as the exemption applied only to agricultural produce. The Authority however held that if the processing was undertaken by an applicant for in-house seed production, there is no supply. [In RE: *Ganga Kaveri Seeds Pvt. Ltd*. – 2022 VIL 32 AAR]

Designing, supplying, installing, testing and commissioning of onboard train collision avoidance system is a composite supply but not works contract – AMC a separate contract: The Telangana AAR has held that a contract for South Central Railways for the purpose of designing, supplying, installing, testing and commissioning of onboard train collision avoidance system is a composite supply. The AAR observed that the supply was a naturally bundled supply which entailed several goods working in unison to achieve a single objective of railway safety through signaling, etc. However, the AAR was of the view that it would not qualify as works contract as it did not pertain to an immovable property. The rate of tax applicable was held to be 18% as applicable on principal supply i.e., Electrical signalling equipment with HSN Code 8530. Further, the authority observed that Annual Maintenance Contract was covered under a different contract and will be enforced separately, chargeable to GST @ 18% as applicable on maintenance service of electrical signalling equipment. It observed that mere mention of AMC in the primary contract would not make it a part of that contract. [In RE: *Kernex TCAS JV* – 2022 VIL 31 AAR]

Construction of administrative building for Telangana State Industrial Infrastructure Corporation Limited eligible for benefit under S. No. 3(vi) of Notification No. 11/2017-Central Tax (Rate): The Telangana AAR has held that the works of construction of administrative building for Telangana State Industrial Infrastructure Corporation Limited (TSIIC), which is owned by the Government of Telangana with paid up equity share capital of the Government of Telangana in excess of 90%, would pertain to civil structure not meant for commerce or industry or any other business. It noted that TSIIC worked to further the objectives and policies of the State Government, Central Government, Local Government for development of industries in the State of Telangana. The AAR hence held that the same shall be chargeable to GST @ 6% CGST and SGST each as per S. No. 3(vi) of Notification No. 11/2017-CT (rate) and post 1 January 2022, it shall be leviable to 9% CGST and SGST each as the term 'Government entity' is excluded by virtue of Notification No. 15/2021-Central Tax (Rate). [In RE: *Siddhartha Constructions* – 2022 VIL 66 AAR]

Customs

Notifications and Circulars

Automation in IGCR Rules – CBIC issues elaborate circular: The Central Board of Indirect Taxes and Customs ('CBIC') has clarified the recent amendment in the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017 ('**IGCR Rules**') which are effective from 1 March 2022. Circular No. 04/2022-Customs, dated 27 February 2022 in this regard summarises the procedure to be followed by the importer covering topics like one-time prior intimation of intent to avail IGCR benefit, import of goods at concessional rate, receipt of goods,

sending goods for job work from importer's premises, receipt of goods from the job worker, inter-Unit transfer of goods, utilization of goods for intended purpose, re-export or clearance for home consumption and monthly statement and maintenance of account.

Time-limit for filing applications for specified MEIS, RoSCTL, RoSL further extended: Para 3.13A of the Foreign Trade Policy 2015-20 has been amended to extend the time lines for filing applications for specified MEIS, RoSCTL and RoSL scrips. Effectively, MEIS (for exports made during the period 1 April 2020 to 31 December 2020) and 2% additional ad-hoc incentive (for exports made during the period 1 January 2020 to 31 March 2020) can now be filed by 30 April 2022. The last extended date for RoSCTL (for exports made during the period 7 March 2019 to 31 December 2020) and for RoSL (for exports made up to 6 March 2019 for which claims have not been disbursed under scrip-based scheme), was 15 March 2022.

Hydrofluorocarbons – Import and Export Policies revised to 'restricted': Import and Export Policies of Hydrofluorocarbons have been revised from 'free' to 'restricted'. It may be noted that while the import restrictions are effective from 9 March 2022, exports are now under the restricted category from 23 March 2022. Further, import and export authorisations will now be issued subject to NOC from Ministry of Environment, Forest and Climate Change. Notifications Nos. 59/2015-20 and 62/2015-20 have been issued by the Ministry of Commerce for this purpose.

Ratio decidendi

Quantum of pre-deposit – Substitution to remove discretion of appellate authority – Provisions earlier at time of incident/act, not applicable: The Supreme Court of India has rejected the plea that since the incident of smuggling was related to the year 2012, i.e., prior to substitution of Section 129E of Customs Act, 1962 on 6 August 2014, the appellant must be governed by the provisions prior to the substitution. The appellant-assessee had contended that under Section 129E as it stood prior to the substitution there was a power available with the Appellate Authority in the matter of demand of pre-deposit and that the amount for pre-deposit in his case was harsh and onerous. The Apex Court was of the view that the substitution had effected a repeal and it had re-enacted the provision as contained in the Section 129E. It stated that the acceptance of the assessee's argument would involve a dichotomy in law. [*Chandra Sekhar Jha* v. *Union of India* – Order dated 28 February 2022 in Civil Appeal No.1566 of 2022, Supreme Court]

EOU – DTA clearance entitlement – Twisted yarn and ropes are similar goods: The Supreme Court of India has upheld a CESTAT Mumbai decision where the Tribunal, after observing that the twisted yarn and ropes are under the same category of goods under SION, had held that the goods can be held to be 'similar' goods in the broader sense of the word. Allowing the plea that FOB value of ropes exported should be counted for the DTA entitlement of ropes or yarns, the Tribunal had noted that the permission/ Green Card given by the Development Commissioner mentioned both the products HDPE/PP/nylon rope/yarn, twisted yarn of HDPE/PP/nylon, i.e., the products exported were separated with the symbol '/ (or)'. The Revenue department had relied upon the definition of similar goods given in Para 3 of Circular 7/2006-Cus., dated 13 January 2006. Further, noting that EOU scheme relies on value of exports and not the quantities, the Tribunal had held that when positive NFE was achieved, the assessee is within its rights to avail the facility of DTA clearance in terms of Para 6.8 of the

Foreign Trade Policy. Dismissing departmental appeal, the Apex Court noted that there was no good ground and reason to interfere with the impugned order. [*Commissioner* v. *Axiom Cordages Ltd.* – 2022 VIL 17 SC CE]

Settlement application not maintainable in absence of show cause notice: The Bombay High Court has reiterated that assessee's application for settlement before the Customs and Central Excise Settlement Commission under Section 127B of the Customs Act, 1962 is not maintainable when show cause notice has not been issued by the Revenue department against the assessee. It held that in the absence of a notice to show cause a mandatory jurisdictional requirement is not fulfilled. It observed that there is no provision under the Customs Act providing for a deemed show cause notice which could be considered as show cause notice as per condition precedent for filing an application for settlement under Section 127B(1) of the Customs Act, 1962. The Court was also of the view that an affidavit-in-reply filed by the department in the earlier writ petition by assessee, opposing the reliefs and pointing out the stage of investigation, pursuant to the summons, cannot be construed as show cause notice contemplated in proviso (a) to Section 127B(1). [*Dinesh Bhabootmal Salecha* v. *Union of India* – 2022 TIOL 327 HC MUM CUS]

Amendment of shipping bills post exports – No requirement of physical examination of exports under Section 149: The CESTAT Chennai has allowed amendment in the shipping bills in a case where though the assessee-exporter had clearly mentioned that the goods were exported under advance authorisation, the scheme code was mistakenly mentioned as '00' instead of '01'. Department's contention that the goods were not physically examined at time of exports and hence amendment was not possible, was rejected by the Tribunal while it observed that there is no requirement in Section 149 of the Customs Act, 1962 that the amendment can be allowed only if the goods have been subjected to physical examination before export. It noted that when an application for amendment is received, if it is clear from the documents that the mistake was only an inadvertent mistake and there is no attempt of fraud or mis-statement to evade duty, the request for conversion ought to be allowed. Department's reliance on Circular No. 36/2010-Cus., to plead limitation in respect of filing for amendment, was also rejected. [*Carboline India Pvt. Ltd.* v. *Commissioner* – 2022 VIL 155 CESTAT CHE CU]

Digital still image video cameras – Exemption under ITA bound notification – Issue referred to Larger Bench: The CESTAT New Delhi has observed that digital still image video cameras would be entitled to BCD exemption under the notification dated 1 March 2005, as amended on 17 March 2012, whereby an 'Explanation' was added to the original notification. Allowing exemption, the Tribunal was of the view that the ITA bound notification must be interpreted in a manner so as to promote the obligation undertaken by India. It also noted that as long as the user cannot record a video clip of 30 minutes or more in a single sequence using maximum (included expanded) capacity, the cameras imported by the appellant shall be covered by the exemption. The issue was however referred to the Larger Bench because the view was contrary to the view taken by the Division Bench of the Tribunal in the earlier round of proceedings arising out of the show cause notice. [*Nikon India Pvt. Ltd.* v. *Commissioner* - Interim Order No. 04/2022, dated 8 March 2022, CESTAT New Delhi]

SCN by DRI officers – Even Section 28(11) of Customs Act not helpful: Observing that there is no proposal to amend Section 28 of the Customs Act, 1962 by the Finance Bill, 2022, the

CESTAT Kolkata has stated that hence show cause notices can be issued even after this Bill becomes the Act only by 'the proper officer', i.e., the officer who has done the assessment in the first place. Relying upon the Supreme Court judgement in the case of *Canon India*, the Tribunal rejected Revenue department's plea that SCN issued by a DRI Officer can be sustained as per Section 28(11) of the Customs Act. The department had pleaded that no notification is required in respect of the officers covered under Section 28(11). [*Beriwala Impex Pvt. Ltd.* v. *Commissioner* – 2022 TIOL 183 CESTAT KOL]

Appeal to High Court – Entitlement to exemption is not an issue in relation to rate of duty: The Supreme Court has held that the issue as to whether the assessee is entitled to exemption cannot be said to be an issue relating to the determination of any question having relation to the rate of duty. Observing that a dispute concerning an exemption cannot be equated with a dispute in relation to the rate of duty, the Apex Court was of the view that the disputes are different, distinct and mutually exclusive. The Court noted that the issue involved was whether the vessel was a foreign-going vessel, and whether exemption was available under Section 87 of the Customs Act, 1962. The assessee had pleaded that since the dispute relating to exemption was in fact related to rate of duty, the appeal before the High Court against the decision of CESTAT was not maintainable. [*Asean Cableship Pte Ltd.* v. *Commissioner* – 2022 TIOL 22 SC CUS]

Central Excise, Service Tax and VAT

Ratio decidendi

No confiscation of land, building and plant and machinery after omission of Central Excise Rule 173Q(2): Observing that on the date of the confiscation in March 2007, Rule 173Q(2) of the Central Excise Rules, 1944 stood omitted from the statute books *vide* Notification dated 12 May 2000, the Supreme Court has set aside the confiscation of land, building and plant and machinery under said Rule 173Q(2). The Apex Court also rejected the contention that the Revenue department was entitled to continue the proceedings on account of Section 38A(c) and Section 38A(e) of the Central Excise Act, 1944, read along with Section 6 of the General Clauses Act, 1897. It observed that while Section 6 of the General Clauses Act was not applicable in the case of omission of a 'Rule', Sections 38A(c) and (e), were attracted only when 'unless a different intention appears'. It noted that the legislature had clarified its intent to not restore/revive the power of confiscation of any land, building, plant machinery, etc., after omission of the provisions contained in Rule 173Q(2), which was evident from the fact that such power was not introduced in the subsequent Central Excise Rules, 2001, Central Excise Rules, 2002 and Central Excise Rules, 2017. [*Punjab National Bank* v. *Union of India* – Judgement dated 24 February 2022 in Civil Appeal No. 2196 of 2012, Supreme Court]

Dues of secured creditors have priority even after insertion of Section 11E in Central Excise Act, 1944: Relying upon its earlier decision in the case of *Union of India* v. *SICOM Ltd,* the Supreme Court of India has held that the secured creditor, i.e., the bank, will have priority over the dues of the Central Excise Department. It was held that the provisions contained in the SARFAESI Act, 2002 will have an overriding effect on the provisions of the Central Excise Act, 1944, even after the insertion of Section 11E in the Central Excise Act, 1944 w.e.f. 8 April 2011. The Court also found the contention that a confiscation order cannot be quashed merely because a security interest was created in respect of the very same property, not worthy of acceptance. [*Punjab National Bank* v. *Union of India* – Judgement dated 24 February 2022 in Civil Appeal No. 2196 of 2012, Supreme Court]

No demand from successor entity when tax paid by predecessor during period from appointed date till approval of scheme of demerger by High Court: The Gujarat High Court has set aside the demand from the successor entity in respect of the goods cleared during the period w.e.f. the appointed date till the scheme of demerger approved by the High Court, on which excise duty had already been deposited by the transferor/predecessor. The Court was of the view that the appointed date is of no significance under the law till the final demerger order is received from the Court and filed with the ROC to give effect to the scheme. Observing that until the transfer as a result of demerger is completed, the liability of the transferor remains, the Court held that the transferor company continues to pay the tax, file returns as if there is no proposal for demerger as the case may be. It also observed that the Central excise department is bound by the Order of High Court approving the scheme of demerger and that duty paid by the predecessor ought to have been adjusted against the central excise duty, if any payable by the successor. According to the Court, declining to do so, would lead to double taxation of the same transaction.

Pre-show cause notice consultation is mandatory: The Gujarat High Court also held that pre-show cause notice consultation is required even in case originating from the intelligence gathered from the DGGI. The Court was of the view that merely because the case originated by investigation of DGGI, it will not bring the show cause notice within the ambit of offence/preventive related SCN. The Court, in this regard, took note of the CBIC Circular No. F.No.116/13/2020-CX-3 dated 11 November 2021 which had clarified that the exclusion from the pre-show cause notice consultation is case specific and not formation specific. [*L and T Hydrocarbon Engineering Ltd.* v. *Union of India* – Judgement dated 3 February 2022 in R/Special Civil Applications Nos. 11308 and 11208 of 2019, Gujarat High Court]

Refund claim of service tax whether maintainable in absence of challenge/assessment/self-assessment in appeal – Issue referred to Larger Bench: The CESTAT Bench at Chandigarh has referred to the Larger Bench the question as to whether refund claim of service tax is maintainable in the absence of any challenge or assessment or self-assessment in appeal. The assessee had paid the service tax as per self-assessment made by them and they had also filed ST-3 return accordingly. The assessee had not filed any appeal to Commissioner (Appeals) for modification of the said assessment order claiming the benefit of exemption and had claimed the benefit of exemption by way of refund claim. Noting that such claims should not be maintainable in view of the decision of three Judges Bench of the Supreme Court in case of *ITC* [2019-TIOL-418-SC-CUS-LB], the Tribunal

also noted that there were contrary decisions by the Mumbai Bench in *Karanjia Terminals and Logistics* [2021-TIOL-76-CESTAT-MUM] and the Ahmedabad Bench in *Cadila Healthcare Ltd.* [2021-TIOL-257-CESTAT-AHM]. [*Shree Balaji Warehouse* v. *Commissioner* – 2022 VIL 159 CESTAT CHD ST]

Refund of service tax on cancellation of sale of flat – Relevant date: The CESTAT Ahmedabad has held that cancellation of sale of flat and refund of amount to the customer should be taken as a relevant date for computing the limitation for refund under Section 11B of the Central Excise Act, 1944 as applicable to service tax, in a case where the sale agreement was cancelled subsequently before the service could be completed. The Tribunal in this regard noted that as per clause (eb) of Section 11B(B) it is clear that in the case where the service tax payment need to be adjusted at a later stage, the date of adjustment has to be reckoned for the purpose of computing limitation. [*Pramukh Realty* v. *Commissioner* - Final Order No. A/10213/2022, dated 22 February 2022, CESTAT Ahmedabad]

Agricultural Produce Market Committees liable to service tax for leasing out shops prior to 1 July 2012: The Supreme Court has held that Agricultural Produce Market Committees are liable to service tax under renting of immovable property services, for leasing out shops, premises, buildings, etc., during the period prior to introduction of Negative List regime, i.e. prior to 1 July 2012. Relying upon the provisions of Section 9(2) of the Rajasthan Agricultural Produce Markets Act, 1961 which used the words 'market committee may', the Court held that the activities mentioned in Section 9(2)(xvii) cannot be said to be mandatory statutory duties and/or activities, and hence not exempted as per Circular No. 89/7/2006, dated 18 December 2006. Facts that said services were placed in the Negative List from 1 July 2012 and that on deposit of the money received by the Market Committees into the Government Treasury/sub-treasury or a bank duly approved, it does not cease to be the Market Committee Fund, were also relied upon by the Court. [*Krishi Upaj Mandi Samiti* v. *Commissioner* – Judgement dated 23 February 2022 in Civil Appeal No. 1482 of 2018 and Ors., Supreme Court]

Amount received from service recipients for payment to vendors is not consideration for any service: In a case where the assessee was merely a nodal agency to supervise and monitor the overall execution of the projects, the CESTAT Delhi has held that the amount received by the assessee-appellant from the State Government for payment to vendors was not a consideration for any service said to be rendered by the assessee to the State Government and, therefore, no service tax could be levied. Drawing a table on the conditions of Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006 and how each one of them were satisfied, the Tribunal observed that the assessee was acting as a pure agent. Relying upon Supreme Court decision in the case of Intercontinental Consultants, the Tribunal also reiterated that the amounts paid by the State Government Departments to the assessee were reimbursements which could not be subjected to levy of service tax. [*Rajcomp Info Service Limited* v. *Commissioner* – 2022 VIL 138 CESTAT DEL ST]

Interest, by service provider when service recipient mistakenly paid tax under RCM, when not payable: In a case where the service provider (appellant/assessee) had paid 50% of the amount towards service tax and the service recipient also mistakenly paid the balance 50% in time directly to the Service Tax Department on the assumption that the reverse charge mechanism was applicable, the Madras High Court has set aside the department's contention

of interest liability. Observing that the Department also recredited the 50% from the service recipient's account to the service provider's account with effect from a later date, instead of giving effect to the same from the date on which original payment was made, the Court held that it was not open to the Department to say that reverse charge mechanism was not applicable and thus the appellant was liable to pay interest on the belated payment. The Court also noted that there was no prohibition in the Act for the service recipient to pay the service tax liability directly to the Department in the account of service provider. [*K & K Contech Engineering Pvt. Ltd.* v. *Customs Central Excise and Service Tax Settlement Commission* – 2022 VIL 145 MAD ST]

Overburden removal during the mining of lignite is not covered under Site formation and clearance, excavation, earth moving and demolition service: The CESTAT Ahmedabad has held that removal of overburden during mining of lignite ore is not covered under the Site Formation and Clearance, Excavation, Earth Moving and Demolition services during the period prior to 2007. Relying upon a certificate issued by the Gujarat Minerals Development Corporation Ltd., who was the recipient of service, the Tribunal held that the work of overburden/interburden removal was part of mining during the course of mining. It held that the service was pre-dominantly related to mining. Considering Section 65A(1)(2a) of the Finance Act, 1994, the Tribunal was of the view that it was not the intention of the legislature to exclude activity of excavation, removal of soil, etc. from mining activities. Activity was held liable under mining activities from 2007 onwards only. [*Associated Soap Stone Distributing Company Pvt. Ltd.* v. *Commissioner* – 2022 VIL 186 CESTAT AHM ST]

Valuation – Related person – Common director and 50% share holding is not material: The CESTAT Mumbai has held that having common director and 50% share-holding of the assessee 2 in the assessee 1 cannot be a reason for establishing the appellants as related person. The appellants-assessee were inter-connected undertakings and the Revenue department had pleaded mutuality of interest as there were common directors, the sale price of the assessee 2 was the price which was determined by assessee 2 in consultation with assessee 1, Appellant 1 sells his entire goods to Appellant 2, both the assesses contributed equally by the way of sharing the expenses towards sale promotion, and appellant 2 was not permitted to undertake the trading of the same/ similar goods of competitors, without prior consent of Appellant 1. [*EWAC ALLOYS LTD*. v. *Commissioner* – 2022 VIL 158 CESTAT MUM CE]

Refund when duty reduced subsequent to clearance and price difference refunded to dealers through cheques: In a case involving subsequent reduction in Central Excise duty on cars from 24% to 20% the CESTAT Delhi has allowed the refund to the auto manufacturer in respect of cars available with the dealers on the date of rate reduction. The Tribunal in this regard noted that consequent to the rate reduction, the assessee reduced the price and issued credit note and refunded the difference along with duty by way of cheques to the dealers. Relying upon its earlier decision in the case of *Prag Industries Pvt. Ltd.,* the Tribunal observed that the assessee was entitled to claim refund of the excess duty paid by them. It also noted that there was no requirement for opting provisional assessment as the assessee was could not be aware of subsequent reduction of duty. Unjust enrichment was also ruled out as the differential amount was refunded to the dealers by cheque. [*Honda Siel Cars India Ltd.* v. *Commissioner* – 2022 VIL 197 CESTAT ALH CE]

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