TAX amicus

June 2023 / Issue – 144

An e-newsletter from
Lakshmikumaran & Sridharan, India

Lakshmikumaran
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Table of Contents

Article **3**

Export of services: Settled, yet unsettled 4

Goods & Services Tax (GST) **7**

Notifications and Circulars 8

Ratio decidendi 9

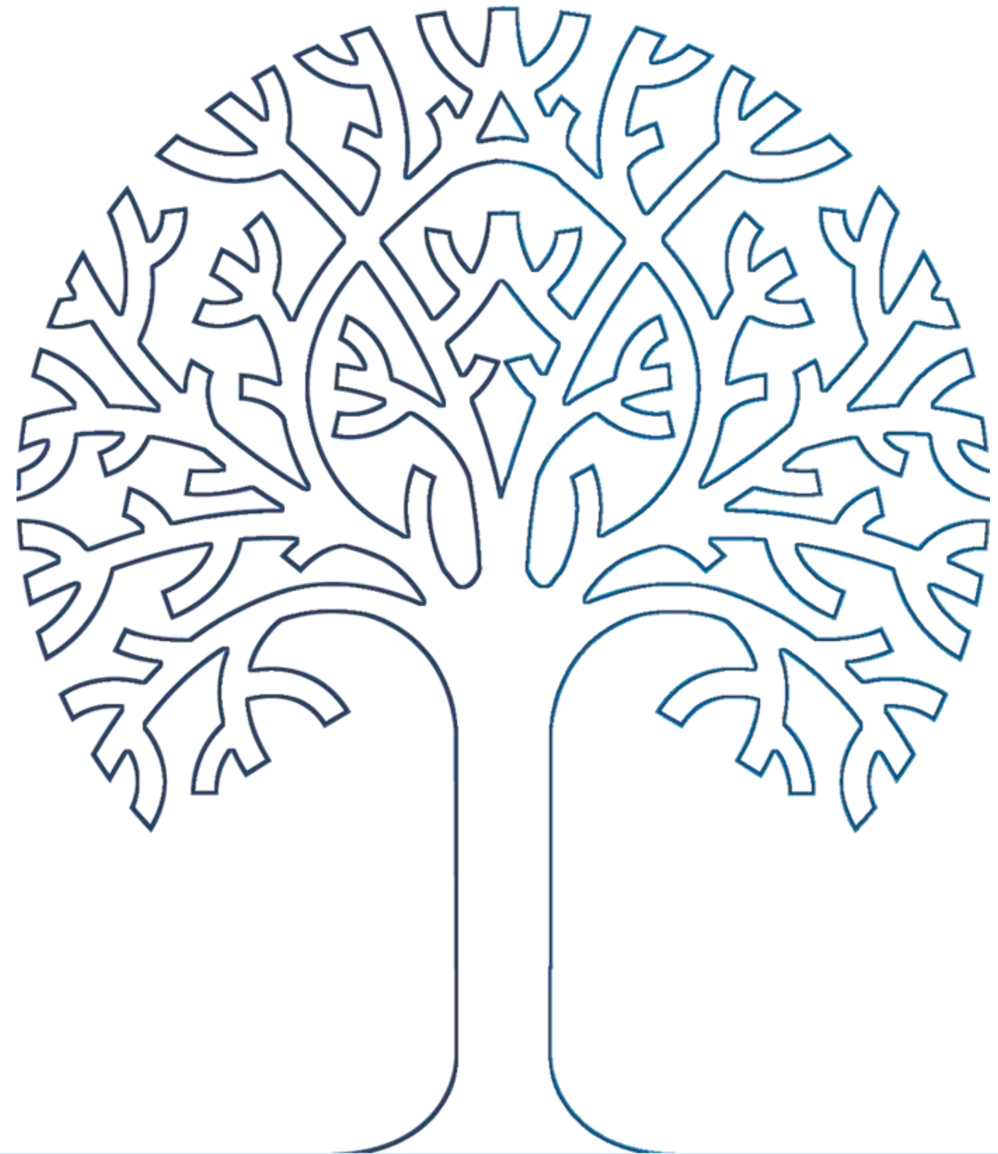
Customs **14**

Notifications and Circulars 15

Ratio decidendi 17

Central Excise & Service Tax **20**

Ratio decidendi 21



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Article

Export of services: Settled, yet unsettled

By Shrishti Agarwal, Disha Bhandari and Narendra Singhvi

The article in this issue of Tax Amicus discusses a recent decision of the Larger Bench of the CESTAT which settles, in favour of assessee, the issue as to whether Business Auxiliary Services (BAS) provided by Indian agents to foreign entities qualify as export of services under the service tax regime. The article in this regard also analyses whether this decision of the Larger Bench will have any impact in the GST regime. While it notes that the Revenue department has consistently challenged this settled position, and that the issue is also pending before the Hon'ble Supreme Court for final resolution, the authors are of the view that the decision will bring a sigh of relief for the assessees whose service tax litigations are pending at various forums. Recommending the industry to wait and watch the outcome at the Supreme Court, the authors state that Businesses must closely monitor and analyze the developments, as it will have significant implications for their operations and tax obligations in relation to cross-border service transactions.

Export of services: Settled, yet unsettled

What is uncertain in tax laws is interpretation of legal provisions, with certainty of litigation. This is particularly true, where nothing/ less goes to kitty of the Government, and more are to be doled out as incentives. Export of services is one such transaction, which is treated as tax-free or zero-rated (as it is called under GST laws). From being regulated by way of delegated legislations in the form of rules and circulars in initial days of service tax regime, it has come a long way, where the whole regime is governed by the Act itself.

Rules governing export of services were introduced for the first time in 2005 in the form of Export of Services Rules, 2005 ('**EOS Rules**'). EOS Rules were no exception and witnessed heavy litigation from the department as also frequent amendments. The condition of 'used outside India' posed interpretational issues for all stakeholders, having views in the form of different judgments from courts, as also circulars from CBIC.

In *Arcelor Mittal Stainless India Private Limited* v. *CST, Mumbai-II*[1], the Larger Bench of the Hon'ble CESTAT has recently delivered its judgment on 9 June 2023, interpreting this condition in favour of exporters and holding that where Business Auxiliary Services ('**BAS**') are provided to recipient located outside India and consideration is received in convertible foreign exchange, it will qualify as export of service.

In this particular case, Arcelor France was appointed as a commission agent for steel mills situated outside India. Arcelor France was required to procure sale orders for the products manufactured by these steel mills from customers across the world. Arcelor India was appointed as a sub-agent by Arcelor France. Arcelor India had a limited role to identify prospective customers and forward their requirements or the requirements of customers who approached it on their own, to foreign steel mills. Once the request was forwarded, the customers and foreign steel mills would directly communicate with each other. Arcelor India was not privy to details such as purchase orders/agreements etc., entered between foreign steel mills and Indian customers. Even the goods were supplied directly by the foreign steel mills to the Indian customers. Being commission agent, Arcelor France received commission from foreign steel mills and a part of this commission was paid to Arcelor India by Arcelor France on the basis of volume of sales.

In this background, it was concluded that since services are provided by Arcelor India to Arcelor France located outside India, such services are ***used outside India***, qualifying as export of

[1] 2023-VIL-516-CESTAT-MUM-ST

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services. That location of service recipient being outside India is the determining factor for fulfilment of this condition.

It extensively referred to CBIC's Circular dated 24 February 2009 to conclude that the phrase 'used outside India' would mean that the benefit should accrue outside India. Distinguishing the judgment of Hon'ble Supreme Court in *GVK Industries Ltd*. v. *Income Tax Officer*[2], it observed that service tax is destination-based consumption tax, wherein location of service receiver is relevant factor and not place of performance. Moreover, on the basis of fact that consideration was flowing from Arcelor France, it held that Arcelor France used the services of Appellant to provide services as main agents to the mills located outside India.

In arriving at this conclusion, the bench also analyzed the important aspect of who is a 'service recipient'. This term, unlike in GST regime, was not defined in service tax law, and was susceptible to doubts, particularly in cases of inter-dependent transactions with involvement of multiple parties. It has been held that service recipient is the person who makes a request for a service, in exchange for a consideration, and is liable to pay for such services received. Service recipient is not a person who is affected by performance of a service. In facts of this case, it was held that contractual relationship of Arcelor India was with Arcelor France, and not customers in India, though steel products were supplied to such customers in India. In other words, the customer of your customer is not your customer.

'Recipient' of supply, however, has been defined under the GST regime, largely based on the above explanation, which, prior to judgment of Larger Bench, was also explained in similar way in other judgments.

At this stage, it becomes pertinent to analyse whether this decision of the Larger Bench will have any impact in GST regime. The definition of export of services under Section 2(6) of the IGST Act, *inter alia*, provides that where the recipient of service is located outside India and the place of supply of service is outside India, it will qualify as export of service.

A perusal of definition of 'location of the recipient of services' in Section 2(14) of the IGST Act shows that it is based on where services are received. Premises, where services are received, becomes the location of the recipient of services. Further, the definition of 'recipient' given under the GST law refers to the person who is liable to pay the consideration. Therefore, the GST law has already taken care of similar situations and Larger Bench might have taken note of the definitions given in the GST law while arriving at its conclusion.

While the judgment by Larger Bench, settles the issue of whether BAS provided by Indian agents to foreign entities qualifies as export of services under service tax regime, it is important to note that the department has consistently challenged this settled position. This issue is also pending before the Hon'ble Supreme Court for final resolution.

[2] 2015 (2) TMI 730 (Supreme Court)

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The aforesaid decision of the Larger Bench will bring a sigh of relief for the assessees whose service tax litigations are pending at various forums. However, one should wait and watch the outcome at the Supreme Court.

Businesses must closely monitor and analyze the developments, as it will have significant implications for their operations and tax obligations in relation to cross-border service transactions.

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Goods & Services Tax (GST)

Notifications and Circulars

- GSTR-1, 3B and 7 by entities in Manipur – Last date of filing postponed till 30 June 2023
- Registration – Guidelines issued for processing of applications

Ratio decidendi

- Attachment of bank account – Only Commissioner having territorial jurisdiction can attach – Delhi High Court
- Attachment of property – Commissioner to form opinion based on relevant facts and not merely on suspicion – Delhi High Court
- SEZ units can be investigated, searched, and inspected by GST officers – Gujarat High Court
- Assessment cannot be based only on the E-way Bill – Patna High Court
- Export of service v. Intermediary service – Scope of IGST Section 13(3)(b) and 13(5) – Delhi High Court
- Budgetary support scheme – Goods manufactured during GST regime should be under same 8-digit HSN code as manufactured pre-GST, and also cleared by availing earlier area-based exemption – Jammu & Kashmir High Court
- Interest not payable for delay in disbursement of Budgetary support benefit – Jammu & Kashmir High Court
- Bank account of person owning debt to taxable person, whose assets are liable to be attached, cannot be subject to provisional attachment – Delhi High Court
- Personal hearing not to be rejected even if reply to SCN, containing request therefor, is rejected for delay – Karnataka High Court
- Input Tax Credit is not deniable only because supplier's registration was cancelled retrospectively – Calcutta High Court
- Mixing various perfumes in unmanufactured tobacco changes its character to manufactured tobacco – Uttar Pradesh High Court
- Transfer of goods when not mere movement of goods not amounting to supply – Maharashtra Appellate AAR
- Treatment of Substance Use Disorder (addiction) not covered under health care services – Rajasthan AAR

Notifications and Circulars

GSTR-1, 3B and 7 by entities in Manipur – Last date of filing postponed till 30 June 2023

The Central Board of Indirect Taxes and Customs (CBIC) has extended for a second time last dates for filing the Forms GSTR-1, GSTR-3B and GSTR-7, for the month of April 2023, for registered persons whose principal place of business is in the State of Manipur. The dates for these forms to be filed for the month of May 2023 have also been extended. Consequently, these forms can now be filed by 30th of June 2023. Notifications Nos. 14, 15 and 16/2023-CGST, all dated 19 June 2023 have been issued for the purpose.

Registration – Guidelines issued for processing of applications

To counter the menace of fake registrations and issuance of bogus invoices for passing of fake Input Tax Credit which has become a serious problem, the CBIC has issued elaborate guidelines for processing of applications for GST registration. The guidelines seek to strengthen the process of verification of applications for registration at the end of tax officers in a uniform manner. Instruction No. 03/2023-GST dated 14 June 2023 has been issued for the purpose. It may be noted that in May 2023, the CBIC had notified Guidelines for Special All-India Drive against fake registrations.

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Ratio Decidendi

Attachment of bank account – Only Commissioner having territorial jurisdiction can attach

The Delhi High Court has held that the term 'the Commissioner' as used in Section 83 of the CGST Act, 2017 would necessarily refer to the Commissioner who exercises jurisdiction under the CGST Act in respect of 'the taxable person'. According to the Court, Section 83 must be read in harmony with Section 3 and Section 5 and the Commissioner, whose territorial jurisdiction is confined by the Board to a particular territory, would not have the jurisdiction to discharge the functions under the CGST Act beyond its territorial jurisdiction. Attachment of the Bank accounts of the assessee not having its principal place of business under the territorial jurisdiction of the Respondent (Principal Commissioner, Meerut), was thus set aside by the Court. Also, Department's contention that the Respondent had the jurisdiction to attach the bank account of the petitioner-assessee as it was a person specified under Section 122(1A) of the CGST Act was held unpersuasive for this purpose. The Department had contended that the Principal Commissioner Meerut had the jurisdiction to pass the attachment order as the petitioner had transferred fraudulent ITC to another company which was being investigated by the said Commissioner. [*Sidhivinayak Chemtech Private Limited* v. *Commissioner* – 2023 VIL 306 DEL]

Attachment of property – Commissioner to form opinion based on relevant facts and not merely on suspicion

Observing that language of Section 83 of the CGST Act requires the Commissioner to form an opinion that it is necessary to attach the property of a taxable person, the Delhi High Court has held that the said opinion is required to be based on relevant facts and not merely on grounds of suspicion. The Court observed that there must be a live nexus between the reasons for provisionally attaching assets and bank accounts and the material available with the Commissioner. According to the Court, the nature of the power makes it necessary that the same is exercised with due caution and only when it is necessary. [*Sidhivinayak Chemtech Private Limited* v. *Commissioner* – 2023 VIL 306 DEL]

SEZ units can be investigated, searched, and inspected by GST officers

The Gujarat High Court has rejected the submission of the petitioner/SEZ unit that since the unit was in SEZ, which is a distinct foreign territory and as such, is tax neutral/ revenue neutral area, outside the ambit of provision of CGST Act, 2017 or SGST Act, 2017, and hence the State GST authorities have no jurisdiction to carry out any search and seizure proceedings at SEZ unit. The Court in this regard relied upon Section 22 of the Special Economic Zone Act, 2005 and Section 6 of the Gujarat Goods and Services Tax Act, 2017, and was of the view that it cannot be said that there was any lack of authority on the part of Department. The High Court also noted that there is no visible

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inconsistency between SEZ Act 2005 or SGST/CGST Act, 2017, and that the Development Commissioner, SEZ was duly intimated before search and seizure by departmental officer while initiating proceedings under Section 67 of the CGST Act. [*RHC Global Exports Private Limited* v. *Union of India* – 2023 TIOL 655 HC AHM GST]

Assessment cannot be based only on the E-way Bill

In a case where the assessee had by mistake entered wrong/higher amount in the e-way bill, though the invoice contained correct value of goods and tax amount, the Patna High Court has held that an assessment cannot be based only on the e-way bill. The Court in this regard termed the mistake as inadvertent, while it noted that no inquiry was conducted by the Department in so far as the goods transported would have been in excess of the invoice produced, and that the e-way bill correctly recorded the invoice number and the vehicle number. The Court also noted that if the value shown in the e-way bill was to be considered the actual value then there would have been almost 100 times the goods transported. Setting aside the assessment order and consequential demand notices, the Court directed the assessment to be based on tax invoice and not on the basis of the e-way bill. [*M.S. Cycle Shop* v. *State of Bihar* – 2023 VIL 317 PAT]

Export of service v. Intermediary service – Scope of IGST Section 13(3)(b) and 13(5)

In a case where the assessee was providing certain services to its foreign holding company, the Delhi High Court has rejected the contention of the Revenue that since such services included making periodic visits to existing and prospective suppliers on behalf of foreign company, in terms of Section 13(3)(b) of the IGST Act, the supply of such services was located in India, as it required the personal presence of the recipient of services or the person acting on its behalf. Setting aside the rejection of refund of Input Tax Credit, consequent to the Department's allegation that such services were covered under intermediary services (and not export of services), the Court noted that supply of services by the assessee-petitioner to the foreign company did not require the physical presence of the foreign company. The Court similarly also rejected the contention of coverage under Section 13(5). It was of the view that conducting interviews, making reference checks or performing any screening services in connection with potential joint venture partners, franchisees or employees has no connection with the services as contemplated under Section 13(5). [*McDonalds India Pvt. Ltd.* v. *Additional Commissioner* – 2023 VIL 319 DEL]

Budgetary support scheme – Goods manufactured during GST regime should be under same 8-digit HSN code as manufactured pre-GST, and also cleared by availing earlier area-based exemption

The Jammu and Kashmir High Court has upheld the rejection of the assessee-petitioner's claim for benefit of budgetary support scheme on the ground that the benefit thereunder can only be allowed on goods manufactured under the same 8-digit HSN

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code, as manufactured pre-GST and cleared after availing benefit of exemption Notification No. 1/2010-C.E. Assessee's argument that it was not necessary that the manufacturing unit must continue to produce only the goods which the unit was producing earlier for which Central Excise duty was exempted under the earlier exemption notification, was thus rejected. Dismissing the petition, the Court noted that as per the new scheme, 'specified goods' which are eligible for the benefit mean those goods which were not only being manufactured but also cleared by the eligible unit by availing the benefit of excise duty exemption. The Court also observed that the duty exemption under the earlier exemption notification was not in respect of goods broadly described under Tariff Head with 4-digit or 6-digit HSN code, but only in respect of specific goods with 8-digit HSN code numbers. The High Court was also of the view that otherwise, it would result in creation of uneven playing field in respect of new units. [*Best Crop Science Industrial Area* v. *Union of India* – 2023 VIL 325 J&K]

Interest not payable for delay in disbursement of Budgetary support benefit

The Jammu & Kashmir High Court has held that as there is no specific provision in the Budgetary Support Scheme for grant of interest on the delayed payment of benefit, it is not available to the assessee-petitioner to claim interest for each day's delay that occurs in the disbursement of the sanctioned amount. Further, observing that the amount though sanctioned, could not be released till the requisite funds were made available to the Commissionerate by the DIPP, the Court held that it could not be said that the amount payable under the Scheme was illegally, arbitrarily or without any reason withheld by the Department. It, in this regard, also noted that the benefit under the Scheme is not claimable by the eligible industrial units as a matter of right. [*VJ Jindal Cocoa Pvt. Ltd.* v. *Union of India* – 2023 VIL 326 J&K]

Bank account of person owning debt to taxable person, whose assets are liable to be attached, cannot be subject to provisional attachment

In a case where assessee-petitioner's bank accounts were attached mainly for attaching the assets of some of the merchants who were using its payment aggregator platform, the Delhi High Court has held that petitioner's bank accounts could not be provisionally attached under Section 83 of the CGST Act, 2017 for any amount due and payable to the merchants using the petitioner's platform. The Court in this regard noted that there was no issue regarding any GST liability of the assessee, and that the bank accounts of the petitioner cannot be attached for securing the revenue of another taxable person. It held that a debt owed by any person to the taxable person, whose assets or bank accounts are liable to be attached under Section 83, can be attached being an asset of such a person but, the bank account of the person owing such debt cannot be subject to a provisional attachment order under Section 83. [*Zhudao Infotech Private Limited* v. *Principal ADG* – 2023 TIOL 609 HC DEL GST]

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Personal hearing not to be rejected even if reply to SCN, containing request therefor, is rejected for delay

The Karnataka High Court has rejected the submission of the Revenue department that when the request for personal hearing was made out in the reply filed in Form DRC 06, which having been rejected for the delay, the request for personal hearing is also to be rejected. The Court observed that there was violation of Section 75(4) of the CGST Act, 2017 which mandates that when a written request is made from the person chargeable with tax or penalty seeking for personal hearing, the same is required to be considered. Directing the petitioner to appear before the Deputy Commissioner, the Court termed the submission of the Department as hyper technical interpretation. [*Principle Mahendra Private Limited* v. *Deputy Commissioner* – 2023 VIL 339 KAR]

Input Tax Credit is not deniable only because supplier's registration was cancelled retrospectively

The Calcutta High Court has allowed a writ petition of the assessee in a case where the Revenue department had denied the benefit of Input Tax Credit only after taking into consideration that the registration of the supplier was cancelled with retrospective effect, i.e. from the date prior to the date of transaction with the assessee-petitioner. The assessee had relied upon tax invoice cum challan, debit note, e-way bill, and statement of bank account to contest that the transaction was genuine. Observing that the Department had rejected the claim without considering the documents relied upon by the assessee, the Court was of the view that it could not be said, without proper verification, that there was any failure on the part of the assessee in compliance with the statutory obligations. It also observed that at the time of the transaction, the name of the supplier was available with the Government record as registered taxable person, and that the payment was made by the assessee through bank. [*Gargo Traders* v. *Joint Commissioner* – 2023 VIL 360 CAL]

Mixing various perfumes in unmanufactured tobacco changes its character to manufactured tobacco

The Uttar Pradesh Authority for Advanced Ruling has held that processing of unmanufactured tobacco dust by mixing the scent (mixture of various perfumes and not jarda scent) is a cumulative process of manufacturing which results in different and irreversible goods, and that it would change the character of unmanufactured tobacco to manufactured tobacco. The Authority noted that as per the explanation given by ICAR-CTRI Central Tobacco Research Institute and Explanatory General Notes to Chapter 24 of First Schedule of the Customs Tariff Act, 1975, only tobacco which is cured at farm level, before supply to market, would fall under this classification as 'unmanufactured tobacco'. According to the AAR, the perfuming process claimed by the assessee-applicant, by mixing scent, does not get covered under this. It, in this regard, noted that as per the Explanatory General Notes to Chapter 24, only natural fermentation is

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covered. The product of the applicant was hence held not to be covered under Heading 2401 20 90. [In RE: *Pandey Traders* – 2023 VIL 92 AAR]

Transfer of goods when not mere movement of goods not amounting to supply

In a case involving leasing of goods to different companies in different States, by the main company (owner of goods to be leased, CIPL Maharashtra), the Appellate Authority for Advance Ruling, Maharashtra has held that movement of equipment from CIPL Karnataka to CIPL Tamil Nadu on the instruction of CIPL Maharashtra, after the end of lease term between CIPL Karnataka and CIPL Maharashtra, cannot be said to be mere movement of goods not amounting to supply, and is thereby liable to GST. The AAAR noted that after termination of lease contract, CIPL Karnataka acts as an agent or bailee of CIPL, Maharashtra in the said facilitation and not in independent capacity. It observed that in effect it would amount to CIPL, Maharashtra picking the goods and sending to CIPL, Tamil Nadu, and held that said transaction of supply of goods on rental or lease basis by CIPL, Maharashtra to CIPL, Tamil Nadu is liable to tax in the hands of CIPL, Maharashtra. Further, the services provided by CIPL, Karnataka to CIPL, Maharashtra in facilitating the transportation of goods to CIPL, Tamil Nadu would be exigible to GST. [In RE: *CHEP India Private Limited* – 2023 VIL 25 AAAR]

Treatment of Substance Use Disorder (addiction) not covered under health care services

The Rajasthan AAR has held that the supply of services by treatment of patients suffering from Substance Use Disorder (SUD) (addiction of drugs) as out-patient is not exempt under Entry 74(a) of Notification No. 12/2017-Central Tax (Rate), dated 28 June 2017. The supply was further held as not a composite supply as the AAR did not find any support to establish that the medicine formed part of counselling services provided by physiatrist, even though the assessee contested that the medicines were not available in market and hence the medicine supplied was part of the composite supply. The Authority in this regard observed that prevention and treatment of substance misuse and substance use disorders have traditionally been delivered separately from other mental health and general health care services, as the former is traditionally seen as a social or criminal problem. Denying exemption available health care services, the AAR also observed that prevention services are not typically considered a responsibility of health care systems. [In RE: *Sanjeevani Psychiatric Clinic* – 2023 VIL 95 AAR]

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Customs

Notifications and Circulars

- Pre-import condition under Advance Authorisation – Procedure notified for payment of IGST and Compensation Cess for the period 13 October 2017 till 9 January 2019
- Import/export declarations – Additional qualifiers introduced with effect from 1 July 2023 for certain products
- E-commerce export of jewellery – Procedure simplified when exporter does not wish to re-import
- Electronic Repairs Services Outsourcing – Pilot initiative launched

Ratio decidendi

- Valuation – Freight charge from third country which the vessel called en route to India, when not includible – CESTAT Mumbai
- Valuation – No enhancement if speaking order not passed under Customs Section 17(5), in case when duty paid under protest – CESTAT Kolkata
- Confiscation – Jurisdiction of customs in case of alleged breach of Food Safety and Standards Act – CESTAT Mumbai
- Appeal to Commissioner (A) – Limitation – Mere sending of adjudication order by registered post is not 'communication' – CESTAT Mumbai
- Transfer from FTWZ/SEZ to DTA is not re-imports for benefit of Notification No. 45/2017-Cus. – Customs AAR
- LED Socket Plug Assembly is classifiable under Customs Heading 8512 – Customs AAR

Notifications and Circulars

Pre-import condition under Advance Authorisation – Procedure notified for payment of IGST and Compensation Cess for the period 13 October 2017 till 9 January 2019

On the directions of the Supreme Court, the CBIC has recently issued an important Circular laying down the procedure for payment of IGST and Compensation Cess in cases involving violation of pre-import condition under Advance Authorisation scheme of the Foreign Trade Policy. The Circular also prescribes elaborate procedure for refund and Input Tax Credit. It may be noted that the Supreme Court had recently while upholding the vires of the said pre-import condition, stated that the pre-import condition was not *ultra vires* the FTP. According to the Circular No. 16/2023-Cus. dated 7 June 2023, the importer (not limited to the respondents before the Supreme Court) may approach the concerned assessment group at the port of import with relevant details for purposes of payment. It may be noted that DGFT has issued Trade Notice No. 07/2023-24, dated 8 June 2023 to state that all the imports made under Advance Authorization Scheme on or after 13 October 2017 and up to and including 9 January 2019, which could not meet the pre-import condition, may be regularized by making payments as prescribed in the Customs Circular.

Import/export declarations – Additional qualifiers introduced with effect from 1 July 2023 for certain products

The CBIC has issued a Circular No. 15/2023-Cus. dated 7 June 2023 on mandatory additional qualifiers in import/export declarations in respect of certain products with effect from 1 July 2023. Now, the declaration of IUPAC name and CAS number of the constituent chemicals, for imports under the Chapters 28, 29, 32, 38 and 39 of the Customs Tariff Act, 1975 would be mandatory from 1 July. In case of exports, according to the Circular, the declaration of the name of the medicinal plant, for exports of parts of plants under Chapter 12; declaration of the name of the formulation, for exports of formulations of different streams of medicine under Chapter 30; and declaration of the surface material that comes into contact with the chemical, for exports of various products under Chapter 84, would be mandatory.

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E-commerce export of jewellery – Procedure simplified when exporter does not wish to re-import

The CBIC has simplified the regulatory framework for e-commerce exports of jewellery through courier mode. Procedures have been simplified in cases where an exporter does not opt to avail the facility of re-import of the exported jewellery. Amendments in this regard have also been made in Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010 by Notification No. 43/2023-Customs (N.T.) dated 15 June 2023 to incorporate the declaration by the exporter as to whether the facility of re-import will be availed for the jewellery. Exporters who do not wish to re-import as permitted *vide* Notification No. 57/2022-Cus. (N.T.) and do make a declaration to this effect in the Courier Shipping Bill (CSB-V) at the time of export, will not be required to upload certain specified documents on the ECCS system. Circular No. 17/2023-Cus. dated 15 June 2023 has been issued for the purpose.

Electronic Repairs Services Outsourcing – Pilot initiative launched

Electronic Repairs Services Outsourcing ('ERSO') is an initiative undertaken by various departments of the Government of India (MeitY, MOEF&CC, DGFT, and CBIC) along with the industry [Manufacturers Association of Information Technology (MAIT)]. The initiative involves import of defective/damaged electronic goods by designated repair service entities in India to repair the electronic goods and re-export them. The initiative has been launched to make India a hub for electronic goods repair and is in sync with India's commitment to the environment. National Assessment Centre and Customs Zones have been instructed to ensure expedited assessment in a standardized manner for import and export of the electronic goods for repair. The initiative has been piloted by Bengaluru Customs Zone. Circular No. 14/2023-Cus., dated 3 June 2023 in this regard provides the procedure for import and re-export *via* the Customs Station at Air Cargo Complex, Bengaluru.

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Ratio Decidendi

Valuation – Freight charge from third country which the vessel called en route to India, when not includible

In a case involving an allegation that shipments were made from a third country and not from the country as mentioned in the Bills of Lading, and hence the cost of transport from such third country needs to be added for the purpose of computation of customs duty, the CESTAT Mumbai has allowed the appeal of the assessee-importer. The Tribunal in this regard observed that the sole evidence with the Department was the records of passage of the vessels, having called on a port in the third country *en route* to India, and that there was no evidence on record, elicited through official channels, of the facts relating to the movement of the vessels. It also noted that the importers had no commercial engagement with the vessels and that the invoices had been issued on either on 'cost insurance freight (CIF)' basis or 'cost and freight (CFR)' with freight cost separately mentioned therein. Holding that it must be assumed that the price in the invoices reflected the qualifications embodied in Section 14 of Customs Act, 1962 for acceptance as transaction value, the Tribunal observed that the facts do not warrant invoking of Rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 except on finding that the freight was payable by the importer to the carrier or that the freight had been absorbed by the seller. Allowing the appeal, the Tribunal also noted that there was no finding that any additional payment was made by either importer or exporter to the carrier. [*Jupiter Dyechem Pvt. Ltd.* v. *Commissioner* – 2023 VIL 458 CESTAT MUM CU]

Valuation – No enhancement if speaking order not passed under Customs Section 17(5), in case when duty paid under protest

In the instant case, enhancement of the declared value of goods was done without providing reasons for enhancement nor did the Adjudicating Authority pass an order under Section 17(5) of the Customs Act. Therefore, the assessee cleared the goods by payment of duty under protest. In this regard, the CESTAT Kolkata has held that the Adjudicating Authority was required to pass an order under Section 17(5). According to the Tribunal, failure to issue a speaking order under Section 17(5) by the Adjudicating Authority made the enhancement of value unsustainable. [*Commissioner* v. *R.A. Electricals* – Final Order No. 75559/2023, dated 1 June 2023, CESTAT Kolkata]

Confiscation – Jurisdiction of customs in case of alleged breach of Food Safety and Standards Act

The CESTAT Mumbai has held that the conclusion that the specified goods were 'unfit for human consumption' was beyond the scope of jurisdiction conferred by the Customs Act, 1962 on the Customs Commissioner in the absence of determination by the designated authority under the Food Safety and Standards Act, 2006. Directing provisional release of the confiscated goods

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subject to furnishing of bond, the Tribunal noted that Section 25 of the Food Safety and Standards Act, 2006 which in relation to food places restrictions on persons, does not bring them under the jurisdiction of customs officers except on a finding by the designated officer that the said provision has been breached in the course of imports. According to the Tribunal, an independent ascertainment of fitness for human consumption, without reference to the statutory authority envisaged for the enforcement of Food Safety and Standards Act, 2006, is not in public interest. [*Excellent Betelnut Products Pvt. Ltd.* v. *Commissioner* – 2023 VIL 476 CESTAT MUM CU]

Appeal to Commissioner (A) – Limitation – Mere sending of adjudication order by registered post is not 'communication'

Observing that Section 128 of the Customs Act, 1962 uses the term 'date of communication of order' for computing the limitation period for filing of appeals under the said section, the CESTAT Mumbai has held that merely by sending a copy of the Order-in-Original by speed post, the Department cannot be said to have discharged its liability. According to the Tribunal, the Department has to communicate the same to the assessee-appellant, which means it has to be served on the assessee. Rejecting the Department's contention that since the adjudication order was sent by speed post it has to be deemed to have been served, the Tribunal observed that the department failed to produce on record any evidence including the tracking record in support of their submission. Decisions in cases of *R. Sundararaj* v. *Commissioner* [2018 (363) E.L.T. 426 (Tri. -Chennai)] and *OSA Shipping Pvt. Ltd.* v. *Commissioner* [2015 (325) E.L.T. 486 (Mad.)] were relied upon. [*Metro Fashions* v. *Commissioner* – Final Order No. A/85925/2023 dated 6 June 2023, CESTAT-Mumbai]

Transfer from FTWZ/SEZ to DTA is not re-imports for benefit of Notification No. 45/2017-Cus.

The Customs AAR has denied the benefit of Sl. No. 5 of Notification No. 45/2017-Cus. in a case involving re-import of goods/equipment from a Special Economic Zone (SEZ)/Free Trade Warehousing Zone (FTWZ) to Domestic Tariff Area (DTA). The AAR held that activity of transfer of goods from FTWZ to DTA cannot be termed as import/re-import in terms of the Special Economic Zones Act, 2005 or the Customs Act, 1962, and thus not covered under Section 7 of SEZ Act. It was hence of the view that no exemption from duties/taxes is admissible. CBIC Circular No. 21/2019-Cus. was distinguished by the AAR while the AAR also rejected the contention of applicability of Rule 48 of the SEZ Rules, 2006. The Authority in this regard was of the view that when the goods are being warehoused in FTWZ, these are not 'procured' by a unit or developer in SEZ. [In RE: *Baker Hughes Oilfield Services India Private Limited* – 2023 VIL 17 AAR CU]

LED Socket Plug Assembly is classifiable under Customs Heading 8512

The Customs AAR has held that 'LED Socket Plug Assembly' is classifiable under Tariff Item 8512 90 00 of the Customs Tariff Act, 1975. The Authority in this regard noted that the product was a

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combination of assembly of LED with associated circuit with a fixture for anti-fog lamp for vehicle and is required to be assembled with other parts *viz.* lens, inner lens, holder, filter, adjusting screw assembly and body to produce a complete fog lamp for automobiles. Classification under Headings 8539 and 8541 was ruled out. The AAR further allowed the benefit of exemption under Serial No. 656 of the Notification No. 69/2011-Cus. relating to India-Japan Free Trade Agreement. [In RE: *India Japan Lighting Private Limited* – 2023 VIL 18 AAR CU]

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Central Excise, Service Tax and VAT

Ratio decidendi

- Earth-moving equipment are not ‘automobiles’ – Repacking of parts of earth-moving equipment was not ‘deemed manufacture’ prior to 29 April 2010 – CESTAT Larger Bench
- Commission Agent service provided to a foreign entity, for booking orders in India, is export of service – CESTAT Larger Bench
- Cenvat credit available on cement and steel used in provision of Commercial and Industrial Construction Services – CESTAT Ahmedabad
- Sale of RMC along with pumping to required floor is not covered under Commercial or Industrial Construction Service – CESTAT Chandigarh
- Cenvat credit of BSS provided by group company – Difference between expense distribution and credit distribution – CESTAT Kolkata
- No service tax on re-instatement interest collected on delayed payment of premium to reinstate lapsed policy – CESTAT New Delhi
- Cenvat credit available on commission paid to collection agents for collection of dues of post-paid plans from subscribers of telecommunication services – CESTAT New Delhi
- ‘Exclusion’ from a certain service does not make it ‘exempted service’ – CESTAT Chennai
- Black tea is covered as ‘agricultural produce’ under Notification No. 13/2003-S.T. – CESTAT Chennai

Ratio decidendi

Earth-moving equipment are not 'automobiles' – Repacking of parts of earth-moving equipment was not 'deemed manufacture' prior to 29 April 2010

Observing that when a word is not defined in the Act, ordinary meaning/common meaning is relevant and dictionaries can be referred to for ascertaining its meaning, the Larger Bench of the CESTAT has held that the earth moving construction equipment cannot be termed as 'automobiles' merely because they move on roads or that they have attachment to execute and move earth from one place to another. The Tribunal rejected the contention of the Revenue that all construction equipment vehicles falling under ETH 8429 will fall under category of 'automobiles', as they have the essential automobile features provided under ETH 8705 in terms of the Explanatory Notes to HSN and because the expression 'self-propelled' used in ETH 8429 is synonymous with self-moving vehicles i.e. automobiles. Further, observing that the definition of a word described in one statute cannot mechanically be applied to another statute, the Tribunal rejected Department's reliance on the Motor Vehicle Act and the Air (Prevention and Control of Pollution) Act, 1981, to understand the meaning of 'automobile'.

The 3-Member Bench of the Tribunal also held that packing or repacking of parts, component and assemblies of earth moving equipment would not amount to deemed manufacture under Section 2(f)(iii) of the Central Excise Act, 1944 read with the Third Schedule thereof, for the period prior to 29 April 2010. It held that Serial No. 100A of the Third Schedule to the Central Excise Act, 1944, which was inserted retrospectively w.e.f. 29 April 2010 by the Finance Act, 2011, would have effect only from 29 April 2010 and not from any date prior to this date. The case involved demand of Central Excise duty on packing or repacking of parts, components and assemblies of wheeled tractor loader backhoe and hydra cranes, hydraulic excavator loader (backhoe loaders), hydraulic loader (wheel loading shovel/shovel loaders), and road rollers (compactors), for the period prior to 29 April 2010. [*Action Construction Equipment Ltd*. v. *Commissioner* - Interim Order Nos. 2-4/2023; 16-17/2023; 21-25/2023, dated 6 June 2023, CESTAT Larger Bench]

Commission Agent service provided to a foreign entity, for booking orders in India, is export of service

Distinguishing the Supreme Court decision in the case of *GVK Industries Ltd*. v. *Income Tax Officer*, as relied upon by the Revenue, the Larger Bench of the CESTAT has held that services

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of commission agent (procurement of sales orders) covered as Business Auxiliary Services, provided as sub-agent to the foreign entity (who was the main agent to the foreign producer of goods), would qualify as export of services during the period April 2005 to January 2009 and hence not liable to service tax. Department's contention that services of commission agent were used in India to cater to the Indian markets and hence there is no export of service, was thus rejected by the Tribunal while it observed that as per CBIC Circular dated 24 February 2009 also, for the services to fall under Rule 3(1)(iii) of the Export of Service Rules, 2005, the relevant factor was the location of the service receiver and not the place of performance of the service or the place where the customers of the service receiver were located. It also noted that it was the consistent view of various High Courts and the Tribunal that export of service would take place if a person residing in India provides a service to a foreign entity to enable it to book orders for customers in India. [*Arcelor Mittal Stainless (I) P. Ltd.* v. *Commissioner* - Interim Order No. 26/2023, dated 9 June 2023, CESTAT Larger Bench]

Cenvat credit available on cement and steel used in provision of Commercial and Industrial Construction Services

The CESTAT Ahmedabad has held that Cenvat credit in respect of inputs *viz.* cement and steel used in the output service, i.e. Commercial and Industrial Construction Services, is available to the assessee. The period involved was from October 2007 to March 2011. The credit was denied solely on the basis of amendment in Explanation-2 to definition of 'input' by Notification No. 16/2009-C.E. (N.T.). Allowing the appeal, the Tribunal noted that Explanation-2 was exclusively applicable to manufacturer and not to service provider. It also noted that cement and steel were vital inputs, without which output service of Commercial and Industrial Construction Service could not be provided. Gujarat High Court decision in the case of *Mundra Ports and Special Economic Zone Limited*, where credit of cement and steel was allowed against the output service of Port Service, was relied upon. [*Bridge & Roof Co (India) Limited* v. *Commissioner* – 2023 VIL 533 CESTAT AHM ST]

Sale of RMC along with pumping to required floor is not covered under Commercial or Industrial Construction Service

The CESTAT Chandigarh has held that sale of RMC does not involve any service angle in spite of the fact that the assessee was pumping the RMC to the desired floor at the request of the customers. The Tribunal in this regard was also of the view that showing pumping charges separately in the work orders or invoices does not materially alter the situation. Rejecting the argument of the Revenue that the activity was covered under 'Commercial or Industrial Construction Service' and liable to service tax, the Tribunal observed that the activity of pumping RMC was incidental to the sale of RMC on which requisite VAT had been paid by the assessee. Period involved in the dispute was from April 2008 to March 2009. It may be noted that according to the Tribunal, the activity of sale and pumping of RMC would

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necessarily fall under 'Works Contract Service'. [*Ultratech Concrete* v. *Commissioner* – 2023 VIL 508 CESTAT CHD ST]

Cenvat credit of BSS provided by group company – Difference between expense distribution and credit distribution

The CESTAT Bench at Kolkata has allowed Cenvat credit of Business Auxiliary Services provided by a group company ('X') to the assessee. The Revenue had denied Cenvat credit on the ground that X company was not an Input Service Distributor to distribute the service tax paid on BSS to their group companies. The CESTAT in this regard observed that facilities in area of consultancy, human resources, legal advice, management, logistics, infrastructure support, business strategic planning, research & development, auditing, etc., provided by X company would be covered under BSS, on which X had rightly paid service tax. It also noted that whether X company only recovered the expenses incurred or even charged a profit element, was immaterial as the manner of arriving at the value of services rendered would not change the nature of BSS provided. [*Hindalco Industries Limited* v. *Commissioner* – 2023 VIL 522 CESTAT KOL ST]

No service tax on re-instatement interest collected on delayed payment of premium to reinstate lapsed policy

The CESTAT New Delhi has held that service tax is not liable on re-instatement interest collected by the assessee on delayed payment of premium by policy holder to reinstate a lapsed policy. Department's contention that the assessee camouflaged the amount received towards processing/administrative charges as reinstatement interest, was thus rejected. Deliberating on difference between lapse and termination of policy, the Tribunal observed that rights and obligation of the parties under the contract do not come to an end on lapse of the policy as the policy holder has an option to revive it. It also noted that requirement of payment of interest for revival of a lapsed policy flowed from the policy contract. According to the Tribunal, the Revenue department committed an error in concluding that the relationship stood terminated upon lapse of a policy and, therefore, no interest could be charged for reviving it. Further, the Department's contention that since the rate of interest was not uniform, it could not be considered as 'interest', was also rejected by the Tribunal while it noted that the Department itself charged simple interest for delayed payment of service tax at different rates. CESTAT Mumbai's decision in the case of *ICICI Prudential Life Insurance Co. Ltd.* was distinguished. [*Max Life Insurance Company Ltd.* v. *Commissioner* – 2023 TIOL 426 CESTAT DEL]

Cenvat credit available on commission paid to collection agents for collection of dues of post-paid plans from subscribers of telecommunication services

The CESTAT New Delhi has allowed Cenvat credit of service tax paid on the commission paid by the assessee to collection agents for collection of dues of post-paid plans from the subscribers. Department's contention that the said service was not used for

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providing the output service and in fact was used after completion of the provision of output service and, therefore, would not qualify as input services for provision of telecommunication service, was thus rejected. Joint Commissioner's view that such services would not be covered in the main part or the inclusive part of the definition of 'input services' was also rejected by the Tribunal while it observed that services having relation with the business of providing of output service would be covered by the definition of input service. Dismissing the Department's appeal, the Tribunal also upheld that finding of the Commissioner (Appeals) that the Explanation inserted in Rule 2(l) of the Cenvat Credit Rules, 2004 on 3 February 2016 would have retrospective effect. [*Commissioner* v. *Bharti Hexacom India Ltd.* – 2023 VIL 457 CESTAT DEL ST]

'Exclusion' from a certain service does not make it 'exempted service'

The CESTAT Chennai has held that the services which are 'excluded' cannot be given the colour of 'exemption' just to fit it somewhere so that a benefit flowing from the statute to a taxpayer is denied. On facts, the Tribunal observed that the words 'does not include' in the definition of cargo handling service take the service relating to handling of export cargo out of the purview of taxability, and hence, the same, at no stretch of imagination, could be equated with an exempted service for the purpose of Rule 6 of the Cenvat Credit Rules, 2004. [*ST. John CFS Park Private Limited* v. *Commissioner* – 2023 VIL 440 CESTAT CHE ST]

Black tea is covered as 'agricultural produce' under Notification No. 13/2003-S.T.

The CESTAT Chennai has allowed the benefit of Notification No. 13/2003-S.T. (as amended by Notification No. 8/2004-S.T.) to an assessee producing black tea and taking services of foreign commission agent. The Notification granted exemption to service of commission agent in relation to sale or purchase of 'agricultural produce'. The Tribunal in this regard noted that the meaning of 'agricultural produce', as per the notification, covered tea, and that the production of black tea involved processes for which there was no bar in the said notification. According to the Tribunal, even the processes involved in converting green tea into black tea do not alter the basic characteristic of tea as such and the same could not be considered as a non-agricultural product under any stretch of imagination. [*Glenworth Estate Limited* v. *Commissioner* – 2023 VIL 499 CESTAT CHE ST]

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