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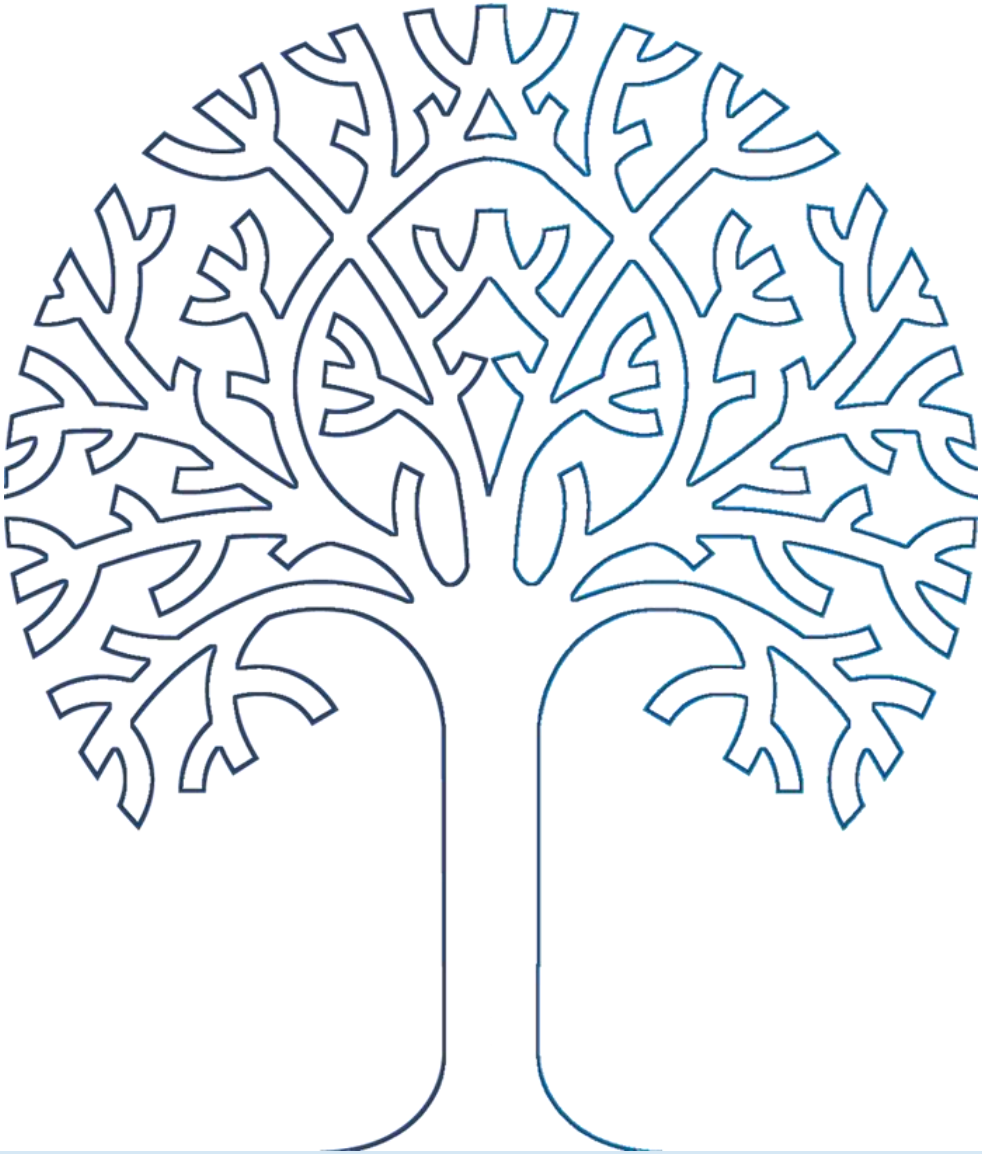

Article

Eligibility of Input Tax Credit *vis-à-vis* inherent loss of inputs during manufacture

By Charulatha R and Nimrah Ali

The Division Bench of Hon'ble Madras High Court recently in the case of *Eastman Exports Global Clothing*, settled an interesting question of law pertaining to the reversal of Input Tax Credit ('**ITC**') on the loss of inputs which is inherent to the process of manufacturing. Although the judgment pertains to the treatment of manufacturing loss under Section 19(9)(iii) of the Tamil Nadu VAT Act, the principle enunciated by the Court is very helpful in determining the entitlement of ITC *vis-à-vis* Section 17(5)(h) of the Central GST/State GST Act. The article notes that the Hon'ble Court emphasised on the test of indispensability of the input in the emergence of the end product, rather than its physical presence in the end product itself, to determine the faith of the claim of ITC on manufacturing loss. It also observes that the *Eastman* judgement might come to assistance against the contention that the inputs which are lost during the process of manufacture equals to inputs being 'destroyed' under Section 17(5)(h). The authors note that the judgement draws a distinction between goods 'destroyed' and goods 'used' in the manufacture. However, in the authors' opinion, the principles enunciated in the judgment may not be applicable uniformly to all the instances of denial of ITC. It may be better to assess each situation individually on a case-to-case basis.

Eligibility of Input Tax Credit *vis-à-vis* inherent loss of inputs during manufacture

The Division Bench of Hon'ble Madras High Court recently in the case of *Eastman Exports Global Clothing* case[1], settled an interesting question of law pertaining to the reversal of Input Tax Credit ('**ITC'**) on the loss of inputs which is inherent to the process of manufacturing. The decision will have a significant bearing on similar claims of ITC made under the present GST regime as well.

Consumption of inputs in the process of manufacture:

At the outset, it can be inferred that the principle on eligibility of ITC on inputs 'consumed' during manufacture is applied uniformly by the Courts even though the decisions are based on the provisions of different statutes.

In this regard, it can be discerned that the discourse on what amounts to 'inputs being used in the manufacture of goods' dates back to 1960s wherein, the Supreme Court while examining the phrase in light of Section 8(3)(b) of the Central Sales Tax, 1956 in the case of *J. K. Cotton Spinning & Weaving* case[2], held that if any process is integrally connected with the ultimate production of goods so much so that but for the said process, manufacture of goods would be commercially inexpedient, goods used as inputs in that process would fall within the ambit of the expression 'used in the manufacture of goods' and such inputs will be considered as being part of the final manufactured product irrespective of the fact that they are physically not present in it.

Subsequent decisions applying the principle:

Thereafter, in the case of *Ran India Steel*[3] the Hon'ble Madras High Court held that inputs that are consumed in the manufacture will not come within the fold of inputs that are 'destroyed at some intermediary stage of manufacture' as per Section 19(9)(iii) of the TNVAT Act.

Similarly, in the case of *ARS Steels*[4] the High Court held that loss of inputs during manufacture cannot be equated with any of the instances set out in Section 17(5)(h) of the Tamil Nadu Goods

[1] *Eastman Exports Global Clothing (P) Ltd.* v. *The Assistant Commissioner and Ors.* - W.A. No. 1094 of 2015.
[2] *J. K. Cotton Spinning & Weaving Mills Co. Ltd.* v. *The Sales Tax Officer, Kanpur and Anr.* - 1965 AIR SC 1310.
[3] *Ran India Steel Pvt. Ltd.* v. *The Principal Secretary/ Commissioner of Commercial Taxes* - 2019 (12) TMI 1305.
[4] *ARS Steels and Alloy International Pvt. Ltd*. v. *The State Tax Officer* - 2021 (6) TMI 957.

and Service Act, 2017 as the loss is inherent to the process of manufacture itself.

Further, even in Excise law, the Assessee was held entitled to claim ITC irrespective of the fact that the end product only contained 95% of the inputs used in it as can be seen from the case of *Rupa and Co.*[5] The principle laid down in the aforesaid cases was followed in several others as well[6].

The outcome of the Eastman judgment:

The primary question before the Hon'ble High Court in the impugned judgment was the enquiry as to whether the inputs that are used in the manufacture and not contained in the final product is relevant to determine the eligibility of ITC on such input because according to the decided cases, a raw material which is consumed in the process of manufacture is as much as an input as that which retains its identity at the last stage of manufacture.

The Hon'ble Court, while delivering the judgment, emphasised on the test of indispensability of the input in the emergence of the end product, rather than its physical presence in the end product itself, to determine the faith of the claim of ITC on manufacturing loss. Further, the judgment also placed reliance on the principle of commercial expediency propounded in the case of *J.K. Cotton Spinning and Weaving Mills* to reach a conclusion that if the invisible loss of inputs is the result of a process which is commercially expedient to the manufacturing of the end product, then, there cannot be denial of ITC on such loss of inputs. The Court also held that the requirement of quantitative tally between the raw materials used in the process of manufacture and the end product is contrary to technical, practical and commercial expediency involved in the activity of manufacture.

Section 17(5) of the CGST/TNGST Act:

Although the impugned judgment pertains to the treatment of manufacturing loss under Section 19(9)(iii) of the TNVAT Act, the principle enunciated by the Hon'ble Court is very helpful in determining the entitlement of ITC *vis-à-vis* Section 17(5)(h) of the CGST/SGST Act. In fact, in the *ARS Steels* case, the Court equated Section 17(5)(h) of the SGST Act with Section 19(9)(iii) of the TNVAT Act by holding that 'the prescription in Section 19 of TNVAT Act is echoed in Section 17 of the SGST Act'. Similarly, in the *Saradhambika* case, the Court held that 'Section 17(5)(h) of the TNGST Act and Section 19(9)(iii) of the TNVAT Act are in *pari materia*'.

To substantiate, Section 17(5)(h) states that ITC shall not be available to an assessee when the inputs are lost, stolen, destroyed, written off or disposed of by way of gift or free samples. At the outset, the case of *ARS Steels* distinctly observes that none of the instances set out above equate with the loss of input in the process of manufacture as the above instances indicate loss of inputs that are quantifiable and involve external factors or compulsions as compared to manufacturing loss which is inherent to the process of manufacturing itself.

However, disputes might still arise on the possible ground that the inputs which are lost during the process of manufacture equals

[5] *Rupa and Co. Ltd.* v. *The Customs, Excise and Service Tax Appellate Tribunal* - 2015 (9) TMI 293.

[6] *Saradhambika Paper and Board Mills Pvt. Ltd.* v. *The State Tax Officer* - 2021 (7) TMI 341; *R.K. Ganapathy Chettiar* v. *The Assistant Commissioner (ST)* - 2021 (8) TMI 595.

to inputs being 'destroyed' under Section 17(5)(h). In this regard, the *Eastman* judgement might come to assistance as it draws a distinction between goods 'destroyed' and goods 'used' in the manufacture. According to this judgement, 'destruction' of goods is used to covey an act that renders the inputs useless for the intended purpose and on the contrary, 'used' in the manufacture of goods conveys a positive act of employing the inputs for the accomplishment of the intended purpose.

Furthermore, it is incumbent to mention that Section 17 of the CGST/SGST Act pertains to allowance of ITC on inputs used in the 'supply' of goods whereas, all the judgments cited above only deal with the concept of loss of inputs during the process of manufacture. Thus, although the Hon'ble High Courts have been unanimous in stating that Section 19 of TNVAT Act is in *pari materia* to Section 17 of the CGST/SGST Act, they have not dealt with the question of whether 'supply of goods' under the CGST/SGST Act is akin to the process of 'manufacture' under the erstwhile TNVAT Act. This, in the author's opinion, could be a moot point before the Courts in the near future.

Conclusion:

In the authors' view, this judgement provides a much need clarity on the subject and will wholeheartedly be welcomed by the business houses. Further, the judgement may also come into play in determining the eligibility of ITC under Section 17(5)(h) of the CGST/TNGST Act. However, in the authors' opinion, the principles enunciated in the judgment may not be applied uniformly to all the instances of denial of ITC. It may be better to assess each situation individually on a case-to-case basis.

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Goods & Services Tax (GST)

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Notifications and Circulars

E-invoice – Threshold limit to be decreased to INR 5 crore

Registered person (except specified persons) having aggregate turnover exceeding INR 5 crore in any preceding FY from 2017-18 onwards will be required to comply with Rule 48(4) of the Central Goods and Services Tax Rules, 2017, i.e., E-invoice provisions, with effect from 1 August 2023. At present, the threshold limit is INR 10 crore. Notification No. 10/2023-Central Tax, dated 10 May 2023 proposes to make amendments to Notification No. 13/2020-Central Tax, with effect from 1 August 2023.

GTA services – Time limit to make a declaration to pay GST under forward charge, extended

In order to exercise the option to pay GST on forward charge, the Goods Transport Agency (GTA) is required to make a declaration in Annexure V to Notification No. 11/2017-Central Tax (Rate), on or before the 15 March of the preceding Financial Year. Now, Notification No. 5/2023-Central Tax, dated 9 May 2023 has amended the above mentioned notification to extend the time limit to make the declaration for the Financial Year 2023-2024. The revised time limit to make a declaration in Annexure V is now 31 May 2023. It may be noted that Notifications Nos. 5/2023-Integrated Tax (Rate) and 5/2023-Union Territory Tax (Rate), both dated 9 May 2023 have also been issued to amend the specified notifications for integrated tax and union territory tax.

Further, as per the amendments, GTA who commences new business or crosses threshold for registration during any financial year, may exercise the option to itself pay GST on the services supplied by it during that Financial Year by making a declaration in Annexure V either before the expiry of 45 days from the date of applying for GST registration, or one month from the date of obtaining registration, whichever is later.

Ratio Decidendi

Offline or online game of skill like 'Rummy' is not gambling or betting, even if played with stakes – GST not leviable

The Karnataka High Court has held that offline/online games such as Rummy which are mainly/preponderantly/substantially based on skill and not on chance, whether played with/without stakes, do not tantamount to 'gambling or betting' as contemplated in Entry 6 of Schedule III of the Goods and Services Act, 2017. According to the Court, the terms 'betting' and 'gambling' appearing in Entry 6 of Schedule III of the CGST Act do not and cannot include games of skill within its ambit. It was hence held that taxation of games of skill is outside the scope of the term 'supply' in view of Section 7(2) of the CGST Act, 2017 read with Schedule III thereof.

The High Court hence rejected the contention of the Revenue department that games of skill played with stakes amounts to gambling. The Revenue had contended that when any person including the players of rummy wagers, stakes or bets on the outcome of a game of rummy, which outcome is unknown and uncertain till the game gets over, such activity of wagering, staking or betting on the unknown and uncertain outcome tantamount to betting and gambling, irrespective of the nature of the underlying game, i.e., of skill or of chance. Rejecting the said contention, the High Court stated that rummy played with stakes cannot be viewed as a 'forecast' or a shot at the 'hidden target'. [*Gameskraft Technologies Private Limited* v. *Directorate General of Goods Services Tax Intelligence* – Decision dated 11 May 2023 in Writ Petition No. 19570 of 2022 and Others, Karnataka High Court]

Ocean freight – Gujarat High Court directs refund of IGST paid during July 2017 to December 2019

The Gujarat High Court has directed the competent authority to refund the IGST paid by the importer-assessee on the ocean freight charged by the foreign vessel provider to the overseas supplier for the transportation of goods up to the customs clearance destination in India. The Court in this regard noted that specified Sl. Nos. of Notifications Nos. 8 and 10/2017-IT (Rate), prescribing IGST on such ocean freight, had already been held to be *ultra vires* the Integrated Goods and Services Tax Act, 2017, and had been stuck down by the Court earlier, which decision was also upheld by the Supreme Court. [*Krishak Bharati Co-operative Limited* v. *Union of India* – 2023 VIL 260 GUJ]

Construction service involving transfer of property in land – Deeming fiction about land cost is applicable only when assessee unable to supply bifurcation

The Madras High Court has held that the deeming fiction under Notification No. 11/2017-Central Tax (Rate) in respect of supply of construction services involving transfer of property in land or

undivided interest in land, would not apply in cases where the assessee is in a position to supply the actual amount of consideration received towards construction services and land cost. According to the Court, the notification would be applicable only in cases where the assessee is unable to supply the bifurcation of the construction as relatable to construction services or sale of land. The High Court in this regard also stated that the Department cannot proceed on the basis that the formula as per the deeming fiction is the only method of assessment in such cases. [*Avigna Properties Pvt. Ltd.* v. *State Tax Officer* – 2023 VIL 264 MAD]

Provisional attachment cannot be kept pending endlessly

The Madras High Court has held that proceedings relating to provisional attachment of bank account cannot be kept pending endlessly such that attachments of bank accounts traverse three to four years seamlessly. In a case where the show cause notice was issued only on 8 October 2022 in respect of an inspection that had transpired in January, 2019, the Court held that the delay of nearly four years in issuing show cause notice cannot be a reason to continue an attachment under Section 83 of the Central Goods and Services Tax Act, 2017 which itself is provisional in nature. According to the Court, the purpose of Section 83 which is stated to be 'provisional attachment to protect revenue in certain cases', cannot be deployed so as to work against the assessee continuously for several years. [*Nitesh Jain Mangal Chand* v. *Senior Intelligence Officer* – 2023 VIL 265 MAD]

Payment of tax in instalments – Benefit of Section 80 is not available if assessee filed even GSTR-1

The Madras High Court has denied the benefit of Section 80 of the Central Goods and Services Tax Act, 2017, relating to payment of tax and other amount in instalments, to an assessee who had filed returns but had not paid tax. The Court in this regard took note of the definition of 'returns' under Section 2(37) of the CGST Act and that Chapter IX titled as 'Returns', proceeds on the basis that the various forms prescribed for filing by assessees, either setting out details of inward or outward supplies or tax credit, would all constitute returns. Dismissing the writ petition, the Court was of the view that the assessee's argument that GSTR 1 only deals with 'details' and hence would not constitute a statutory return (for exclusion from Section 80), was unacceptable and contrary to the scheme of the Act. [*K.I. International (India) Ltd.* v. *Principal Secretary* – 2023 VIL 267 MAD]

E-way bill – Conduct of the transporter is required to be examined before imposition of penalty

The Calcutta High Court has held that the conduct of the transporter is required to be examined bearing in mind that the rule itself provides for extension of the validity period of the e-way bill and the transporter has been given a latitude of 8 hours to seek for such extension. Allowing the writ petition, the Division Bench of the Court observed that there was no intention on the

part of the assessee-appellant to evade payment of tax. It also observed that if an e-way bill had expired, the transporter had 8 hours-time to seek for extension of the time stipulated in the e-way bill, and that if that allowance is given, there was a delay of about 1 hour and 35 minutes only. It also noted that the vehicle was within the area as specified in the e-way bill and that even as per the Department, the distance between the place where the vehicle was intercepted and the specified place, was about 20 kilometres. According to the Court, this was not a case, where penalty, that too 200% penalty, should have been imposed. [*Progressive Metals Pvt. Limited* v. *Deputy Commissioner* – 2023 VIL 270 CAL]

Regional Vigilance & Enforcement Officer of Home Department can conduct inspection of premises

The Andhra Pradesh High Court has rejected the contention of the assessee that the Regional Vigilance & Enforcement Officer of State Home Department has no statutory right to conduct inspection in assessee's premises and forward the alert note to the Deputy Commissioner (ST) and that the latter cannot act upon such information. The Court in this regard noted that the enforcement functions of the V&E Department are to safeguard revenues due to the Government and it is permeable in all the departments including the Tax department. It also observed that during course of such inspection if the officials of the V&E Department found the attempts of such traders in evasion of tax, they can pass on the information to tax department. The Court was of the view that it is an exchange of information between two statutory authorities for safeguarding the revenue due to the Government. Contention of the petitioner that the notices became illegal for want of authorization under Section 67 of the APGST Act, was also held as untenable. [*Sudhakar Traders* v. *State of Andhra Pradesh* – 2023 VIL 273 AP]

Refund on account of SEZ supplies – Non-submission of physically signed and scanned declarations is not fatal

In a case involving refund on account of SEZ supply, the Rajasthan High Court has held that there is no requirement of law (Rules 26 and 89 of the CGST Rules, 2017) mandating that even after having authenticated a document in the manner prescribed under Rule 26, the declarations are also required to be signed in physical mode before being scanned and uploaded through electronic submission along with the application for refund. Observing that such requirements have only been added by an administrative instruction, i.e., Circular No. 125/44/2019-GST, dated 18 November 2019, the Court held that non-submission of physically signed and scanned declarations may only be an irregularity, but not an illegality. The High Court was of the view that administrative instructions cannot bar claim of refund if the legal requirements as contained in the law are fulfilled. [*Medicamen Biotech Limited* v. *Union of India* – 2023 VIL 275 RAJ]

Transporter cannot seek release of detained conveyance stating that tax has been paid by the concerned assessee

The Madras High Court has held that a transporter cannot seek release of detained conveyance on the ground that tax has been paid in full by the concerned assessee. The Court noted that it is not for the transporter to make this submission because such payment, if at all would have been borne by the assessee concerned, and not the transporter. Dismissing the writ petition, the Court also noted that the assessee was not on affidavit before the Court attesting to the aforesaid position. [*Lodha Roadways* v. *Deputy State Tax Officer* – 2023 VIL 285 MAD]

Appeal to Appellate Authority – Limitation – Four months is not 120 days

The Allahabad High Court has held that bare reading of the provisions of Section 107 of the Central Goods and Services Tax Act, 2017 reflects that it is not 120 days, but it is four months and, therefore, it would depend upon the date on which date the adjudicating authority passes the order. Restoring the appeal, which was summarily dismissed only on the ground that it was beyond 120 days, to its original number, the High Court observed that four months may be of 121 days or 122 days, as the case may be. [*Shri Ram Ply Product* v. *Additional Commissioner* – 2023 TIOL 548 HC ALL GST]

Application for Advance Ruling by recipient of service is maintainable

The Calcutta High Court has set aside the Ruling of West Bengal Authority for Advance Ruling (AAR) which had rejected the application of the assessee, holding that the assessee being recipient of service is not entitled to maintain an application before the AAR. The Court noted that in Section 95(c) of the CGST Act, 2017, the term 'applicant' has been defined to mean any person registered or desirous of obtaining registration under the Act. It was of the view that since the term 'applicant' has been defined in a widest possible manner, and since the assessee-applicant was registered, it was well within the jurisdiction of AAR to consider the application on merits rather than rejecting the same on ground of locus standi. The Court in this regard also noted that question of applicability of exemption Notification No. 12/2017-CT (Rate) would fall under Section 97(2)(b) of the CGST Act. [*Anmol Industries Ltd.* v. *West Bengal AAR* – 2023 VIL 251 CAL]

Manufacture with inputs from recipient when is supply of goods and not service

In a case where the assessee-applicant was manufacturing goods (precast manholes and rises) on order, wherein the main ingredients were supplied by the recipient of supply, the Rajasthan AAR has held that the supply is supply of goods under the CGST Act, 2017. The AAR in this regard observed that the ownership of goods remained with applicant. It also noted that manufacturing activities carried out by applicant did not fell under the ambit of job work as it involved whole manufacturing

process and could not be termed as 'any treatment or process undertaken by a person on goods belonging to another registered person'. The Authority further distinguished CBIC Circular No. 52/26/2018, dated 9 August 2018, relating to bus body building on chassis fitted with engines supplied by the recipient. The AAR was of the view that activity involved in bus body building was modification and treatment on a good, while here new goods were manufactured from raw materials and no work was done on the goods belonging to the recipient. [In RE: *Natani Precast* – 2023 VIL 79 AAR]

Margin scheme is not available in case of purchase of old gold jewellery and sale thereof after melting

In a case where the assessee-applicant was engaged in the business of purchase of second-hand gold jewellery from unregistered individuals and sale of same after melting, the Karnataka AAR has held that since the processing changes the nature of the goods, the applicant is not eligible to avail the benefits of Rule 32(5) of the CGST Rules, 2017, i.e., pay GST on the difference between sale price and purchase price (Margin scheme). The Authority was of the view that the nature of the goods changes in as much as the characteristics of the articles and the classification changes. It noted that the inward supply of old gold jewellery was covered under Heading 7113 while after melting into gold lumps or irregular shapes of gold, the applicable classification is Heading 7108 of the Customs Tariff Act, 1975. [In RE: *White Gold Bullion Private Limited* - 2023 (5) TMI 747 - Authority for Advance Ruling, Karnataka]

Charitable trust renting rooms to pilgrims when liable to GST

The Gujarat AAR has held that the applicant, a charitable trust, providing accommodation to the pilgrims visiting a temple, in line with the trust deed, and charging rent on per-day basis, was providing services in the nature of services by a hotel, inn, guest house, club or campsite, for residential or lodging purposes, and hence liable to GST. The Authority in this regard observed that the applicant could not substantiate the claim that all the accommodation granted was to the pilgrims visiting the temple. The applicant had claimed exemption in terms of Sl. No. 1 of the Notification No. 12/2017-CT(Rate), i.e., services by an entity registered under Section 12AA of the Income Tax Act, 1961, by way of charitable activities. Further, benefit of Sl. No. 13(b) of the notification was denied as the ashram was not owned by the trust managing the temple. The AAR in this regard also observed that the rooms being rented were not in the precincts of the temple. [In RE: *Nandini Ashram Trust* – 2023 (5) TMI 286-Authority for Advance Ruling, Gujarat]

Bonus received from service recipient when is also liable to GST at the rate of service supplied

Observing that the applicant provided only canteen services and no other ancillary or incidental services, the Telangana AAR has held that the amounts received, including the bonus, shall be in the nature of consideration towards the canteen services and that the value of the bonus amounts are to be included in the value of

the canteen services as per Section 15(2)(b) of the CGST Act, 2017. The AAR was hence of the view that GST would be payable at the rate of 5% on the whole amount where the applicant does not retain any part of it in the nature of commission. Apart from the consideration received for canteen services, the applicant was also receiving a lump sum bonus from the service recipient for the purpose of paying their employees. The Authority however held that if the applicant retains a portion of the lump sum amount received for payment of bonus in the form of commission, then the applicant would be liable to pay GST at the rate applicable to 'Intermediary services', on the amount so retained. [In RE: *Foodsutra Art of Spices Private Limited* - 2023 (5) TMI 228-Authority for Advance Ruling, Telangana]

Input Tax Credit when is not available on construction of shed using pre-fabricated structures

The Telangana AAR has held that shed erected by the applicant using pre-fabricated structures ('**PFS**') constitutes immovable property and is not eligible for Input Tax Credit (ITC) in terms of Section 17(5)(c) and (d) of the CGST Act, 2017. The Authority in this regard observed that the shed/warehouse was erected to make use of the space created over the land on which it was built and that the activity involved application of PFS and also civil work for supporting it and developing the RCC platform. It noted that if not for the purpose of beneficial enjoyment by way of conducting business on the RCC platform, the 'PFS' has no separate existence, and that the PFS cannot be relocated by unfixing the pre-fabricated structures alone without substantial damage to the foundation. [In RE: *Sanghi Enterprises* – 2023 (5) TMI 126-Authority for Advance Ruling, Telangana]

Sale or right to use parking space service and construction service are not naturally bundled

The West Bengal Appellate AAR has confirmed the views of the AAR that sale or right to use parking space service and construction services are separate services which are not dependent on the sale and purchase of each other. According to it, sale or right to use parking space is not naturally bundled with the construction services and hence, cannot be treated as composite supply of construction services. The AAR had held that since the applicant provided services of right to use of parking space on the basis of option exercised by a prospective apartment buyer or existing apartment owner, the same was not naturally bundled with construction services of the apartment and should not be construed as a composite supply. It was held that the rate of GST applicable for such supply on the parking space charges would be 18% GST without any abatement on value of land. It was also held that where sale of apartments along with parking spaces were executed after receipt of completion or occupancy certificate, GST would be payable only on the parking space charges. [In RE: *Eden Real Estates Private Limited* - 2023 (5) TMI 748-Appellate Authority for Advance Ruling, West Bengal]

Customs

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Notifications and Circulars

Crude soyabean oil and crude sunflower seed oil – Exemption from BCD and AIDC when imported under Tariff Rate Quota authorisation

Crude soyabean oil, whether or not degummed, and crude sunflower seed oil, have been exempted from basic customs duty (BCD) and agriculture infrastructure and development cess (AIDC), when imported under a valid Tariff Rate Quota (TRQ) authorization for the Financial Year 2022-23. The Notification No. 37/2023-Cus., dated 10 May 2023, issued for the purpose, is effective from 11 May 2023 till 30 June 2023.

Amnesty scheme for one-time settlement of default in export obligation under Advance authorisation and EPCG authorisation, clarified

The Central Board of Indirect Taxes and Customs (CBIC) has clarified the recently introduced amnesty scheme, by the DGFT, for one-time settlement of default in export obligation under Advance authorisation and EPCG authorisation. Circular No. 11/2023-Cus., dated 17 May 2023, in this regard, highlights the changes made by Notification No. 32/2023-Cus. in some 13 notifications pertaining to Advance Authorisation and Export Promotion Capital Goods (EPCG) scheme authorisation, and reiterates that the authorisation holder choosing to avail this amnesty scheme must complete the process of payment on or before 30 September 2023. It also notes that cases under investigation or those adjudicated for involving fraud, mis-declaration or un-authorised diversion of material and/or capital goods are not covered under the amnesty scheme, and that, however, cases of calculation mistakes are to be dealt on merits.

It may also be noted that DGFT has also prescribed elaborate procedure for applying for the amnesty scheme. According to Policy Circular No. 1/2023-24, dated 17 April 2023, application for AA/EPCG discharge/closure needs to be filed online through the DGFT website. Regional Authorities have also been directed to process applications within 3 working days.

Apples import prohibited if CIF import price is less than INR 50 per kg

The Ministry of Commerce has prohibited import of apples if the CIF import price of the fruit is less than or equal to INR 50 per kilogram. Notification No. 5/2023, dated 8 May 2023, issued in this regard, however further states that the minimum import price conditions shall not be applicable in case of imports from Bhutan. Chapter 08 under Schedule-I of the ITC(HS) 2022 has been amended for this purpose.

Ratio Decidendi

'Pre-import condition' under advance authorisation scheme was not ultra vires Foreign Trade Policy

The Supreme Court has reversed the decision of Gujarat High Court and held that the 'pre-import condition' stipulated in grant of exemption from payment of IGST and Compensation Cess, in respect of imports under Advance Authorisations, is not *ultra vires*. The Gujarat High Court had earlier held that grant of IGST exemption with 'pre-import condition' as contemplated in Notification No. 79/2017-Cus., dated 13 October 2017 was arbitrary and that such condition was *ultra vires* the scheme of the Foreign Trade Policy. The Apex Court observed that the concept of 'pre-import condition' was not alien to the Foreign Trade Policy 2015-20 (FTP), and that inconvenience caused to exporters by paying IGST and claiming refund thereafter could not be a ground to hold the 'pre-import' condition as arbitrary.

The Supreme Court was also of the view that the exclusion of benefit for imports made in anticipation of Advance Authorisation, and requiring payment of duties, under Sections 3(7) and (9) of the Customs Tariff Act, 1975, with the 'pre-import condition', cannot be characterized as arbitrary or unreasonable. Assessee's argument that there is no rationale for different treatment of BCD and IGST under Advance Authorisation was also held as without merits. With respect to retrospective effect of Notification No. 01/2019-Cus., dated 10 January 2019 *vide* which pre-import condition was removed, the Apex Court held that Central Government has no power under Foreign Trade (Development and Regulation) Act, 1992 to issue retrospective notification / regulations. [*Union of India* v. *Cosmo Films Ltd.* – Judgement dated 28 April 2023 in Civil Appeal No. 290 of 2023 and others, Supreme Court]

Modification of assessment order can also be sought under Section 149 – 'Documentary evidence' under Section 149 not includes decisions of Courts

The Supreme Court has dismissed a Special Leave Petition filed against the decision of the Telangana High Court wherein the High Court had rejected the contention of the Revenue that only reassessment under Section 128 of the Customs Act, 1962 is the remedy available to the importer, and that Section 149 (relating to amendment of Bill of Entry) cannot be invoked for the purpose of refund. Relying on the Supreme Court decision in the case of *ITC Ltd.*, the High Court had held that Supreme Court (in *ITC Ltd.*) nowhere said that such amendment or modification of an assessment order can only be done in an Appeal under Section 128.

Further, in respect of amendment under Section 149, the High Court had also rejected the contention of the Revenue that decision of the Supreme Court (in another dispute, in *SRF Ltd.*) was the 'documentary evidence' which was not in existence at the

time of clearance of the goods since the decision in *SRF Ltd.* was delivered after the impugned clearances. According to the High Court, firstly, the law declared by the Supreme Court, unless made prospective, is always deemed to be the law of the land, and secondly, the term 'documentary evidence' used in Section 149, in the context of amendment to BoEs or like documents, cannot include decisions of Courts. [*Union of India* v. *Sony India Pvt. Ltd.* – 2023 TIOL 42 SC CUS]

Pipelines connecting two facilities around 217 km apart is eligible for EPCG scheme – Word 'premises' is wide enough to cover entire stretch

The CESTAT Kolkata has allowed the benefit of Export Promotion Capital Goods (EPCG) Notification No. 64/2008-Cus. to the assessee in a case involving import of pipeline, under the EPCG scheme, to connect the two facilities of the assessee located around 217 km apart. The Department had denied the benefit alleging that the pipelines were installed outside the 'approved' premises. The Tribunal however observed that notification required the imported capital goods to be installed in the 'factory or premises' of the EPCG license holder, and that it did not mention that the installation has to be made within the Central Excise Registered factory. According to the Tribunal, the word 'premises' as mentioned in the Notification was wide enough to cover the entire stretch where the pipelines were installed. It, in this regard, also noted that the assessee-appellant had the right to way of the entire land on which the pipelines were installed, and that DGFT had accepted the position and granted EODC to the assessee.

The plant was an integrated facility, consisting of a beneficiation plant at Barbil, Odisha and a pellet-making facility at Jajpur, Odisha. The pipeline was being used to transport iron ore concentrate in slurry form from one plant to another and to carry water from the nearby river to the beneficiation plant as also to carry 'tailings' (i.e. iron ore waste) to a nearby tailings dam. [*Brahmani River Pellets Limited* v. *Commissioner* – 2023 VIL 342 CESTAT KOL CU]

Drawback is required to be refunded on written-off unrealised export invoices – RBI Circular dated 12 March 2013 not affects exporters obligation in enactments other than FEMA

The Delhi High Court has rejected the plea of the assessee-exporter that write-off of unrealised bills in terms of the RBI Circular dated 12 March 2013 (RBI AP (DIR Series) Circular No. 88) also absolved them (the assessee) from refunding the duty drawback availed by them on exports. According to the Court, any amount written off in terms of the Circular, which liberalized the procedure for writing-off the amounts receivable by the exporters in respect of the export shipments, would not be considered as non-compliant with the provisions of FEMA, but, the same did not affect the exporter's obligations under other enactments. The High Court was of the view that it is erroneous to contend that the second proviso to Section 75 of the Customs Act, 1962 is

inapplicable in cases where write-off is permissible under FEMA. Further, the Court in this case also observed that Rule 16A(5) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 was not applicable as the three conditions stated thereunder were not stated to be met. [*Rangoli International Pvt. Ltd.* v. *Union of India* – 2023 TIOL 492 HC DEL CUS]

No reassessment permissible after goods cleared for home consumption

The CESTAT New Delhi has held that the Deputy Commissioner has no jurisdiction to review its own order and reassess the bill of entry once again after the goods are cleared for home consumption on payment of duty. The Tribunal in this regard observed that once an order permitting clearance of imported goods for home consumption is issued, they cease to be imported goods and dutiable goods, and hence the question of determining the dutiability or the amount of duty, etc. under Section 17 of the Customs Act, 1962, i.e., assessment or re-assessment, ends. According to the Tribunal, if this limitation was not there in Section 17 read with Section 2(2), 2(14) and 2(25), 'the proper officer' can re-open and re-assess duty in any Bill of Entry anytime and Sections 28 and to some extent, Section 129 would have become otiose. [*Samyak Metals Pvt. Ltd.* v. *Commissioner* – 2023 VIL 335 CESTAT DEL CU]

Central Excise, Service Tax and VAT

Ratio decidendi

- No service tax on hostel fees – Hostel services and education services are naturally bundled in the ordinary course of business of education services – CESTAT New Delhi
- Credit note issued to dealer in consideration of replacement of defective part under warranty is exigible to sales tax – Supreme Court
- Demand – Extended period – Suppression of facts must be wilful and with intention to evade, even when expression 'wilful' absent before words 'suppression of facts' – CESTAT Delhi
- User Development Fee collected by airports is a statutory levy even if not deposited in government treasury – Supreme Court
- Batteries specifically designed for use in solar power generating system qualify as non-renewable energy device – CESTAT Kolkata
- Fertilizer or plant growth regulator – Mere presence of micronutrients does not make a product a plant growth regulator – CESTAT Mumbai

Ratio decidendi

No service tax on hostel fees – Hostel services and education services are naturally bundled in the ordinary course of business of education services

Observing that hostel facility could not be provided without the provision of education services by a boarding school, the CESTAT New Delhi has held that hostel services and education services provided by a boarding school are naturally bundled in the ordinary course of business. The Tribunal was also of the view that education service was the service which gave the essential character to such bundled service. Setting aside the service tax demand on hostel fees received by the assessee from the students, the Tribunal also noted that students who were not receiving education services could not also avail hostel services. It was hence of the view that there was a nexus between the two services. CBIC Press Release dated 13 July 2017 (issued in the GST era), relating to exemption to services of lodging/boarding in hostels provided by specified educational institutions, was also noted by the Tribunal. [*Mody Education Foundation* v. *Commissioner* – 2023 VIL 421 CESTAT DEL ST]

Credit note issued to dealer in consideration of replacement of defective part under warranty is exigible to sales tax

A Larger Bench (3-Judge Bench) of the Supreme Court has held that a credit note issued by a manufacturer to a dealer of automobiles in consideration of the replacement of a defective part in the automobile sold pursuant to a warranty agreement, being collateral to the sale of the automobile, is exigible to sales tax. The Apex Court in this regard noted that when the dealer replaces the defective part, under a warranty agreement, from his own stock (or is purchased by the dealer from the open market), the dealer is recompensated by the manufacturer in the form of a credit note, which is a 'valuable consideration' within the meaning of the definition of 'sale' under both, Central Sales Tax Act as well as the State enactments. According to the Court, merely because the dealer is acting as an intermediary or on behalf of the manufacturer pursuant to a warranty and receives a recompense in the form of a credit note, the same cannot escape liability of tax under the Sales Tax Acts. The Court held that the person who pays the valuable consideration in a sale transaction is irrelevant so long as it is paid.

It may be noted that though the Supreme Court's earlier decision in the case of *Mohd. Ekram Khan* was upheld by the Larger Bench of the Court here, the 3-Judge Bench also held that judgment in *Mohd. Ekram Khan* does not apply to a case where the dealer has simply received a spare part from the manufacturer of the automobile so as to replace a defective part therein under a warranty collateral to the sale of the automobile. [*Tata Motors* v. *Deputy Commissioner* – Judgement dated 15 May 2023 in Civil Appeal No. 1822/2007 and Others, Supreme Court]

Demand – Extended period – Suppression of facts must be wilful and with intention to evade, even when expression 'wilful' absent before words 'suppression of facts'

Deciding on the question as to whether in the absence of the expression 'wilful' before 'suppression of facts' under Section 73(1) of the Finance Act, 1994, suppression of facts has still to be wilful and with an intent to evade payment of service tax, the CESTAT Delhi has found merit in the assessee's contention that mere suppression of fact is not enough for invoking extended period of limitation. According to the Tribunal, it has also to be conclusively established that suppression was wilful with an intent to evade payment of service tax. The CESTAT, in this regard, relied upon various Supreme Court decisions relating to Section 11A of the Central Excise Act, 1944, and decisions of other forums. [*Hospitech Management Consultants Pvt. Ltd.* v. *Commissioner* – 2023 VIL 422 CESTAT DEL ST]

User Development Fee collected by airports is a statutory levy even if not deposited in government treasury

The Supreme Court has held that service tax is not leviable on user development fee levied and collected by the airport operation, maintenance and development entities. The Court in this regard observed that neither the fact that the amount is not deposited in a government treasury, per se, nor that it is discretionary in nature (it may not be necessarily levied always), render it any less a statutory levy or compulsory extraction. Dismissing the Revenue's appeal against the CESTAT decision, the Apex Court also observed that the public nature of these funds does not in any manner get undermined, merely because they are kept in an escrow account, and their utilization is monitored separately. [*Central GST, Delhi-III* v. *Delhi International Airport Ltd.* – 2023 TIOL 68 SC ST]

Batteries specifically designed for use in solar power generating system qualify as non-renewable energy device

The CESTAT Kolkata has held that 'Tubular Plate Lead Acid Batteries', specifically designed for use in solar photovoltaic modules/ system, to store the electricity generated by solar cells and are an integral part of the photovoltaic module (Solar Power Generating System), are eligible for the benefit of exemption Notification 6/2002-C.E. (Entry 10 and 21 of List 9). The Tribunal in this regard also reiterated that just because the fully finished

system came into existence only at the site, the benefit of exemption available to the system cannot be denied to the 'parts', which are an integral part of the system. The Department had denied the exemption contending that the batteries were compatible for multipurpose application and that the assessee was not manufacturing solar power generating systems in the factory. The assessee had submitted that as the batteries were essential component of the solar power generating system, they would quality as 'non-renewable energy device' per se, which is eligible for exemption. [*Racily Udyog* v. *Commissioner* - Final Order No. 75216-75217/2023, dated 31 March 2023, CESTAT Kolkata]

Fertilizer or plant growth regulator – Mere presence of micronutrients does not make a product a plant growth regulator

The CESTAT Mumbai has held that merely presence of micronutrients in the concerned products does not make them plant growth regulator. The dispute involved was whether Zymegold Plus and Dripzyme are classifiable under Heading 3808 as 'Plant Growth Regulator' as reclassified by the Department or under Heading 3101 as 'Fertilizer', as claimed by the assessee. Allowing assessee's appeal, the Tribunal observed that there is a difference between fertilizer and plant growth regulator. Relying on various precedents, it observed that a fertilizer will promote growth of the plant by providing nutritional support and will not inhibit it, whereas a plant growth regulator stimulates plant growth without providing any nutrition to the plants. According to the Tribunal, a plant growth regulator is like a tonic which promotes/inhibits the growth by affecting the structure at the physiological level. Further, Department's reliance on definition of 'fertilizer' as provided in Fertilizer Control Order, 1985, for changing the classification, was rejected by the Tribunal while it observed that the definition provided in other statutes, totally unrelated to statute in issue, cannot be made the basis for changing the classification. [*Godrej Agrovet Ltd.* v. *Commissioner* – 2023 VIL 385 CESTAT MUM CE]

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