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An e-newsletter from
Lakshmikumaran & Sridharan, India

September 2021 / Issue – 123

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Article

Asset distribution on retirement of partners – A transaction with multiple GST issues

By **Arushi Jain**

The retirement of partners from the partnership firms is a universal phenomenon. Further, it is not an aberrant practice for partnership firms to distribute assets to its partners at the time of retirement. However, with issues cropping up in the GST law, such distribution of assets to the retiring partners is an area of concern.

It is common knowledge that GST is chargeable on supply of goods or services. As per Section 7(1)(a) of the CGST Act, 'supply' covers all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. The bone of contention here is whether the assets distributed by a firm to its retiring partners will come within the purview of 'supply' or not.

In order to analyse this issue, it is crucial to first comprehend the relationship between a partner and partnership firm. Every partner brings in his contribution to the capital of the firm at the time of admission to a partnership and thereby gets entitled to receive share in the profits of the firm. Under the Indian Partnership Act, 1932, the partners are collectively called a firm. The firm as such has no separate rights of its own in the partnership assets. It is the partners who jointly own the assets of the partnership.

It is due to this relationship that at the time of retirement of a partner, the capital contribution brought in by the retiring partner, as increased by his respective share in the profits of the firm, is given back by the firm. This can either be in the form of cash or non-monetary assets.

In the context of income tax, the Supreme Court in *Dewas Cine Corporation* analysed the transaction of distribution of assets to partners on dissolution of partnership and held that the same amounts to mere adjustment of rights of partners in the partnership assets. It is neither sale or transfer nor it is for a price.

In respect of the *erstwhile* VAT law, the Madhya Pradesh High Court in *Khurana and Co.* held that the transfer of property to retiring partner in satisfaction of his claim to his share cannot be considered as a sale or transfer. Similarly, the Bombay High Court in *Synthetic Suppliers* held that all partners are entitled for their respective shares in the property of partnership. Therefore, there cannot be a sale between the partners since, the same is distribution of their own property.

From the aforesaid decisions, the ratio that emanates is distribution of assets to a retiring partner is only in the nature of an adjustment of his share in the assets of the firm. Further, such adjustment is not being carried out by the firm against receipt of any payment. Thus, on the basis of these decisions, it is possible to argue that as long as a retiring partner is given assets in proportion to his share in the assets of the firm, the transaction will not be brought within the confines of Section 7(1)(a). However, a contra argument can be that the distribution of assets by

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the firm is towards consideration of giving up of rights by the retiring partner.

The complexity further increases in case where the retiring partners are being distributed assets in excess of their share in the assets of the firm. A similar issue had come up before the Tamil Nadu Authority for Advance Ruling in the case of *Shiv Sankara Health Care Enterprises* [2021 (4) TMI 838]. The question raised before the Authority was whether the amount paid towards goodwill to the retiring partners will be leviable to GST or not. This question could not be examined by the Authority due to withdrawal of the application. However, the Authority took cognizance of the question and noted that the taxability can only be determined after analysing the details as to how the goodwill was arrived at.

Another intricacy that is involved here relates to Section 7(1)(c) of the CGST Act which deems transactions specified in Schedule I as 'supply' even without consideration. One of the transactions covered under Schedule I is permanent transfer or disposal of business assets where input tax credit has been availed.

The term 'disposal' was interpreted by Punjab and Haryana High Court in the case of *Goodyear India Limited* as forsaking of title as well as control and possession of the goods. It thereby appears that once the partnership firm permanently parts away with an asset on which it had availed credit, the same can fall within the four corners of Schedule I read with Section 7(1)(c).

The dispute however does not end here. The Finance Act, 2021 has inserted clause (aa) under Section 7(1) retrospectively w.e.f. 1 July 2017. As per this clause, the activities or transactions, by a person, other than an individual, to its members or constituents or *vice-versa*, for cash, deferred payment or other valuable consideration have been included within the meaning of the term 'supply'. The issue that surfaces here is whether the transactions between a firm and its retiring partners will get covered under the said clause. Even though the aforesaid amendment is yet to be notified, it still remains a point worth pondering.

Considering the numerous issues originating from a single transaction of distribution of assets to the retiring partners, the possibility of the Department raising disputes cannot be denied. Hence, it becomes essential to take stock of such type of transactions and decide a further course of action.

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Goods and Services Tax (GST)

Notifications and Circulars

Refund under CGST Section 77 or IGST Section 19 when nature of tax paid is wrong: The CBIC has clarified the scope of the words 'subsequently held' appearing in Section 77 of the CGST Act, 2017 and Section 19 of the IGST Act, 2017 which deal with refund of tax wrongfully collected and paid to the Central Government or the State Government. As per Circular No.

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162/18/2021-GST, dated 25 September 2021, the term 'subsequently held' covers both the cases where the inter-State or intra-State supply made by a taxpayer, is either subsequently found by the taxpayer himself as intra-State or inter-State respectively or where the same is subsequently found/ held by the tax officer in any proceeding. The Circular also clarifies that such refund would not be available where the taxpayer has made tax adjustment through credit note.

Further, sub-rule (1A) has been inserted in Rule 89 of the CGST Rules, 2017 by the Central Goods and Services Tax (Eighth Amendment) Rules, 2021 on 24 September 2021, to prescribe the manner and conditions for such refund under Section 77/19. Accordingly, refund can be claimed within two years from the date of payment of tax under the correct head. It may be noted that in a benevolent move, the new sub-rule also states that in case the taxpayer has made the payment in the correct head before the date of issuance of Notification No.35/2021-Central Tax, dated 24 September 2021, the refund application can be filed within two years from the date of issuance of the said notification, i.e. from 24 September 2021.

Intermediary services – Scope clarified: The CBIC has clarified on the scope of 'intermediary services' as defined under Section 2(13) of the IGST Act, 2017. Circular No. 159/15/2021-GST, dated 20 September in this regard clarifies many issues with the help of various illustrations. It takes note of the primary requirements, namely, minimum of three parties, two distinct supplies, intermediary having character of broker, agent or any other similar person (supportive role) and non-inclusion of person who supplies 'such' goods/services, etc., on own account. It is also clarified that sub-contracting for a service is not an intermediary service. The Circular also notes that specific provision of place of supply of 'intermediary services' under Section 13 of the IGST Act should be invoked only when either the location of supplier of intermediary services or location of the recipient of intermediary services is outside India.

Services to foreign related company covered as exports: Supply of services by a subsidiary/ sister concern/ group concern, etc. of a foreign company, incorporated in India under the Companies Act, 2013, to the establishments of the said foreign company located outside India is not barred by Section 2(6)(v) of the IGST Act 2017 for being considered as export of services. According to CBIC Circular No. 161/17/2021-GST, dated 20 September 2021, this supply would not be treated as supply between 'merely establishments of distinct persons' under Explanation 1 of Section 8 of IGST Act 2017. The Circular in this regard notes that a company incorporated in India and a foreign company (as per Companies Act, 2013) are separate persons under the CGST Act and thus are separate legal entities.

ITC on debit note issued prior to 1 January 2021 can be availed till filing of September 2021 GSTR-3B or furnishing of annual return for 2020-21: In a very benevolent clarification, the CBIC has stated that input tax credit availed after 1 January 2021 for debit note issued in FY 20-21 [even prior to 1 January 2021, i.e. before the amendment in Section 16(4)] is eligible till due date of furnishing of Form GSTR-3B for the month of September 2021 or furnishing of the annual return for FY 2020-21, whichever is earlier. It may be noted that w.e.f. 1 January 2021, in case of debit notes, the date of issuance of debit note (not the date of underlying invoice) determines the relevant financial year. Circular No. 160/16/2021-GST, dated 20 September 2021 has been issued for the purpose.

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Invoice physical copy not required in case of e-invoice: The CBIC has clarified that there is no need to carry the physical copy of tax invoice during movement of goods in cases where invoice has been generated under Rule 48(4) of the CGST Rules, i.e. e-invoice has been generated. According to Circular No. 160/16/2021-GST, dated 20 September 2021, production of the Quick Response (QR) code having an embedded Invoice Reference Number (IRN) electronically, for verification by the proper officer, would suffice.

Ratio decidendi

Inverted tax structure - Supreme Court urges GST Council to reconsider formula: The Supreme Court has strongly urged the GST Council to reconsider the formula relating to calculation of refund due to inverted duty structure and take a policy decision regarding the same. The Apex Court noted that the practical effect of the formula might result in certain inequities and anomalies. However, it rejected to read down the formula prescribed in Rule 89(5) of the Central Goods and Services Tax Rules, 2017 which excludes input tax credit on input services. It held that while interpreting the provisions of Section 54(3) of the Central Goods and Services Tax Act, 2017, it must give effect to its plain terms and cannot redraw legislative boundaries based on an ideal which the law was intended to pursue. It also observed that the realpolitik of tax policy and governance in the real world may not always match up to ideals. [*Union of India* v. *VKC Footsteps India Pvt. Ltd.* – Judgement dated 13 September 2021 in Civil Appeal No. 4810 of 2021 and Ors., Supreme Court]

Inverted tax structure – CBIC Circular No. 135 contrary to provisions of Section 54(3)(ii): The Gauhati High Court has held that CBIC Circular No. 135/05/2020-GST, dated 31 March 2020, clarifying that refunds will not be available in the event the inputs and output supplies are the same even though their tax rates are different, is in conflict and contrary to the provisions of Section 54(3)(ii) of CGST Act, 2017. The assessee engaged in trading activity had applied for such refund as its output supplies were subjected to partial exemption even though his input and output supplies were same. A show cause notice was issued rejecting the refund claim, mentioning that assessee had mis-declared the amount of total turnover in RFD-01. The High Court while holding the Circular in conflict with Section 54(3)(ii), remanded the matter back to the Assistant Commissioner to decide whether the inverted tax structure applies in the instant case. [*BMG Informatics Pvt. Ltd & Ors.* v. *Union of India* – 2021 VIL 650 GAU]

Interest when amount to be re-credited in electronic credit ledger delayed after issuance of GST PMT-03: In this case Form GST PMT-03 was issued 3 years back for re-credit of the amount to electronic credit ledger on account of rejection of refund claim. The principal amount was credited during the pendency of this writ petition and the petitioner sought for statutory interest accruing on delayed re-credit of the principal amount. Observing that there was no reasonable explanation offered by the department, the Court was of the view that the petitioner cannot be made to suffer on account of laches on the part of the department. The petitioner was directed to lodge a claim of statutory interest for the period from issuance of Form GST PMT-03 till re-credit. [*Prakash Mica Exports Private Limited* v. *The State of Jharkhand & Ors.* – 2021 VIL 600 JHR]

No provisional attachment after passing Order in Form DRC-07: The Gujarat High Court has answered in negative the question as to whether after passing order in Form GST DRC-07 the departmental authority can pass an order

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of provisional attachment of property under Section 83 of the CGST Act. Observing that recovery of any debts, interest or penalty by way of revenue measures under Section 79(3) of the CGST Act was like recovery under the Bombay Land Revenue Code which was permissible only after proper attachment of any property of the assessee, the High Court held that the said attachment has nothing to do with the provisional attachment under Section 83. [*Mahavir Enterprise* v. *State of Gujarat* – Oral Order dated 2 September 2021 in R/Special Civil Application No. 9586 of 2020, Gujarat High Court

Input tax credit blocked under Rule 86A can be utilized after expiry of one year: The Tripura High Court has held that restrictions imposed under Rule 86A of the CGST Rules, 2017 on the use of credit available in electronic credit ledger is a temporary measure for the period not exceeding one year. It was of the view that there is no scope of extension of this time and that upon expiry of a period of one year the effect of the restriction seizing to take effect would be automatic. The Court however stated if department wants to permanently disallow such credit, it must first pass an adjudication order to this effect. The petitioner had challenged the validity of blocking the credit in electronic credit ledger under Rule 86A after the expiry of one year from the date of attachment of ledger. [*Sahil Enterprises* v. *Union of India* – 2021 VIL 665 TRI]

Refund claim arising from appeal order not deniable after acknowledgment in RFD-02: In a case where the refund had arisen on the strength of an appeal order and where upon scrutiny of the online refund claim, the acknowledgment in Form GST-RFD-02 was issued by the department, the Allahabad High Court has held that the revenue authorities cannot decline the refund on the reasoning or excuse of the application being incomplete. The Court was of the view that while rejecting such claims, the authorities are forcing the assessee to litigate and also defeating the claim of interest that is otherwise due on account of delay. [*Manoj Handlooms Pvt. Ltd.* v. *Union of India* – 2021 VIL 659 ALH]

Jurisdiction of Central authorities to issue summons under Section 70 when assessee under State authority: In a case where the State authority had conducted the search and seizure operations, summons had been issued and order of provisional attachment had been passed, the Madras High Court has rejected the contention of the assessee that the central revenue authorities cannot initiate any action and issue summons under Section 70 of the CGST Act. The Court was of the view that such summons were not barred under Section 6(2)(b) of the CGST Act in as much as the scope of Section 6(2)(b) and Section 70 was different and distinct. It noted that while the former dealt with any 'proceedings on a subject matter/same subject matter' whereas, Section 70 dealt with power to summon in an inquiry. The High Court held that the words 'proceedings' and 'inquiry' cannot be mixed up. [*Kuppan Gounder P G Natarajan* v. *DG GST Intelligence* – 2021 TIOL 1835 HC MAD GST]

R&D activity for foreign entity on samples provided by latter is not exports: In a case where the applicant was carrying out R&D activities on the product samples/goods sent by the foreign entities for R&D purposes, and submitted a detailed report to the foreign entities, the Gujarat AAR has held that the services provided by the applicant shall be covered under Section 13(3)(a) of the IGST Act, 2017. The Authority was hence of the view that the place of supply of the said services shall be the location where the services actually performed, that is, Gujarat. Applying the requirements under Section 2(6) of the IGST Act, 2017, the authority held that the R&D activity undertaken by the applicant was

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not export of services. It further held that since the location of the supplier and the place of supply of services were in the same State, it shall be treated as intra-state supply liable to CGST and SGST. [In RE: *Hilti Manufacturing India Pvt. Ltd.* – 2021 VIL 321 AAR]

Part of canteen charges collected by employer from employees and paid to service provider, not liable to GST: The Gujarat AAR has held that GST shall not be liable to be levied on the amount representing the employees' portion of canteen charges collected by the applicant and paid to the canteen service provider. The applicant had arranged a canteen for its employees, which was run by a third-party canteen service provider. As per the agreement, part of the canteen charges was borne by the applicant and the remaining part was borne by its employees. The said employees' portion of canteen charges was collected by the applicant and paid to the canteen service provider. The applicant did not retain any profit margin in the activity of collecting employees' portion of canteen charges. Observing that since the applicant was carrying out the said activity without consideration, the AAR held the said activity as not liable to GST. [In RE: *Dishman Carbogen Amcis Ltd.* – 2021 VIL 334 AAR]

Composite supply – Merely common agreement not makes a supply of bundled services: The Maharashtra AAR has held that other services like electric meter installation and security deposit for meter, advance maintenance, club-house maintenance, development charges, and infrastructure charges collected from the clients to whom residential construction service was also provided, are not naturally bundled with the construction service. The Authority was of the view that merely because the agreement was common it will not make it a supply of bundled services. It also noted that the applicant had not treated these other charges as a part of supply of main construction service, for payment of Stamp duty. [In RE: *Puranik Builders Ltd.* – 2021 VIL 342 AAR]

Transfer of going concern – Sale not the only criteria under Notification No. 12/2017-CT (R): The Gujarat AAR has held that to effect transfer of going concern, sale is not the only criteria and that transfer simpliciter, *vide* subject business arrangement, is valid enough. Nothing that the wording used in Notification No. 12/2017-CT (R) was transfer of business and not sale of business, it observed that transfer of business may be by way of sale, gift, lease, leave and license, hire or in any other manner whatsoever. It also held that transfer of business may be as a whole or independent part. The Authority also did not find any merit in drawing any parallel between the 'Transfer of Business' which was the subject matter and 'Transfer of Business Assets' as mentioned in Schedule II(4) of the CGST Act, 2017. [In RE: *Airport Authority of India* – 2021 VIL 349 AAR]

ITC not available on inputs/input services used for CSR activities: The Gujarat AAR has held that Input Tax Credit (ITC) is not available on inputs and input services used in the provision of CSR activities by an assessee. The Authority observed that while as per Companies (CSR Policy) Rules, 2014, CSR activities are not activities undertaken in pursuance of applicant's normal course of business, according to Section 16(1) of the CGST Act, 2017, credit is available only on inputs/input services used or intended to be used in the course or furtherance of business. It was hence held that Section 16(1) of the CGST Act bars CSR activities from credit on inputs/input services. [In RE: *Adama India Private Limited* – 2021 VIL 355 AAR]

ITC not available inputs/input services used in expired cakes and pastries: Holding that the act of throwing away expired cakes and pastries was akin to destroying of expired food products,

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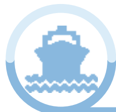
the Gujarat AAR has held that the expired cakes and pastries were covered under the non-obstante clause (h) of Section 17(5) of the CGST Act. The Authority was hence of the view that input tax credit on inputs and input services used in manufacturing cakes and pastries which expired was not admissible and was thus required to be reversed. The AAR also noted that Section 7 of Prevention of Food and Alteration Act, 1954 prohibited the sale of expired goods not fit for consumption and Section 273 Indian Penal Code criminalized the act of sale of harmful perishable food products. [In RE: *Kanayalal Pahilajrai Balwani (Siddharth Foods)* – 2021 VIL 347 AAR]



Customs

Notifications and Circulars

RoDTEP – Manner to issue duty credit notified – CBIC also notifies Electronic Duty Credit Ledger Regulations, 2021: The Central Board of Indirect Taxes and Customs (CBIC) has notified the manner to issue duty credit for goods exported under the Scheme for Remission of Duties and Taxes on Exported Products (RoDTEP) and the Electronic Duty Credit Ledger Regulations, 2021. The Regulations prescribe procedures for issuance of duty credit scrip, creation and registration of scrip, use, validity, transfer and suspension of the scrip. The Notification prescribing conditions for the duty credit also states the procedure for cancellation of duty credit and recovery of amount of duty credit. Notifications Nos. 75 and 76/2021-Cus. (N.T.), both dated 23 September 2021 have been issued for the purpose.

RoSCTL – Manner to issue duty credit notified: The CBIC has similarly issued a notification No. 77/2021-Cus. (N.T.), dated 24 September 2021 for the Rebate of State and Central Taxes and Levies (RoSCTL) scheme against exports of garments and made-ups. This scheme is also applicable in respect of exports made from 1 January 2021. Rates and cap are as listed in Schedules 1, 2, 3 and 4 to the Notification No. 14/26/2016-IT (Vol.II), dated the 8 March 2019 issued by Ministry of Textiles.

Service Exports from India Scheme (SEIS) for service exported in 2019-20 notified: The Directorate General of Foreign Trade (DGFT) has notified the list of eligible services and the rates under SEIS for services exported in the financial year 2019-20. It may be noted that the benefit is capped at INR 5 crore per IEC. The deadline for submission of online applications for the benefit is 31 December 2021. As per new Para 3.10B of the Foreign Trade Policy, provision of late cut shall not apply for SEIS applications for the above-mentioned period and such applications will get time-barred after 31 December 2021. Notification No. 29/2015-20, dated 23 September 2021 has been issued for the purpose.

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Duty credit scrips – Validity period and last date for submitting applications revised: The last date for submitting applications under MEIS, SEIS, ROSCTL, ROSL and 2% additional *ad hoc* incentive (under Para 3.25 of FTP) is now 31 December 2021. DGFT Notification No. 26/2015-20, dated 16 September 2021 amends Chapter 3 of the Foreign Trade Policy for this purpose. It may be noted that late cut as notified in the notification will also apply in certain cases of MEIS and SEIS. Further, the validity of any scrip issued under Chapter 3 and 4 of the Foreign Trade Policy after this Notification will be 12 months from the date of issue.

EPCG scheme – Relief in Average Export Obligation for 2019-20 and 2020-21 notified: The Para 5.19 of HBP 2015-20 provides relief to exporters of those sectors where total exports in that sector/product group has declined by more than 5% as compared to previous year. The DGFT Circular 37/2015-20, dated 10 September 2021 now provides lists of product groups and the percentage decline in exports during 2019-20 as compared to 2018-19 and during 2020-21 as compared to 2019-20. The Average Export Obligation for the year may be reduced proportionate to reduction in exports of that particular sector/ product group during the relevant year as against the previous year. As per the Circular, the relief should be taken into consideration prior to issuance of demand notice, and EODC and should also be part of check-sheet for EODC.

IEC – Deactivation of non-updated IECs on 6 October: As per DGFT Trade Notice No. 18/2020-21, dated 20 September 2021, all IECs which have not been updated after 1 January 2005 will be de-activated with effect from 6 October 2021 if the same are not updated till 5 October. The Trade Notice however states that any IEC where an online updation application has been submitted but is pending with the DGFT RA for approval shall be excluded from the de-activation list. It may be noted that the as per the Trade Notice, the de-activated IEC can be updated after 6 October also and upon successful updation the given IEC will be re-activated.

Aircraft and helicopter imports by Aircraft Leasing Entities in IFSC permitted: The Ministry of Commerce has revised the Policy Conditions for import of aircrafts and helicopters, including the second-hand ones. Effectively, Aircraft Leasing Entities in International Financial Services Centres can now import aircrafts and helicopters without an import licence from the DGFT. As per Notification No. 21/2015-20, dated 31 August 2021, amending Policy Condition No. 1 of Chapter 88 of ITC (HS) 2017, the change is in line with the revised Air Transport Circular 02/2017 issued by the Directorate General of Civil Aviation. Additionally, the notification also removes the requirement of permission by Ministry of Civil Aviation for imports of aircrafts or helicopters for undertaking scheduled/ scheduled commuter/ non-scheduled air transport services or aerial work operations.

India-Mauritius CECPA – Tariff Rate Quota and procedure for import notified: The DGFT has notified list of items under Tariff Rate Quota (TRQ) as Annexure III to Appendix 2A in accordance with Table 4 of Notification No. 25/2021-Cus dealing with India-Mauritius Comprehensive Economic Cooperation and Partnership Agreement. Additionally, procedural conditions have also been laid down in the Public Notice No. 23/2015-20, dated 7 September 2021. Further, as per Public Notice No. 24/2015-20, dated 17 September 2021, the DGFT has invited applications for allocation of TRQ for the year 2021-22. The last date for filing application is 31 October 2021.

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Mercury imports and exports now restricted: Import and Export policies of Mercury, classifiable under HS Code 28054000, have been revised from 'Free' to 'Restricted'. Both imports and exports will now be subject to Prior Informed Consent from Ministry of Environment, Forest and Climate Change (MOEF & CC). DGFT Notifications Nos. 24/2015-20, dated 9 September 2021 (for imports) and 31/2015-20, dated 23 September 2021 (for exports) have been issued for the purpose.

Palm Oil, Soya Oil, and Sunflower Oil – BCD revised: Rate of Basic Customs Duty (BCD) has been reduced on Crude Palm Oil (1511 1000) to 2.5%; Crude Soya Oil (1507 1000) to 2.5%; Refined Soya Oil (1507 9010) to 32.5%; Palm Oil other than Crude Palm Oil (1511 90) to 32.5%; Crude Sunflower Oil (1512 1110) to 2.5%; and Refined Sunflower Oil (1512 1910) to 32.5%. Further, as per Notification No. 42/2021-Cus., dated 10 September, which is effective from 11 September, the rate of Agriculture and Infrastructure Development Cess (AIDC) on import of crude palm oil has been revised from 17.5% to 20%.

Ratio decidendi

Re-classification by department for subsequent period not permissible: The CESTAT Chennai has held that where the classification adopted by the Appellant under Tariff Item 4911 99 90 was accepted by the department previously and proceedings were dropped, the department cannot allege misclassification for import of same goods made during subsequent period. Further, considering Appellant's contention that entire proceedings were vitiated as SCN was issued by the DRI, the Tribunal set aside the impugned order and allowed the appeal. [*Hi-Tec Corporation* v. *Commissioner* – 2021 TIOL 544 CESTAT MAD]

ADG, DRI is not the proper officer to issue show cause notice under Section 28(4) of Customs Act: In a department's appeal filed before it, the Supreme Court, relying on its recent *Canon India* judgment, has dismissed the appeal holding that in the present case also the SCN was issued by ADG, DRI who was not a proper officer within the meaning of Section 28(4) read with Section 2(34) of the Customs Act, 1962. [*Commissioner* v. *Agarwal Metals and Alloys* – Order dated 31 August 2021 in Civil Appeal No. 3411 of 2020, Supreme Court]

Refund when reassessment absent – Assessee can get bills of entry amended/ corrected under Section 149 or Section 154: Relying upon the judgment of Bombay High Court in *Dimension Data India Pvt. Ltd.* [2021 (1) TMI 1042 – Bombay High Court] and the Telangana High Court decision in *Sony India Pvt Ltd.* [2021 (8) TMI 622 – Telangana High Court], the CESTAT Delhi has held that modification of bill of entry is not only restricted to Section 128. It held that the respondent-assessee can take recourse to appropriate proceedings, including the provisions of Section 149 and 154 of the Customs Act for amendment/ correction purposes. The assessee's refund was earlier denied by the Department relying upon the Supreme Court decision the case of *ITC*, which stated that reassessment is mandatory for refund. The Tribunal directed that if the assessee makes an application for amendment of bill of entry under Section 149, the same should be adjudicated expeditiously. [*Principal Commissioner* v. *Vivo Mobile India Pvt. Ltd.* - 2021 (9) TMI 646 CESTAT New Delhi]

Refund – Section 27 of Customs Act not applicable for refund of Extra Duty Deposit: The CESTAT Chennai has held that Extra Duty

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Deposit (EDD) made during SVB investigation, cannot be considered as 'duty' for the purpose of Customs Act, 1962. The Tribunal was hence of the view that the provision for refund given under Section 27 of Customs Act, 1962 is inapplicable against EDD deposited. It also held that refund of EDD must be made automatically upon the conclusion of final assessment and that there is no requirement for application. [*Tenneco Automotive India Pvt. Ltd.* v. *Commissioner* – 2021 VIL 386 CESTAT CHE CU]

Redetermination of value for additional duty based on retail sale price: The CESTAT Mumbai has held that recourse to Rules of Customs valuation framed under Section 14 of the Customs Act, 1962 is precluded in respect of value for the purpose of proviso to Section 3(2) of Customs Tariff Act. The Tribunal was of the view that the sanctity of 'declared' 'retail selling price' was protected from being re-determined. It held that the adoption of 'retail selling price' of other re-sellers before the goods were cleared for home consumption on the presumption that the importer intended to enhance the 'retail selling price' at the point of sale was a misdirection. [*D S Chandok & Sons* v. *Commissioner* – 2021 VIL 442 CESTAT MUM CU]

Cash refund permissible of duty paid using MEIS scrips: The CESTAT Delhi has answered in affirmative the question as to whether the duty paid by the importer by using MEIS scripts can be refunded in cash. Relying upon various precedents in respect of refund of duty paid through DEPB scrips, the Tribunal observed that duty payment made by using MEIS scripts is same as payment made in cash. It also noted that the Department's plea was miserably silent about reason for which the DEPB scrips should be considered as different from MEIS scrips as far as the issue of refund of amount lying credited vide those scrips was concerned. [*Jaideep Ispat & Alloys Pvt. Ltd.* v. *Commissioner* – 2021 VIL 467 CESTAT DEL CU]

Multi-functional devices – Compulsory Registration Order 2012 prescribing standards for import of goods, is beyond scope of BIS Act 1986 and BIS Rules 1987: The CESTAT Chennai has held that Electronics and Information Technology Goods (Requirement for Compulsory Registration) Order 2012 (CRO 2012) has, in clause (3), gone beyond the scope of the BIS Act, 1986 and the BIS Rules, 1987 in prescribing a standard for import of goods and in prohibiting import of goods which did not meet the standards. The Tribunal noted that just like BIS Act, BIS Rules did not provide for regulating or prohibiting import of goods. The Tribunal hence expressed doubt as to whether the CRO 2012 was legally sustainable. Further, noting that the said CRO 2012 not covered multi-functional devices, the Tribunal rejected the contention of the Department that the said goods were covered under printers/plotters (as per Meity Circular). [*Commissioner* v. *S.P. Associates* – 2021 VIL 446 CESTAT CHE CU]

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Central Excise, Service Tax and VAT

Ratio decidendi

No service tax under C&F Agent service on profits from trading in ocean freight, and under Steamer Agent service on amount received from agent of shipping line: The CESTAT Bengaluru has held that service tax is not leviable under the head of 'Clearing and Forwarding Agency Service' on the difference between the amounts charged by the assessee from its clients towards ocean freight and the amounts paid by it to the shipping line towards such freight. The Tribunal was of the view that the profits gained by buying space on ships at lower price and selling at a higher price to the customers cannot by any stretch of imagination be called 'Clearing and Forwarding Agent Service'. It observed that the arrangement was that of a trader who enjoyed the margin as profit. Allowing the assessee's appeal, the Tribunal also noted that there were situations where the assessee had booked the space for higher amount but due to market conditions, had to sell the space at a lower price incurring loss. The demand under Steamer Agent service on the amount received from the agents of the shipping line for booking cargos, was also set aside observing that the service if any was provided to the agent/broker and not to the shipping line. [*Direct Logistics India Pvt. Ltd.* v. *Commissioner* - Final Order No. 20731-20735/2021, dated 1 September 2021, CESTAT Bengaluru]

TDS deducted after grossing up, while making payment to foreign service provider not includible for service tax: The CESTAT Chennai has held that TDS (under Income-tax) deducted while making payment to the foreign service provider is not includible in the value of services for payment of service tax by the assessee under reverse charge mechanism. Noting that the assessee had grossed up the TDS as under Section 195A of the Income-tax Act, 1961 and complied with the statutory obligation, the Tribunal held that the situation would be different if the TDS is deducted from the actual consideration. [*T.V.S. Motor Company Limited* v. *Commissioner* – 2021 VIL 412 CESTAT CHE ST]

Cenvat credit available on event management services for organising skill competition among dealers and employees and for Vishwakarma Puja, etc.: The CESTAT Chandigarh has allowed Cenvat credit on event management services procured by the assessee to organise skill competition between dealers and employees and other business events like Vishwakarma Puja, inauguration of production line etc. Observing that during skill competition the employees showed how they increased the production while the dealers showed as to how they improved the sales, the Tribunal held that service was an integral part of manufacturing as well as sale activity and hence would qualify as input service. Similarly, in respect of other business events the CESTAT was of the view that the two pujas (Vishwakarma Puja and puja done at time of inauguration of production line) were also integral part of the manufacturing activity. [*Maruti Suzuki Ltd.* v. *Commissioner* – 2021 TIOL 568 CESTAT CHD]

Sabka Vishwas (LDR) Scheme – Litigation category – Filing of appeal and not it numbering before the cut-off date important: The Madras High Court has rejected the contention of the Revenue department that until the appeal is numbered and it is pending adjudication before any appellate forum like the CESTAT, the assessee cannot be an eligible person to be categorised under the litigation

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category. In a case where the assessee had filed an appeal 10 days prior to the cut-off date, the Court held that in the eye of law, there was a litigation by way of appeal which was filed and was pending before the appellate forum. Holding that whether the appeal filed would be subsequently numbered or not was not the criteria as per Section 124 or 125, the Court also noted that only the categories exclusively given in Clauses (a) to (h) of Section 125(1) alone shall be excluded. The Department had treated the assessee under the arrear category. [*R. Shanmugam Pillai & Sons* v. *Designated Committee* – 2021 VIL 643 MAD CE]

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