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Article

RoDTEP Scheme – Should it work within the budgetary limit?

By **D. Kalirajan**

The Central Government recently notified the much-awaited Remission of Duties and Taxes on Exported Products Scheme ('**RoDTEP Scheme**') with retrospective effect i.e., for exports from 1 January 2021, with certain exclusions. The RoDTEP Scheme has been notified under Chapter 4 of the Foreign Trade Policy 2015-20 ('**FTP**') which deals with the Duty Exemption/Remission Schemes, like, Advance Authorisation Scheme, DFIA Scheme, etc. As per the scheme notification, the RoDTEP Scheme should be implemented within the overall budget for a year finalised by the Ministry of Finance ('**MoF**'). Whether imposition of such budget limit would allow the scheme to achieve its objective or would lead to unnecessary litigations and practical hurdles? This article endeavors to find answer to this question.

Objective of the scheme

As per Para 4.54 of the FTP, the objective of RoDTEP Scheme is to refund, currently unrefunded,

a. duties/ taxes / levies, at the Central, State and local level, borne on the exported product, including prior stage cumulative indirect taxes on goods and services used in the production of the exported product; and

b. such indirect duties/ taxes / levies in respect of distribution of exported product.

It is also provided under said para that the rebate under the RoDTEP Scheme shall not be available in respect of duties and taxes already exempted or remitted or credited.

Fixation of budgetary limit

The Central Government has also prescribed that the overall budget/outlay for the RoDTEP Scheme would be finalized by the MoF in consultation with Department of Commerce ('**DoC**') taking into account all relevant factors. The Scheme shall operate within a Budgetary framework for each financial year and necessary calibrations and revisions shall be made to the Scheme benefits, as and when required, so that the projected remissions for each financial year are managed within the approved Budget of the Scheme. The said aspect of working within Budgetary limit is prescribed as part of operating principle of RoDTEP Scheme.

The objective of RoDTEP Scheme is nothing but the policy of Indian Government that the domestic duties and taxes are not to be exported along with the goods. In case the fund allocated to the RoDTEP Scheme for a particular year is less than the actual duties and taxes suffered by the exporter, which is embedded in the export goods, they would be forced to export the duties and taxes along with the goods.

Though the objective of RoDTEP Scheme is to refund the duties and taxes which are not refunded/remitted/credited under any other schemes, the same cannot be optimally achieved in view of the budgetary limit fixed.

The RoDTEP Scheme empowers the Central Government to reduce the rate of RoDTEP within

a same financial year, in order to manage the disbursements within the approved Budget. This may lead to discriminatory treatment being meted to the equals. For instance, those who exported the goods during the initial part of the year may become entitled to avail more benefits than those exporting the very same products during later part of year, in view of the non-availability of funds for RoDTEP Scheme at a later point of time during the same year.

The MEIS Scheme was an export incentive scheme which was notified to incentivize and promote the export of goods. However, the RoDTEP Scheme is a duty remission scheme which merely refunds the duties and taxes suffered by the exported goods. Therefore, there should not be any budget limit for RoDTEP Scheme or capping the benefit.

The manner of arriving at the rate of RoDTEP for products of various sectors is similar to the way how the All Industry Rates (AIR) of duty drawback are determined, i.e., by calling industry-wise data by the Drawback committee and determination of AIR of Drawback. It may be noted that the Duty Drawback Scheme however recognizes that all the exporters under same sector may not suffer same amount of duties and taxes, and thus, there is a facility of claiming duty drawback at brand rate by those exporters who suffered more duties and taxes. The RoDTEP Scheme, being duty/tax remission scheme, also should recognize such principle and provide for fixation of exporter-specific rate of RoDTEP, like brand rate of duty drawback, to achieve the objective of RoDTEP Scheme.

Before parting…

Fixing the budgetary limit for RoDTEP Scheme may lead to reduction in rate of RoDTEP Scheme within the same financial year or fixation of cap on the amount of RoDTEP to be claimed per IEC holder, like MEIS Scheme. It is pertinent to note here that the Central Government's decision to restrict the benefit of MEIS Scheme to INR. 2 crore per IEC has already been challenged in the case of *Man Industries (India) Ltd*., before the Gujarat High Court. Similarly, it might lead to treat the equals unequally by granting the higher amount of RoDTEP benefits for exporters who exported the goods during initial part of year and by granting lesser amount of benefits to exporters who exported the goods during later part of year, though both the exporters exported very same goods and both goods suffered same amount of duties and taxes. In fact, the same exporter may be getting different benefits for the same exports over a period of time considering the time when the export is being made, leading to uncertainty. In such case, the same may also be challenged before the Court of law on the Principle of Equality and arbitrariness.

Considering the potential practical and legal consequences of fixation of budgetary limit for RoDTEP Scheme, the industries may place appropriate representations before the Central Government and the RoDTEP Committee to remove such budgetary framework. For achieving the objective of RoDTEP Scheme, a request may also be placed for introduction of provisions for fixation of exporter-specific rate of RoDTEP, like brand rate of duty drawback, where the actual amount of embedded duties and taxes are much higher than the notified rate of RoDTEP. As a measure of ease of doing business and to avoid unnecessary litigations, the Central Government either *suo moto* or considering the representations from industries, may issue suitable amendments to the new scheme to set the potential issues in rest.

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Goods and Services Tax (GST)

Notifications and Circulars

Requirement of GST audit and reconciliation statement by professionals removed with effect from 1 August 2021: The Ministry of Finance has appointed 1 August 2021 as the date on which the provisions of Sections 110 and 111 of the Finance Act, 2021 have come into force. These sections amend Sections 35 and 44 of the Central Goods and Services Tax Act, 2017 to provide for removal of mandatory requirement of GST audit and reconciliation statement (to be filed along with annual return) by a chartered accountant or cost accountant. The new Section 44 now provides for filing of the annual return including reconciliation statement on self certification basis. Further, Commissioner has been empowered to exempt class of taxpayers from requirement of filing the annual return. Notification No. 29/2021-Central Tax (Rate), dated 30 July 2021 has been issued for the purpose. Consequential changes have also been made in Rule 80 of the Central Goods and Services Tax Rules, 2017 which now provides for furnishing of a self-certified reconciliation statement along with the annual return.

Ratio decidendi

Interest liability can be paid in instalments, but registration can be restored only after all dues are cleared: Considering the pandemic situation, the Gauhati High Court has permitted an assessee to pay the interest liability in instalments. The Court however held that the registration, which was earlier cancelled due to non-payment of tax, can be restored only after all the dues are cleared. The petitioner's GST registration was cancelled due to non-payment of tax. The disputed tax amount was later paid but the registration was not restored due to outstanding interest liability remaining unpaid. [*Aich Brothers* v. *Union of India and Ors.* – 2021 VIL 544 GAU]

Order under Rule 86A creates lien up to the limit specified if no positive credit is available on the date of such order: The Allahabad High Court has held that the words 'input tax credit available' used in Rule 86A(1) of the Central Goods and Services Tax Rules, 2017 cannot be read as actual input tax credit available on the date of order under said rule. According to the Court, the words should be read in the context of either fraudulent availment or availment *dehors* eligibility to the same. The Court held that if there is no positive credit lying in the electronic credit ledger on the date of passing of the order under Rule 86A, that order would be read to create a lien up to the limit specified in the order. As and when the credit entries arise, the lien would attach to those credit entries up to such limit. Writ petition was filed challenging the order passed by the department under Rule 86A(1)(a)(i), wherein the validity of blocking input tax credit over and above the amount available on the date of order was questioned. [*RM Dairy Products LLP* v. *State of UP and Ors.* – 2021 VIL 553 ALH]

Input tax credit attributable to the period covered by provisional registration of supplier can be taken once tax with interest is paid by the supplier: Petitioner was permitted to apply for fresh registration as he was unable to obtain GST registration from the appointed date due to the technical glitches in the GST Portal. Consequently, petitioner was unable to upload returns for the period prior to registration which

resulted in disallowance of input tax credit to petitioner's customers. The Court observed that an opportunity for statutory compliance for the period prior to the registration ought to be provided but it was technically impossible to make such changes in the GST portal now. Therefore, the Court directed the petitioner to pay tax with interest under Form DRC-03 for the period covered by provisional registration and as a result recipient shall not be denied input tax credit on the ground that transaction was not reflected in GSTR-2A. [*ST. Joseph Tea Company Ltd. & Ors*. v. *State Tax Officer* – 2021 VIL 550 KER]

Vehicle a 'used personal effect' even if run for negligible distance – No requirement of e-way bill: The Kerala High Court has reiterated that the vehicle even if run only for negligible distance, is to be categorized as 'used personal effects' under Section 138(14)(a) of the CGST/Kerala GST Rules, with no requirement of e-way bill for inter-State transportation. The vehicle was purchased after payment of IGST, temporary registration was taken and was run for some 43 kms before being entrusted to a transporter for inter-State transportation. The department had detained the vehicle for non-generation of e-way bill. Decision of the Court in the case of *KUN Motor Company Private Limited and Others* [2018 VIL 554 KER] was relied upon. [*Assistant State Tax officer (Intelligence)* v. *VST and Sons (P) Limited & Ors.* – 2021 VIL 558 KER]

E-vouchers are taxable and liable to GST @ 18%: The Karnataka AAR has held that e-vouchers are taxable as per residual Entry No. 453 of third schedule of Notification No.01/2017-Central Tax (Rate) at the rate of 18% GST. The Authority observed that though the e-voucher is intangible, but it has all the required capabilities to be called as goods and hence could be treated as intangible goods. It also observed that the transaction of sale of vouchers involved transfer of the title and hence they were covered under supply of goods. The Authority distinguished the Supreme Court decision in the case of *Sodexo SVC India Pvt Ltd.* Regarding the time of supply of the said transaction, the AAR was of the view that since the applicant was not aware of date of redemption of e-voucher, the time of supply would be governed by Section 12(5)(a) of the CGST Act, 2017. [In RE: *Premier Sales Promotion Pvt. Ltd.* – 2021 VIL 283 AAR]

Forbearance charges cannot form part of composite supply along with sale: The Telangana AAR has held that sale of LPG, lease of SGS manifold and 'Take or Pay' Charges together cannot form a composite supply. Observing that 'Take or Pay' charges were meant to compensate for breach of a contract, in case the buyer did not lift the required quantity, the AAR was of the view that supply of LPG and 'Take or Pay' charges were mutually exclusive and could never exist together. It held that the forbearance comes into existence only upon breach and hence the requirements of a composite contract were not fulfilled. [In RE: *SHV Energy Private Limited* – 2021 VIL 289 AAR]

No transfer of 'going concern' if liabilities not transferred: In a case where the Business Transfer Agreement contemplated the sale of business to the purchaser, except any of the employees or liabilities, and the purchaser intended to continue the same business, the Andhra Pradesh AAR has held that transaction did not fit in the definition of a 'going concern' in the context of exclusion of liabilities. The AAR was hence of the view that the benefit of serial No.2 of the Chapter 99 of the Notification No.12/2017-Central Tax (Rate), would not be available to such transaction. [In RE: *SCV Sky Vision* – 2021 VIL 294 AAR]

Incentive received from State government when not a subsidy: The Gujarat AAR has held that amount of 4% received as an incentive by the assessee from the State government, on the total loan amount disbursed to the customers by the assessee-bank, is liable to GST. The applicant-bank had disbursed the loans to customers @ 8% interest out of which customer was liable to pay interest @2% and remaining 6% interest amount was borne by the State Government. Further, the applicant received 4% as an incentive on the total loan amount disbursed to the customers, over and above the 6% interest amount. Referring to the dictionary meaning of 'incentive', the AAR noted that while said incentive @4% on the disbursed loan amount had not lessened the burden of the customers and hence was not a subsidy, applicant's business performance was the sole criteria for receiving subject incentive and fell under the meaning of 'consideration'. [In RE: *Rajkot Nagarik Sahakari Bank Ltd.* – 2021 TIOL 203 AAR GST]

EU VAT – VAT deductions on sale of warranty extensions, not correct: The Court of Justice of the European Union has held that transactions involving intermediation in the sale of warranty extensions, performed by seller of goods, at the time of sale of the product, constitute services relating to insurance transactions performed by insurance brokers and agents. The Court was hence of the view that the amount of turnover relating to those transactions must not be excluded from the denominator of the fraction used to calculate the deductible proportion referred to in Article 174(1) of the EU Directive. Consequently, the VAT deduction on sale of warranty extensions was not allowed. [*Radio Popular – Electrodomesticos SA* v. *Autoridade Tributaria e Aduaneira* – Judgement dated 8 July 2021 in Case C-695/19, CJEU]

Customs

Notifications and Circulars

Import/export prohibitions and restrictions by DGFT: Para 2.07 of the Foreign Trade Policy regarding principles of restrictions and prohibitions for imports/exports has been amended by the Ministry of Commerce to empower DGFT to impose prohibitions or restrictions for preventing sudden increase in imports from causing serious injury to domestic producers. Further, prohibitions/restrictions can also be imposed to relieve producers who have suffered such injury. Export prohibitions/restrictions can be imposed for ensuring essential quantities for the domestic industry. The DGFT Notification No. 17/2015-20, dated 10 August issued for this purpose also mentions that the amendment is in line with international agreements.

RoDTEP scheme to substitute MEIS notified: The Ministry of Commerce has notified the RoDTEP Scheme by Notification No. 19/2015-20, dated 17 August 2021. Simultaneously, the DGFT has also notified the rates by way of a public notice. The rates are mentioned in the Appendix 4R of the Handbook of Procedures, covering the eligible export goods, rates and per unit and value caps, wherever applicable for a total of 8555 export items. It may be noted that the rates are applicable for the exports already made under the Scheme from 1 January 2021. Products manufactured or exported by EOUs, SEZ units and under the Advance Authorization or Duty Free Import Authorization scheme, are at present not eligible for this scheme and the implementation dates for these categories of exports will be notified later. It seems that benefit under the RoDTEP Scheme would not be available to exports of iron & steel, chemicals and pharmaceuticals as these items are not covered under Appendix 4R at present.

e-BRC with LEO up to 31 March 2020 on which RoSCTL scrip claimed to be uploaded by 15 September 2021: The DGFT has directed the IECs/firms, who have been issued scrips under the RoSCTL, to get e-BRCs uploaded on DGFT portal by respective AD Banks latest by 15 September 2021. The direction is in respect of Shipping Bills with Let Export Orders up to 31 March 2020. As per DGFT Trade Notice No. 13/2021-22, dated 4 August 2021, otherwise, actions might be initiated as per Para 4.96 of Handbook of Procedures.

RMS implemented for processing of Duty Drawback claims: The second phase of Risk Management System has been taken up w.e.f. 26 July 2021, wherein RMS will process the shipping bill ('**SB**') data after the EGM is filed electronically and will provide required output to ICES for selection of SBs for risk-based processing of Duty Drawback claims. Further, Systems Directorate have informed that certain documents required to accompany Duty Drawback claims can be attached to the SB electronically on e-Sanchit. The second phase of export RMS also envisages post clearance audit of the Duty Drawback SBs. The development of an electronic module for PCA of such SBs is underway in the Systems Directorate. Till then, the current instructions for audit, as stipulated in the Manual for Customs Post Clearance Audit, 2018 shall continue to be followed. Circular No. 15/2021-Cus., dated 15 July 2021 has been issued for the purpose.

Continuous AEO-T1 introduced – No periodical renewal of AEO-T1 required: The CBIC has decided to allow the facility of continuous AEO certification/ auto renewal for AEO-T1 entities. These entities will no longer be required to seek periodic renewal of their AEO-T1 certification. As per Circular No. 18/2021-Cus., dated 31 July 2021, all AEO-T1 entities certified on or after 1 April 2019 shall stand migrated to the auto renewal process with effect from 1 August 2021. This facility is however available subject to submission of annual self-declaration (between October-December every year) and review thereof. The Circular also states that the review will be conducted on the basis of at least two annual self-declarations and that the AEO entities certified between January to December of each year will be exempted from filing the annual declaration for that year.

AA/EPCG Authorization transfer in case of amalgamation/de-merger/acquisition – Procedure notified: Detailed step-by-step procedure for online filing and transfer of Advance Authorisation(s) and EPCG Authorisation(s) from erstwhile entity to the new entity(s) have been notified. The online application must be through DGFT Website. In addition to this, the Trade Notice No. 14/2021-22

dated 4 August 2021 provides that in case of any issue or assistance, the same may be brought to notice through DGFT website only.

Integrated Circuits (ICs) – CHIMS implementation extended by two months: The trial period of Chip Import Monitoring System (CHIMS) has been extended by further two months period i.e. up to 30 September 2021. Facility of online registration at CHIMS portal will be effective from 1 October 2021. As per amendments by Notification No. 15/2015-20, dated 9 August 2021, CHIMS will be effective from 1 October 2021, i.e. for Bills of Entry filed on or after said date. It may be noted that by notification dated 10 May 2021, the Ministry of Commerce had revised the import policy of ICs described in certain HS Codes of Chapter 85. The monitoring system would require importers to submit advance information of imports of ICs in an online system and obtain an automatic registration number.

IEC modification period extended till 31 August 2021 – Fees waived for modifications in August 2021: Period of modification of IEC has been extended for the year 2021-22 only till 31 August 2021. Further as per amendments by Notification No. 16/2015-20, dated 9 August 2021, no fee shall be charged on modifications carried out in IEC during the period up to 31 August 2021. Para 2.05(d) of the Foreign Trade Policy has been amended for this purpose.

Ratio decidendi

Software Technology Parks – No provision for partial exemption under Notification No. 153/93-Cus.: In a case where the importer, an infrastructure service provider had imported capital goods under Notification No. 153/93-Cus. and used the same for both Software Technology Park (STP) units and non-STP units, the CESTAT Chennai has held that there is no provision in the said exemption notification to allow partial exemption. The Commissioner had in the order impugned before the Tribunal had allowed partial exemption on proportionate basis in proportion to the land used for STP and non-STP units. The CESTAT was of the view that Commissioner had no power to modify an exemption notification while applying it. [*Commissioner* v. *India Land & Properties Ltd.* - 2021 (8) TMI 391 CESTAT Chennai]

Interest on refund of pre-deposit deposited prior to 2014 amendment of Section 129EE must be in terms of Section 27A: Taking note of the date of amendment in Section 129EE of the Customs Act, 1962, the Andhra Pradesh High Court has held that interest on the pre-deposit refunded is to be computed as per pre-amended Section 129EE of Customs Act, 1962. Hence, interest is due for a period commencing after expiry of 3 months from the date of communication of order of appellate authority till the refund of such amount, as given in Section 27A, and not from the date of deposit till date of refund as envisaged under the current Section 129EE. Assessee's contention that deposit was made in 2006 when there was no statutory restriction on the discretion to grant interest from the date of deposit and hence the Supreme Court's decision in the case of *Sandvik Asia Limited* was applicable, was rejected. [*Maithan Ceramics Ltd.* v. *Commissioner* – 2021 VIL 519 AP CU]

Jurisdictional issue can be raised at any stage of proceedings: The Karnataka High Court has reiterated that the point of jurisdiction can be raised at any stage of proceedings. The Court was of the view that absence of jurisdiction to issue a show-cause notice if raised even after an assessment order is passed, such objection if found in the affirmative would vitiate the whole proceedings including the assessment orders or orders passed on an appeal and other orders of the superior authorities. Taking note of the

decision of *Canon India Pvt. Ltd.*, the High Court held that the proceedings initiated by DRI were invalid. However, the authorities were granted liberty to initiate fresh proceedings. [*Givaudan India Pvt. Ltd.* v. *Principal Commissioner* – 2021 VIL 559 Kar CU]

Refund – Re-assessment under Section 128 not the only remedy available: In a case where the assessee-importer had sought amendments in the Bills of Entry under Section 149 of the Customs Act, 1962, the Telangana High Court has rejected the contention of the Revenue Department that re-assessment under Section 128 is the only remedy available to the assessee-petitioner, and that Section 149 cannot be invoked. The High Court observed that the Supreme Court in the case of *ITC Ltd.*, while holding that the refund cannot be granted by a refund application under Section 27 until and unless an assessment order is modified, nowhere said that such amendment or modification of an assessment order can only be done in an appeal under Section 128. The assessee had sought amendments in BOEs based on Supreme Court decision in the case of *SRF Ltd*., contending that the same was not available/ in existence at the time when the goods pertaining to the relevant BoEs were cleared. [*Sony India Pvt. Ltd.* v. *Union of India* – 2021 TIOL 1707 HC TELANGANA CUS]

Demand of erroneously refunded EDD cannot be made pending adjudication: Relying on CBIC Circular No. 984/2014-CX, dated 16 September 2014, the Madras High Court has held that in dispute regarding refund of erroneous Extra Duty Deposit (EDD), the demand cannot be made till such issues are settled finally. The demand notice was kept in abeyance till disposal of CESTAT appeal. [*Hyundai Motor India Ltd.* v. *Secretary, Ministry of Finance & Ors.* – 2021 VIL 512 Mad CU]

Head mounted device running on android and partly programmable with voice inputs classifiable under Heading 8517: The Customs Authority for Advance Ruling has held that a head mounted device consisting of high-resolution micro display with Snapdragon CPU, RAM, Bluetooth/GPS/Wi-Fi, with an internal storage of 16GB and 16MP camera is classifiable under Tariff Item 8517 62 90. This device used voice commands as input method and could process data, execute programs, download and install software applications, amongst other activities. Relying on Note 3 to Section XVI of the First Schedule to Customs Tariff Act, 1975, the AAR classified the device under '*machines for reception, conversion and transmission or regeneration of voice, images or other data*' under Tariff Item 8517 62 90. With respect to the classification by application of Chapter Note 5(D)(ii) to Chapter 84 read with CBIC Circular No. 20/2013-Cus., the AAR observed that although the device was partly programmable but cannot essentially be considered to have same functionality as laptop. [In RE: *Ingram Micro India Pvt. Ltd.* - 2021 (8) TMI 411-CAAR-Mumbai]

'Bluetooth module' classifiable under Tariff Item 8517 62 90: The CESTAT Delhi has held that Bluetooth module will attract classification under Tariff Item 8517 62 90 of the Customs Tariff Act, 1975 as it is not a 'part' and can be used in many devices like printers, computers, hard drive, etc. The Tribunal in this regard also observed and all these devices could work independently without the Bluetooth module. Department's contention of classification under Tariff Item 8529 90 90 on the basis of Section Note 2(b) for the reason that Bluetooth module was principally used with car infotainment system, was hence rejected by the Tribunal while allowing the appeal. [*Minda D-Ten Pvt. Ltd.* v. *Commissioner* – 2021 TIOL 457 CESTAT DEL]

Bamboo beakers made of 72% plant fibres and 25% melamine classifiable under Heading 3924 as plastic product: The Court of Justice of the European Union has held that bamboo beakers made up to 72.33% plant fibres and 25.2% melamine resin are classifiable under Heading 3924. The Court noted that even if the plant fibres were predominant in terms of quantity, the melamine resin contained in the goods was of overriding importance for their use. It held that melamine resin gave the concerned goods their essential character within the meaning of Rule 3(b) of the Interpretative Rules. [*BalevBio Eood* v. *Teritorialna direktsia Severna Morska* - Decision dated 3 June 2021 in Case C-76/20, CJEU]

Fire alarm containing recording system not covered under Heading 9027 as measuring instrument: Observing that recording of an alarm event was not a recording that a particular quantity has been measured or checked, the UK's First Tier Tribunal Tax Chamber has held that fire alarm containing recording system is not covered under Heading 9027. Noting that the product provided only diagnostic function after the fire, it also observed that the product did not record the actual quantity measured, nor the threshold operating at the time of the alarm event but, only that the alarm was sounded and, in the case of combined detectors, that the product detected either smoke alone, or heat and smoke together. The Tribunal was hence of the view that the principal function of the product was not to be found within Heading 9027. [*Fireangel Safety technology Group Plc.* v. *Commissioner HMRC* – Decision dated 1 June 2021 in Appeal number: TC/2019/01256, United Kingdom's First Tier Tribunal Tax Chamber]

Central Excise, Service Tax and VAT

Ratio decidendi

Area-based exemption – Limitation for filing applications for special rates: The Gauhati High Court has held that application for fixation of special rate of value addition under Notification No. 17/2008-C.E. as amended by Notification 31/2008-C.E. cannot not be dismissed by the Department on grounds of limitation when such applications was filed immediately after the decision of the Supreme Court dated 22 April 2020 in the case of *VVF Ltd.* The Court upheld the view that once the notifications were set aside by it earlier and the matter was pending before the Apex Court, the requirement to file applications for fixation of special rates only arose after the said decision of the Supreme Court. [*Jyothi Labs Ltd.* v. *Union of India & Ors.* – W.P (C) No. 3569/2021, Order dated 12 August 2021, Gauhati High Court]

Cenvat Credit on input services used in setting up of plant/factory, available even after 1 April 2011: The CESTAT Hyderabad has upheld the plea that even though the input services used in setting up of the plant (or factory) are not covered in the inclusive part of the definition of 'input services' post 1 April 2011, the same are covered in the main part of the definition after said date. Observing that as per

the main part of the definition, any service which is used not only in manufacture but also 'in relation to' manufacture will also qualify as input service, the Tribunal held that setting up the factory is an activity directly in relation to manufacture. It noted that neither the manufacturing can take place without a factory nor a factory could be set up without the services of land lease and other common facilities. [*Pepsico India Holdings (Pvt.) Ltd.* v. *Commissioner* – 2021 VIL 335 CESTAT HYD ST]

Cenvat credit on in-warranty maintenance services provided by dealer, available even after 1 April 2011: In a dispute pertaining to the period after 1 April 2011, i.e., after the amendment to definition of 'input services, the CESTAT Delhi has allowed Cenvat credit of in-warranty repair and maintenance services provided by the dealers to the assessee-manufacturer of automobiles. The Tribunal, for this purpose, held as *per incuriam* its earlier decision in the case of assessee where it had distinguished the decisions in the cases of *Carrier Airconditioning & Refrigeration*, *Honda Motorcycle* and *Samsung India Electronics.* It was of the view that when Cenvat credit was justified under the 'means' clause, as in the three decisions, there was no necessity to examine whether it can be justified under the 'includes' clause or 'excludes' clause of the definition. [*Case New Holland Construction Equipment (I) Pvt. Ltd.* v. *Commissioner* – 2021 VIL 383 CESTAT DEL ST]

SVLDR Scheme – Discharge certificate not to be refused after payment of amount as per SVLDRS-3: The Andhra Pradesh High Court has held that once the declarant (under SVLDR Scheme) has paid the estimated amount as per the statement in form SVLDRS-3 within the stipulated time, he has immunity from any further claim of tax, interest or penalty on the self-same subject matter. Holding that it was beyond the jurisdiction of the department to proceed with adjudication of the show-cause notice on self-same subject matter, the Court observed that it was incumbent upon the Designated Committee to issue a discharge certificate in such case. The High Court also noted that there was nothing in the Scheme which empowered the department to refuse discharge certificate based on any subsequent event. The discharge certificate was refused as the assessee had availed transitional credit of the disputed Cenvat credit. [*Bharathi Cement Corporation Pvt. Ltd.* v. *Additional Commissioner* – Common Order dated 16 August 2021 in Writ Petition Nos.2, 3 & 5 OF 2021, Andhra Pradesh High Court]

SVLDR Scheme – 'Redemption fine' covered in word 'penalty': The Allahabad High Court has held that 'redemption fine' is covered in the ambit of the word 'penalty' used in Section 129(1)(a) of the Finance (No.2) Act, 2019 relating to Sabka Vishwas (Legacy Dispute Resolution) Scheme. The Court was of the view that 'redemption fine' is a kind or type of 'penalty' under the Central Excise Act, 1944. It observed that the word 'penalty' appearing in Section 129 includes both, a penalty in *personam* and a penalty in *rem* (confiscation) and that redemption fine, by virtue of Section 34 of the Central Excise Act, was only a payment made in lieu of such penalty in *rem*. Observing that the scheme was reformative legislation (and not amnesty), the Court held that in absence of any provision to exclude redemption fine/ penalty in *rem* from the benefits contained in Section 129, no such inference may be drawn. [*Jay Shree Industries* v. *Union of India* – 2021 TIOL 1677 HC ALL CX]

Reversal of credit not required in case of inputs/packing material destroyed in fire: The CESTAT Mumbai has held that Rule 3(5B) of Cenvat Credit Rules, 2004 is applicable only in case where inputs on which credit has been taken are written off in books of account and not

in case where inputs/packing materials were destroyed in fire. The Tribunal observed that Rule 21 of the Central Excise Rules, 2002 did not limit its application only to the finished goods but was wide enough to include all the goods, whether finished good, raw material, packing material, semi-finished goods or the capital goods. It held that when the amount required to be paid in terms of Rule 3(5) has been deemed to be the duty paid by the manufacturer removing the inputs as such, then claim made by such manufacturer in terms of Rule 21 for remission of these amounts cannot be brushed aside if the Commissioner is satisfied that these goods have been lost or destroyed by natural causes or by unavoidable accident. [*Cipy Polyurethanes Pvt. Ltd.* v. *Commissioner* - 2021 VIL 327 CESTAT MUM CE]

Heavier hydrocarbons, described as gas condensate, are not liable to NCCD as not marketable: The CESTAT Delhi has upheld the plea of the assessee that gas condensate consisting of heavier hydrocarbons, namely C4+, being very volatile in nature and non-transportable or marketable, is not liable to NCCD. The Tribunal in this regard noted that no evidence was led by the Department to substantiate that the product was marketed or was marketable. It was held that NCCD would not be leviable on gas condensate even though it was classifiable under Heading 2709 of the Central Excise Tariff. [*Commissioner* v. *Gas Authority of India* – 2021 TIOL 451 CESTAT DEL]

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