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Development Rights: A service or a condition precedent to sale of land

By **Shivam Mehta and Shubham Vijay**

The ongoing debate surrounding the imposition of GST on Development Rights through Joint Development Agreement ('**JDA**') continues, seeking resolution. The article in this issue of Indirect Tax Amicus notes that though there are judicial decisions, including the recent Telangana High Court decision, as well as advance rulings which have attempted to clarify the concept of Development Rights, yet there is no definite answer on this burning issue. The authors note that while one perspective regards it as a service to the landowner, others view it as an outright sale of land. They in this regard elaborately discuss the narrowed approach under the provisions of GST Law and alternative views on the taxability of transfer of development rights under GST law. According to them, while finality is anticipated from the constitutional courts, it is prudent for businesses to take an informed call on the taxability of development rights. The authors also highlight that as there is no universal approach for taxability of JDAs and their treatment depends on the nuances of each agreement, the legal examination of the underlying documentation assumes much importance.

Development Rights: A service or a condition precedent to sale of land

By Shivam Mehta and Shubham

The ongoing debate surrounding the imposition of GST on Development Rights through Joint Development Agreement (**'JDA'**) continues seeking resolution. The intricacies of the concept persist, making discussions a fascinating aspect of legal discourse. Recently, in the case of *Prahitha Constructions*[1], the Telangana High Court held that mere transfer of development rights pursuant to a JDA cannot indicate an automatic transfer of ownership or title rights, therefore, transfer of development rights is amenable to GST and cannot be brought within the purview of Entry 5 of Schedule III of the GST. The Developer has filed a Special Leave Petition in the Supreme Court against the said decision, and for the time being, no stay has been granted by the court.

Moreover, there have been other judicial decisions as well as advance rulings in the past which have attempted to clarify the concept of Development Rights, yet there is no definite answer on this burning issue. However, a definitive ruling on the issue of taxability of development rights under GST can be expected in the future considering the said issue is now pending before the Apex Court.

While delving into the intricacies of development rights, it's imperative to look at the terms and conditions of the JDA which are agreed upon between the developers and landowners. Development rights consistently cultivate a symbiotic relationship, offering advantages to both the parties. For landowners, it ensures a valuable asset which they can market, while simultaneously affording developers substantial benefits. For developers, development rights reduce their capital expenditure by relieving them from incurring hefty acquisition costs at the upfront and accordingly making development rights operationally feasible within a defined parameter. Underlying this system, there are two fundamental rights granted to developers – (i) the right to develop the property; and (ii) the subsequent right to sell the developed property.

[1] *Prahitha Constructions* v. *Union of India*, Writ Petition No. 5493 of 2020

This dual-phase operation of development rights is the reason which has sparked debate concerning the tax treatment of development rights. One perspective regards it as a service to the landowner while another views it as an outright sale of land. Thus, it becomes imperative to scrutinize both viewpoints to gain clarity on the matter.

Narrowed approach under provisions of GST Law

In the erstwhile service tax regime, Section 65B (44) of the Finance Act defined 'service' as an activity carried out by one person for another in lieu of a consideration, but *inter-alia* excluded a transfer of title in goods or immovable property. Thus, the provision under service tax regime explicitly excluded the transfer of title in immovable property from its purview. While 'title' is often misconstrued as synonymous with ownership, it doesn't exclusively connote ownership. As elucidated by the Hon'ble Supreme Court in *Syndicate Bank* v. *Estate Officer and Manager*[2], a jurisprudential title to a property may not necessarily entail ownership rights but a title could be subordinate to an owner and might not necessitate a registered deed of conveyance, still confers a legal claim. The overarching principle is that land is made up of bundle of rights. It establishes that title can be transferred in various ways, with ownership being just one facet of those methods.

The CESTAT, Chandigarh in *DLF Ltd.* v. *Commissioner of Service Tax, Gurugram*[3] held that development rights would fall within the ambit of 'immovable property' and would consequently not be subject to service tax as 'immovable property,' encompasses not only 'land' but also 'any benefits arising out of land'.

However, the shift from the service tax regime to the GST regime marked a significant change in the treatment of development rights. Under the GST law, it is only the 'sale of land' and 'sale of building' which has been excluded from the tax net and not transfer of title in immovable property.[4]

Beyond the bench: Alternative views on the taxability of transfer of development rights under GST law

Entry 5 of Schedule III under the CGST Act and the notifications[5] issued by the GST Council, regarding the taxation of the Development Rights carry substantial weight in

[2] *Syndicate Bank* v. *Estate Officer and Manager*, MANU/SC/3661/2007
[3] *DLF Ltd.* v. *Commissioner of Service Tax, Gurugram*, MANU/CJ/0033/2019
[4] Entry 5 of Schedule III of the Central Goods and Service Tax Act, 2017
[5] Notification No. 4 of 2018-Central Tax (Rate) dated 30.09.2019

signaling the government's stance on the matter. In furtherance to which there have been further reinforcements through the categorical stance taken by various advance ruling authorities. However, despite the clear intent to tax, there have been divergent views regarding the applicability of GST on transfer of development rights.

One prominent school of thought believes that development rights serve as a condition precedent for the sale of land. It is often argued that the implication and effect of execution of the JDA is to be taken into consideration. By virtue of the execution of the JDA, the developer acquires development rights of property which ultimately results in sale of land proportionate to the amount of revenue/developed area shared by the developer. In other words, the development rights form an integral part of the bundle of rights associated with land ownership, and considering when a landowner transfers these rights with a commitment to convey land to the customer once developed, the development rights can be said to be a founding stone for the sale of land in future. Accordingly, it is believed that in a transaction involving transfer of development rights pursuant to a JDA, the essential supply is that of the land and the transfer of development rights is intrinsically linked to the eventual sale of the land.

It is also believed that the development rights unlike any other rights in form of licensing or leasing of right are inherently irrevocable and permanent in nature. Furter, unlike any other rights, development rights confer upon developers the exclusive authority to utilize and dispose of the property according to their discretion. It is certain that there will be a sale of land subsequent to conferment of development rights. Thus, the treatment of transfer of development rights as a supply of service from the developer to the landowners could distort the application of GST, as it fails to recognize the integral role of development work in facilitating sale of land.

Moreover, it has been pointed out that the GST is a contract-based levy. Therefore, the supply must be identified from the intention of the parties on the basis of express terms and conditions of the contract. In light of the same, it is often argued that the parties to a JDA agree to contribute mutually in the form of land and development work and share the revenues out of sale of developed land/apartments to the prospective customers. Accordingly, the ultimate purpose of a JDA is to derive benefits through the sale of land.

Coupled with the above points, the question of taxability of development rights is further complicated in cases involving

transfer of development rights in pre-GST regime for which full/part consideration in money or kind has been received in the GST regime. In such cases, the perpetual confusion persists if the service has been supplied already or the time of supply has already occurred in the pre-GST regime.

Conclusion

The divergent perspectives on the treatment of development rights; whether as a service or an outright sale, have led to confusion in the realm of land transactions. Therefore, while finality is anticipated from the constitutional courts in GST regime, it is prudent for businesses to take an informed call on the taxability of development rights.

Further, the taxability of development rights hinges on the specific terms and conditions outlined in the JDA. There is no universal tax approach for taxability of JDAs and their treatment depends on the nuances of each agreement. Therefore, the legal examination of the underlying documentation also assumes much importance.

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Goods & Services Tax (GST)

Ratio decidendi

- Appellate Authority can condone delay beyond one month from prescribed period of 90 days – Application of Section 5 of Limitation Act is not excluded – Calcutta High Court
- E-way bill – Over dimensional cargo – Speed of vehicle is no criteria to determine nature of cargo – Allahabad High Court
- Non-availability of hard copy of e-way bill in the vehicle is a technical violation – Allahabad High Court
- Show cause notice to company already dissolved under IBC Section 59(8) is wrong – Directors of erstwhile company also cannot be proceeded against – Karnataka High Court
- Audit can be undertaken for prior period even if registration cancelled subsequently – Rajasthan High Court
- No penalty for wrong vehicle number in e-way bill when intention to evade is absent – Allahabad High Court
- Registration cannot be cancelled without substantiating allegation of violation of Rules – Allahabad High Court
- No ITC even if supplier registered on date of transaction if investigation reveals that supplier was non-existent – Allahabad High Court
- Appellate Authority can interfere with Adjudicating Authority's discretion for imposing fine in lieu of confiscation – Kerala High Court
- Writ maintainable against order of Original Authority if appeal thereagainst before Appellate Authority was dismissed as time-barred – Karnataka High Court
- Non-uploading of summary of SCN in DRC-01 and Order-in-original in DRC-07 is not sufficient enough to entertain writ petition – Gauhati High Court
- Appeal to Appellate Authority – Pre-deposit of only 10% of tax is required – Uttarakhand High Court
- No ITC if GSTR-2B shows purchase during period when ITC not available, even if invoice pertained to subsequent period when same permitted – Telangana AAR
- Referral consultancy to foreign universities qualifies as export of service – Telangana AAR

Ratio Decidendi

Appellate Authority can condone delay beyond one month from prescribed period of 90 days – Application of Section 5 of Limitation Act is not excluded

The Calcutta High Court has held that an Appellate Authority is not denuded of its power to condone the delay beyond one month from the prescribed period of limitation as provided for in Section 107(4) of the Central Goods and Services Tax Act, 2017. Setting aside the refusal of the Appellate Authority to condone the delay in maintaining the appeal under Section 107, the Court relied upon its earlier Division Bench decision in *S.K. Chakraborty & Sons* v. *Union of India (citation)* wherein it was concluded that in the absence of a non-obstante clause rendering Section 29(2) of the Limitation Act 1963 in-applicable, and in absence of specific exclusion of Section 5 of the Limitation Act, 1963, it would be improper to read implied exclusion thereof. The decision of the Allahabad High Courtin the case of *Yadav Steels* (2024 VIL 173 ALH) was held as not persuasive enough. The submission of the Revenue-Department that though the provisions of Section 5 of the Limitation Act, 1963 may not have been expressly excluded, the same stands impliedly excluded was thus rejected. [*Sanyukta Bhattacharjee* v. *Union of India* – 2024 VIL 440 CAL]

E-way bill – Over dimensional cargo – Speed of vehicle is no criteria to determine nature of cargo

The Allahabad High Court set aside the seizure and penalty in a case where the Department contented that just because the goods had travelled at a faster speed and reached the destination quickly, the vehicle cannot be categorised as an Over Dimensional Cargo. The Court in this regard relied upon a Circular dated 17 January 2024 by the Commissioner, State Tax, which indicated that the speed of a vehicle is not a criterion to decide the nature of the cargo. It was hence of the view that mere fact that the goods in question were transported at a faster speed does not constitute sufficient grounds for penalization.

It also observed that the other documents in the vehicle, i.e., invoice, e-way bill and bilty, were all in order and matched with the goods in question. According to the Court, in the

absence of concrete evidence demonstrating willful misconduct or deliberate intent to circumvent tax obligations, the imposition of penalties was arbitrary and unjustified. [*Ace Manufacturing Systems Limited* v. *State of U.P.* – 2024 VIL 517 ALH]

Non-availability of hard copy of e-way bill in the vehicle is a technical violation

The Allahabad High Court has set aside the penalty under Section 129 of the CGST Act, 2017 in a case where the driver of the vehicle could not produce the hard copy of the e-way bill to the Department's intercepting team. The Court in this regard noted that the driver had informed the team about the e-way bill number, and that the e-way bill was downloaded prior to the interception of the vehicle. It was held that the violation, wherein the e-way bill was not present in the vehicle, was a technical one. Allowing the writ petition, the Court also observed that the invoice and the e-way bill matched with the goods in the vehicle and that there was no *mens rea* for evasion of tax. Directing refund of tax and penalty, the Court also noted that the Department had also not provided any opportunity of hearing to the assessee. [*Mid Town Associates* v. *Additional Commissioner* – (2024) 18 Centax 452 (All.)]

Show cause notice to company already dissolved under IBC Section 59(8) is wrong – Directors of erstwhile company also cannot be proceeded against

The Karnataka High Court has held that tax assessment under the Central Goods and Services Tax Act, 2017 cannot be initiated against a non-existent company which stood dissolved under Section 59(8) of the Insolvency and Bankruptcy Code, 2016. The Court noted that after the order passed by the National Company Law Tribunal (NCLT) under the above provisions, the company ceased to exist for all purposes, including imposing or fastening any liability. The show cause notice demanding duty was issued in this case after the NCLT order.

Further, the Court also rejected the Department's contention that erstwhile Directors of the petitioner-company can be proceeded against by virtue of Section 88(3) of the CGST Act. The High Court for this purpose noted that since the SCN was issued after the dissolution of the company, at the time of adjudication order, there was no company in existence for the purpose of determination of the tax, interest or penalty and consequently, the question of invoking Section 88(3) against the

Directors would not arise. Regulation 4 of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 was also relied upon for this purpose. [*Hitachi Nest Control Systems Pvt. Ltd.* v. *Additional Commissioner* – 2024 VIL 480 KAR]

Audit can be undertaken for prior period even if registration cancelled subsequently

The Rajasthan High Court has held that registered person under Section 65 of the CGST Act, 2017 would include those who were registered for the period for which the audit was undertaken. Hence the Court declined to issue writ for quashing an order passed in pursuance of an SCN which was issued for objection/audit para created in GST audit in a case where the audit was done after cancellation of the GST registration. The High Court in this regard noted that as per Section 29(3), cancellation of registration does not affect the liability of the person to pay tax and other dues. It was also noted that Section 65(1) also authorizes the Authority to undertake audit of any registered person for such period. Dismissing the writ petition with cost, the Court noted that the assessee-petitioner was a registered person during the period for which audit was done. It was also observed that the assessee had filed a detailed reply to the SCN issued after the audit and the assessment order was passed only thereafter. [*Ashoka Fabricast Pvt. Ltd.* v. *Union of India* – 2024 VIL 488 RAJ]

No penalty for wrong vehicle number in e-way bill when intention to evade is absent

The Allahabad High Court has set aside a penalty imposed on the taxpayers for wrong mention of the vehicle number in the e-way bill. The vehicle number mentioned was PB 11 AN 9287, while the goods were transferred through vehicle number RJ 13 GB 0072. The Court in this regard noted that the case involved stock transfer and the Department had not brought on record any intention of the part of the dealer to evade tax. It hence held that the minor discrepancy as to registration of the vehicle in the e-way bill would not attract proceedings for penalty under Section 129 of the Central Goods and Services Tax Act, 2017. [*Poddar Tyres Ltd.* v. *State of U.P.* – 2024 VIL 492 ALH and *BMR Enterprises* v. *State of U.P.* – 2024 VIL 516 ALH]

Registration cannot be cancelled without substantiating allegation of violation of Rules

The Allahabad High Court has held that mere mention of two sub-rules, without clarifying as to how those rules were violated and what was the material to substantiate the

allegation of violation of the rules, would not give rise to a justified ground for cancellation of GST registration of an assessee. Allowing assessee's petition, the Court noted that the show cause notice merely alleged violation of Rule 21(b) and 21(a) of the Central Goods and Services Tax Rules, 2017 and did not mention any inspection made by the Proper Officer or the findings recorded on the basis of the inspection. It, in this regard, also observed that the cancellation order did not take into consideration the explanation offered by the petitioner in reply to the show cause notice. [*Siddha Mahajan Private Limited* v. *State of U.P.* – 2024 VIL 520 ALH]

No ITC even if supplier registered on date of transaction if investigation reveals that supplier was non-existent

The Allahabad High Court has held that merely because the supplier was registered on the date of transaction, it cannot be said that the Department is bound to grant ITC benefit to the assessee. even though it was only revealed later on that the supplier was non-existent and it could not have made any actual supplies. The Court observed that Section 16(2)(b) of the CGST Act, 2017 mandates that a registered person shall not be entitled to Input Tax Credit unless they have actually received the goods or services. Observing that in the present case investigation by Special Investigation Branch (SIB) had revealed that the suppliers were non-existent and bogus firms, and no actual supply of goods had taken place, the High Court held that thus the condition of 'receipt of goods' under Section 16(2)(b) of the CGST Act, 2017 was not fulfilled. [*Rajshi Processors Raebareli* v. *State of U.P.* – (2024) 18 Centax 472 (All.)]

Appellate Authority can interfere with Adjudicating Authority's discretion for imposing fine in lieu of confiscation

The Kerala High Court has rejected the contention of the Revenue department that the Appellate Authority has no jurisdiction to interfere with the discretion exercised by the Adjudicating Authority in imposing the fine equal to the market value of the goods in lieu of the confiscation of the goods. According to the Court, considering the wide nature of the powers conferred on the Appellate Authority under Section 107(11) of the CGST Act, 2017, there is no fetter on its powers to modify the order passed under Section 130(2) by the Adjudicating Authority, as the Appellate Authority has ample power to decide the issue afresh and make enquiry to decide the issue in appeal. The Adjudicating authority had, in this

case, imposed a fine equal to market value of confiscated goods as they were being transported without valid documents. The Appellate Authority had, however, reduced the fine observing that the assessee was a registered person who maintained proper books of accounts and filed regular returns. The Department had contended that unless the Appellate Authority finds the discretion exercised by the Adjudicating Authority is arbitrary or against the law or in violation of the mandatory requirement of hearing, the Appellate Authority should not interfere with the discretion of the Adjudicating Authority. Dismissing the petition, the High Court also observed that adjudicating authority has no absolute discretion to impose fine. [*Joint Commissioner* v. *Sasi Pathirakunnath* – (2024) 17 Centax 432 (Ker.)]

Writ maintainable against order of Original Authority if appeal thereagainst before Appellate Authority was dismissed as time-barred

The Karnataka High Court has held that merely because an appeal against an order of Original Authority cancelling GST registration was dismissed by the Appellate Authority as being barred by limitation, it cannot be said that the High Court is denuded of its power or jurisdiction to examine the claim of the assessee under Article 226 of the Constitution of India. The Court was of the view that it can examine the legality, validity, and correctness of the order of the original authority, cancelling GST registration, under Article 226. In this regard, the Court had noted that the dismissal of the appeal as barred by limitation would not result in merger of the order of the Original Authority with the order of the Appellate Authority, and order of the Original Authority would be capable of being challenged under Article 226. [*Sri Suvarna Enterprises* v. *Superintendent of Central Tax* – 2024 VIL 477 KAR]

Non-uploading of summary of SCN in DRC-01 and Order-in-original in DRC-07 is not sufficient enough to entertain writ petition.

The Gauhati High Court has held that non-uploading of summary of the Order-in-Original on the common portal is not an exceptional situation to entertain a writ petition. The Court also observed that the assessee, while filing reply to SCN, had not raised the issue of non-uploading of summary of SCN and had thus clearly waived the right to urge about non-compliance. The Court noted that neither the Demand-cum-Show Cause Notice nor the Order-in-Original had any public character as they dealt with the individual rights of the

petitioner-assessee only and that it was not a case of no service of either of them. [*Ashika Business Private Limited* v. *Union of India* – 2024 VIL 497 GAU]

Appeal to Appellate Authority – Pre-deposit of only 10% of tax is required

The Uttarakhand High Court has held that if the amount of tax is being disputed, only 10% is to be deposited as pre-deposit for filing appeal before the Appellant Authority. Provisions of Section 107(6)(b) of the Uttarakhand Goods and Services Tax Act, 2017 were relied upon by the Court for this purpose. The Department had contended that penalty and interest should also be included to the total demand for computing quantum of pre-deposit. [*Hawkeye Infracare* v. *Deputy Commissioner* – 2024 VIL 487 UTR]

No ITC if GSTR-2B shows purchase during period when ITC not available, even if invoice pertained to subsequent period when same permitted

Observing that the supplier had reported the sale in its GSTR-1 for July 2023 and the same was reflected in the buyer-applicant's GSTR-2B for July 2023, implying that the supply was made in July 2023, the Telangana AAR has denied the benefit of Input Tax Credit to the assessee-applicant as the assessee was in July 2023 availing the lower tax rate of 5% without ITC and was not eligible to claim ITC. The AAR was of the view that even though the supplier's invoice was dated August 2023 when the applicant was paying tax @ 12% with facility of ITC, the statutory returns filed on the GST portal (GSTR-1 and GSTR-2B) stand as higher evidence compared to physical invoices. The applicant had sought an advance ruling on whether they could claim ITC on the GST paid for the purchase, considering the apparent mismatch between the invoice date and the GSTR-2B reporting. [In RE: *Noori Travels* – (2024) 18 Centax 210 (A.A.R. - GST - Telangana)]

Referral consultancy to foreign universities qualifies as export of service

The Telangana AAR has held that 'Marketing/Recruitment/ Referral Consultancy' by the applicant to foreign universities/ colleges, on principal-to-principal basis, qualifies as 'export of services' under Section 2(6) of the Integrated Goods and Services Tax Act, 2017 and is not covered under the definition of 'intermediary' as per Section 2(13) of the IGST Act, 2017. The AAR in this regard noted that the agreements between the

applicant and the foreign universities indicated a principal-to-principal relationship, underscoring that the applicant was providing independent services directly to the foreign universities and colleges, and was not acting as an agent or broker facilitating services to a third party. It also noted that there were only two parties involved and the services provided by the applicant were not ancillary but was the main service. Jurisprudence from the service tax regime was relied upon by the Authority for the purpose while it also observed that the applicant fulfilled all the conditions under Section 13(2) of the IGST Act, 2017. [In RE: *Center for International Admission And Visas* – (2024) 18 Centax 408 (A.A.R. - GST - Telangana)]

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Customs

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- Advance Authorisations – Payments for regularisation of bona fide defaults clarified
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- Solar power generation under MOOWR is valid – CBIC Instruction dated 9 July 2022 quashed – Delhi High Court
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Notifications and Circulars

Advance Authorisations – Payments for regularisation of bona fide defaults clarified

The Directorate General of Foreign Trade (DGFT) has clarified that for regularization of *bona fide* export obligation defaults, Advance Authorisations (AAs) issued prior to 1 April 2023 would be governed by the relevant provisions of the Handbook of Procedures under which such AAs were issued. Accordingly, as per Policy Circular 2/2024, dated 3 May 2024, provisions relating to payment of 10% of CIF value and 3% of shortfall in FOB value amounts, as specified in paras 4.49(a)(ii) and 4.49(b), respectively, of the Handbook of Procedures, are applicable only in cases of AAs issued from 1 April 2023 onwards.

QCO compliance for import of inputs by Advance Authorisation holders, and EOU and SEZ units further relaxed

The Ministry of Mines has been added to the list of ministries/ departments whose notifications on mandatory QCOs are exempted for goods to be utilized/ consumed in the manufacture of export products by Advance Authorization holders, Export Oriented Units (EOU), and Special Economic Zones (SEZ). DGFT Public Notice No. 04/2024-25, dated 10 May 2025 has amended Appendix 2Y of Handbook of Procedures for this purpose.

Additionally, the DGFT has clarified that the Advance Authorizations issued before 11 March 2024 shall be governed by the provisions prevailing at the time of issuance of such authorizations. Accordingly, amendments to incorporate QCO exemption and facility of clubbing authorizations are not available to advance authorizations issued before 11 March 2024. DGFT Trade Notice No. 03/2024-25, dated 10 May 2024 has been issued for this purpose.

All Industry Rates of drawback revised for certain products from 3 May 2024

The All Industry Rates (AIR) of Drawback as prescribed by Notification No. 77/2023-Cus. (N.T.), dated 20 October 2023 have been revised for certain goods falling under the Chapters 03, 16, 42, 63, 72, 75, 81, 85, 87, 88 and 93 of the First Schedule to the Customs Tariff Act, 1975. Notification No. 33/2024-Cus.

(N.T.), dated 30 April 2024, but effective from 3 May 2024, has been issued for the purpose. According to CBIC Circular No. 04/2024-Cus., dated 7 May 2024, clarifying the changes, drawback rates/caps have been enhanced for certain marine products, bags, handbags, suitcases, etc., bed linen, table linen, etc., radar apparatus, radio navigational aid apparatus, etc. and unmanned aircrafts. Further, in order to promote export of defense sector, drawback rates have been provided to certain goods of this sector falling under Chapters 72, 75, 81, 87, 88 and 93.

Bengal Gram (Desi Chana) and Yellow Peas – BCD exemption

Basic Customs duty (BCD) and Agriculture Infrastructure and Development Cess (AIDC) on the import of Bengal Gram (Desi Chana) falling under Tariff Item 0713 20 20 have been exempted up to 31 March 2025. Further, BCD exemption on import of Yellow Peas falling under TI 0713 10 10 will now be available in respect of Bills of Lading issued on or before 31 October 2024. Notification No. 24/2024-Customs dated 3 May 2024 amends Notifications Nos. 48/2021-Cus., 49/2021-Cus., and 64/2023-Cus., with effect from 4 May 2024 for this purpose. Further, it may be noted that import of Yellow Peas will also be free from Minimum Import Price and port restrictions in case where Bills of Lading are issued on or before 31 October 2024, instead of 30 June 2024. Compulsory registration under the online Import Monitoring System, however, remains intact. The Ministry of Commerce has issued Notification No. 12/2024-25, dated 8 May 2024 for this purpose.

Onions exports 'Free' with USD 550/MT MEP and 40% export duty

The DGFT has revised the export policy for onions falling under HS Code 0703 10 19, from 'prohibited' for export to 'free' for export. However, as per the revised policy, effective from 4 May 2024, onion exports are subject to a Minimum Export Price (MEP) of USD 550 per Metric Ton (MT). The Ministry of Commerce Notification No. 10/2024-25, dated 4 May 2024 has amended Chapter 07 of Schedule 2 of ITC(HS) Export Policy for this purpose.

Further, it may be noted that an export duty of 40% has been imposed on onions falling under sub-heading 0703 10 of the Customs Tariff Act, 1975, with effect from 4 May 2024. Customs Notification No. 27/2011-Cus. has been amended by Notification No. 24/2024-Cus., dated 3 May 2024 for this purpose.

Ratio Decidendi

Valuation (Imports) – Redetermination of MRP for purpose of CVD is wrong in absence of machinery provisions for same

Observing that there is no methodology or machinery for redetermining the MRP of the imported goods for the purpose of payment of additional customs duty, the CESTAT Chennai has reiterated that redetermination of MRP is against the provisions of law. The assessee had adopted a new MRP/RSP for the combined laptop computer, carry bag, booklet and instruction guide while disposing goods in the domestic market, and the Department had redetermined the RSP of the imported laptops in question alleging misdeclaration of MRP. The Tribunal in this regard noted that there is no mention in Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008 that they would be applicable to Section 3 of the Customs Tariff Act, 1975 (relating to additional customs duty). It was also noted that Section 3 though refers to Section 4A, it does not adopt it to determine the assessable value. CESTAT Bengaluru's decision in case of *ABB Ltd.* v. *Commissioner* was relied upon while CESTAT Mumbai decision in *Nitco Tiles* v. *Commissioner* was distinguished. ***The assessee was represented by Lakshmikumaran & Sridharan here.*** [*Acer India (Pvt.) Ltd.* v. *Commissioner* – 2024 (5) TMI 478-CESTAT Chennai]

Valuation (Imports) – Royalty and licence fee when not includible in value of imports

In a case where royalty was payable only on the value addition done by the Indian importer utilizing the technical know-how of the licensor-exporter and had nothing to do with the value of the imported components, the CESTAT Kolkata has held that payment of royalty was not includable in the transaction value of the imported components. The Department had argued that since royalty was an agreed percentage of the net selling price, it depends not only on the price of the domestic components but also on the imported components used in the manufacture of the finished products, and hence the same was an inseparable condition for sale of the parts and components imported. The Tribunal in this regard noted that in transactions of import of technology and payment of license fee, the cost of imported components or parts was specifically excluded for the

purpose of payment of royalty and thus, the royalty payable could not be held as a condition of sale of imported components. Dismissing the Department's appeal, the Tribunal also observed that the imported components constituted only a small fraction of the total purchases made by the assessee-importer. Reliance in this regard was also placed on Interpretative Notes to Rule 10(3) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. [*Commissioner* v. *Humboldt Wedag India Pvt. Ltd.* – 2024 VIL 489 CESTAT KOL CU]

Supplementary show cause notices could be issued under Section 124 before 29 March 2018 also

The Calcutta High Court has held that prior to the insertion of the second proviso to Section 124 of the Customs Act, 1962 on 29 March 2018, the power to issue supplementary show cause notice was implicit and inbuilt under the said section. The High Court considered the tenor of the second proviso and held that the second proviso is merely declaratory of the previous law and that its retrospective operation is intended. Relying on precedents, the Court in this regard observed that the correct manner of interpreting the proviso is that but for the proviso, the enacting part of the section could have included the subject matter of the proviso. Submission that before the insertion of the second proviso, there was no power conferred on the authority to issue a supplementary SCN, was thus rejected. [*Commissioner* v. *Sandeep Kumar Dikshit* – (2024) 17 Centax 184 (Cal.)]

Export prohibition of non-basmati rice – Absence of reasons for denial of transitional arrangements is wrong

The Bombay High Court has held that restrictions imposed by Ministry of Commerce notification dated 20 July 2023, denying the benefit of para 1.05 of the Foreign Trade Policy regarding transitional arrangements in respect of export prohibitions, is not justified, in absence of any reasons in this regard in the notification. The dispute involved prohibitions for export of non-basmati rice by the notification which also did not allow benefit of transitional arrangements to the Indian exporter. The Court in this regard noted that for similar prohibitions in respect of export of wheat, the Government had allowed benefit of transitional arrangements. Directing that the benefit of transitional provisions would be available to the exporters, the Court relied upon the doctrine of legitimate expectations. [*Shriram Food Industry Ltd.* v. *Union of India* – 2024 (5) TMI 835-Bombay High Court]

Customs cannot recover duty until DGFT cancels scrips and cannot recover MEIS benefit by invoking Section 28(4)

Observing that the Customs department is not empowered to venture into the authority of DGFT to withdraw the MEIS benefits, the CESTAT Mumbai has held that until the DGFT has taken any action for cancellation, the Customs department cannot recover the duty by discarding the scrips issued by DGFT. Section 9(4) of the Foreign Trade (Development & Regulation) Act, 1992 and Rule 10 of Foreign Trade (Regulation) Rules, 1993 were relied upon by the Tribunal for the purpose. The case involved proceedings initiated under Section 28(4) of the Customs Act, 1962 for recovery of alleged fraudulently availed MEIS duty credits utilized by the assessee and revolved around re-classification of the exported goods by the Department. Allowing assessee's appeal, the Tribunal also observed that the Customs department can recover duty and interest under Section 28(4) but not the MEIS benefits and that too only on the ground of ineligibility to MEIS. Further, according to the Tribunal, if a licence is granted in respect of a particular item by the licensing authority, the customs authority will have no right or power to go beyond the licence and determine the classification or reclassifying the same. [*Bharat Rasayan Ltd.* v. *Commissioner* – 2024 VIL 504 CESTAT MUM CU]

Penalty – Finding of liability to penalty does not translate into imposition of same

The CESTAT New Delhi has held that the expression 'shall be liable to penalty' under Section 112 of the Customs Act, 1962, does not mean that 'penalty shall be imposed'. According to the Tribunal, it will be perfectly legal for an adjudicating authority or an appellate authority to find that the person was liable to penalty under Section 112 and still not impose any penalty. It was noted that words 'liable to' means 'likely to be' and not 'shall be' and hence the adjudicating authority can exercise his discretion and decide not to confiscate the goods/impose penalty if the violation is, for instance, a technical violation or a minor violation. The Tribunal also noted that the provision only provides for an upper limit for penalty with no lower limit. [*Principal Commissioner* v. *N&N Traders* – (2024) 18 Centax 274 (Tri.-Del)]

Solar power generation under MOOWR is valid – CBIC Instruction dated 9 July 2022 quashed

The Delhi High Court has held that the statutory scheme underlying the MOOWR Regulations cannot be construed as seeking to exclude solar power generation in terms of permissions granted under Section 65 of the Customs Act, 1962. According to the Court, neither Section 61 nor Section 65 can be justifiably construed as incorporating an inherent or implied exclusion of solar power generation. The High Court further quashed the CBIC Instruction dated 9 July 2022, insofar as it mandated review of existing licenses and taking of follow-up action.

Rejecting the submission of the Department based on purposive interpretation, the Court observed that it would be incorrect to recreate or reassemble Section 65 so as to exclude a particular category of activity based upon the experience of its working or its perceived negative impact on the domestic industry. The Court was also of the view that construction of a statute cannot be guided or influenced by the subsequent experience of the executive or of discerned inequitable results. Further, the Department's submission that Section 65 only contemplates those categories of goods which are capable of being consumed in the manufacturing process or those which are worked upon in the course of manufacture, was held as fundamentally flawed and misconceived. Similarly, it was also held that the submission that capital goods must necessarily form part of the resultant goods was also misconceived.

Quashing CBIC Instruction dated 9 July 2022, the Court observed that the Instruction had the effect of deterring the licensing authority from independently examining any contention that may be addressed. The High Court for this purpose relied upon precepts of administrative law which, according to the Court, abhor abdication of an independent decision-making power as well as a quasi-judicial authority being compelled to act under the dictates of a superior authority. [*ACME Heergarh Powertech Pvt. Ltd.* v. *CBIC* – 2024 VIL 455 DEL CU]

Duty-free shops are beyond customs frontiers, hence, no violation of Legal Metrology Act

Placing reliance on the decision of the Supreme Court in the case of *Hotel Ashoka (India) Tour. Dev. Cor. Ltd.* [2012 (2) TMI 62-SC], the Calcutta High Court has held that the proceedings under the Legal Metrology Act and Rules thereunder, cannot

be initiated concerning alleged violations that took place in the duty-free shop at the international airport. The Court noted that such shops are beyond/ outside the customs frontiers of India. [*Flemingo Duty Free Shop Pvt. Ltd.* v. *Kaushik Bhattacharya* – 2024 (5) TMI 1008- Cal HC]

Gold coins which are not legal tender, are classifiable under Customs Heading 7114

The CESTAT New Delhi has held that gold coins which are not legal tender are classifiable under Heading 7114 of the Customs Tariff Act, 1975 and not under Heading 7118 *ibid*. The Tribunal in this regard noted that for the coins to be legal tender, they should have face value and should be allowed to be spent in the country of issue. It was also noted that the gold coins being an object/a thing of particular kind, were nothing but 'articles', for coverage under Heading 7114 as 'articles of gold'. [*Giriraj Propmart Pvt. Ltd.* v. *Commissioner* – 2024 VIL 450 CESTAT DEL CU]

Mushroom shelving is classifiable under Tariff Item 8436 99 00 and not under TI 7610 90 10 – Classification by foreign customs is not relevant

The CESTAT Bench at New Delhi has held that mushroom shelving which is to be integrated with drains and automatic watering system post import is classifiable under Tariff Item 8436 99 00 of the Customs Tariff Act, 1975 and not under TI 7610 90 10 *ibid*. The Tribunal in this regard noted that it was not denied that other machines essential for mushroom growing were also to be fastened on the imported aluminium shelves and that the product was a specifically designed part of mushroom growing apparatus. It was observed that the foreign exporter was dealing in structures specific to mushroom growing industry and the importer-appellant was also in the business of growing mushrooms. Allowing the appeal, the Tribunal also relied upon common trade parlance. It may be noted that as per the Tribunal, extract that China Customs was classifying the product under Heading 7610 was not that relevant. [*Welkin Foods* v. *Commissioner* – TS 163 CESTAT 2024(DEL) CUST]

Central Excise, Service Tax and VAT

Ratio decidendi

- Additional labelling of already labelled cocoa butter and powder amounts to 'manufacture' – Supreme Court
- No service tax on renumeration paid to whole-time directors, even if same is over and above the salary – CESTAT New Delhi
- Charter of rig when not covered under 'Supply of Tangible Goods for Use' service – CESTAT Mumbai
- Separating foot oil, pressed/paraffin wax from slack/residue wax just by tilting and then pressing is not 'manufacture' – CESTAT Kolkata

Ratio Decidendi

Additional labelling of already labelled cocoa butter and powder amounts to 'manufacture'

The Supreme Court has rejected the Revenue department's contention that the activity undertaken by the assessee, i.e., putting labels on the two sides of the cartons which were already labelled at another unit of the assessee, cannot be said to be a manufacturing activity. Upholding the CESTAT Mumbai decision passed after a difference of opinion among Tribunal Members, the Court noted that in terms of Note 3 to Chapter 18 of the Central Excise Tariff, this process of re-labelling amounted to 'manufacture'. [*Commissioner* v. *Jindal Drugs Ltd.* – TS 161 SC 2024 EXC]

No service tax on renumeration paid to whole-time directors, even if same is over and above the salary

The CESTAT Delhi has held that once there is no denial about certain directors being the whole-time directors/employees of the assessee, whatever renumeration is paid to them, even if it is over and above the amount of salary, the renumeration is out of the relationship of employer and employee and hence is not liable to service tax. Relying on a CBIC Circular, the Tribunal was of the opinion that any kind of payment made to an employee, by whatever name called, irrespective of the employee being a director, cannot be attributed to the service outside employment. Accordingly, it was held that all the payments made to whole-time directors would be treated as salary only. Allowing assessee's appeal, the Tribunal also rejected the reliance by the Adjudicating Authority on the difference between the values of balance sheet and Form 16. ***The assessee in this case was represented by Lakshmikumaran & Sridharan Attorneys.*** [*Jindal Steel and Power Ltd.* v. *Commissioner* – 2024 VIL 477 CESTAT DEL ST]

Charter of rig when not covered under 'Supply of Tangible Goods for Use' service

In a case where the assessee had hired rigs on 'Bare boat charter' from its foreign subsidiary for use in drilling operations for an Indian entity, the CESTAT Mumbai has set aside the demand of service tax under reverse charge mechanism under 'Supply of Tangible Goods for Use' service. The period involved was both pre and post implementation of Negative List regime. Allowing the assessee's appeal, the Tribunal noted that to comply with various legal compliances in delivery, possession, voyage, for

upkeep of the vessel, etc., the ship owner entered into contract with the assessee-hirer, who conducts same functions as owner, on the basis of standard BIMCO (Baltic and International Maritime Council) contract provisions, which highlights that the hirer-assessee was in possession and control of the rigs.

Diving deep in the agreement between the parties, the Tribunal noted that the assessee was free to operate and navigate the rig as per its desire, the master and the crew was appointed by the assessee, the assessee was required to comply with all the applicable safety and labour laws, etc, and was also responsible for all loss/damage, etc. The Tribunal in this regard also noted that while right of inspection by the owner could not cause off-hire of the rig, the prohibition to incur any lien over the rigs and the requirement to depict a notice of ownership, did not interfere with the quite possession; the repair clause and the clause providing that Master be the employee of the assessee, and the repossession clause, in fact reaffirmed the contention that assessee was in possession and effective control of the rig. [*Greatship (India) Ltd.* v. *Commissioner* – 2024 VIL 467 CESTAT MUM ST]

Separating foot oil, pressed/paraffin wax from slack/residue wax just by tilting and then pressing is not 'manufacture'

The CESTAT Kolkata has held that process of separation of foot oil, pressed wax and paraffin wax from the slack wax and residue wax by first tilting the drums containing slack wax, where 90% of the oil was separated, and then by squeezing out remaining 10% using hydraulic presses, does not involve any process amounting to manufacture under Section 2(f) of the Central Excise Act, 1944. The Tribunal in this regard noted that the separation was not a process where any new product came into existence, as foot oil, pressed wax and paraffin wax were all parts of slack wax and residue wax, which were only separated. [*Chief Commissioner* v. *Krishna Wax Private Limited* – 2024 VIL 481 CESTAT KOL CE]

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